

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DEBORAH R. HARGY, ED C. MALLOY,
ESQ., AND GENERATIONS LAW, P.C.

Appellants

v.

PAUL TONER, ESQ., BRIAN C. LEGROW,
ESQ., VINCENT B. MANCINI &
ASSOCIATES, LLC, JOHN D'ANNUNZIO,
VINCENT D'ANNUNZIO, AND
J & V DEVELOPERS, INC.

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2211 EDA 2013

Appeal from the Order Entered July 24, 2013
In the Court of Common Pleas of Delaware County
Civil Division at No(s): 12-10386

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED JUNE 04, 2014

Appellants, Deborah R. Hargy, Ed C. Malloy, Esquire, and Generations Law, P.C., appeal from the order entered July 24, 2013, sustaining the preliminary objections filed by Appellees, Paul Toner, Esquire, Brian C. Legrow, Esquire, Vincent B. Mancini & Associates, LLC, John D'Annunzio, Vincent D'Annunzio, and J&V Developers, Inc., and dismissing Appellants' amended complaint, sounding in abuse of process, with prejudice. Upon careful review, we affirm.

* Former Justice specially assigned to the Superior Court.

The trial court summarized the relevant facts and procedural history of this case as follows.

[Appellant], Deborah R. Hargy [(hereinafter, Hargy),] and [Appellee], J&V Developers, Inc. [(hereinafter, J&V),] had entered into an agreement of sale for real estate situated in Aston Township. [Hargy] defaulted on the agreement and [J&V] brought suit to retain the deposit monies as liquidated damages. [J&V] was successful in prosecuting its claim but only after a very lengthy and costly process. Thereafter, [J&V] brought a claim against [Hargy] and her attorney, Edward C. Malloy, Esquire, a[n Appellant] herein, [(collectively, Appellants),] for costs and counsel fees incurred in the underlying breach of contract action. The [trial] court awarded substantial fees to J&V finding the conduct of [Appellants] to be obdurate and vexatious. That matter [was addressed] on appeal to the Superior Court of Pennsylvania.

[On October 24, 2013, this Court affirmed the trial court's July 13, 2012 order granting J&V's petition for attorney's fees, pursuant to 42 Pa.C.S.A. § 2503, on the grounds "the conduct of Appellants was obdurate, vexatious or in bad faith[.]" **See J & V Developers v. Hargy, D.**, --- A.3d --- (Pa. Super. 2013) (unpublished memorandum at 32) (2323 EDA 2012).]

[On December 17, 2012], based on what occurred in the breach of contract action, [Appellants] brought an abuse of process action against [J&V], its realtor and attorneys [(collectively, Appellees)]. [On February 15, 2013, Appellees] jointly filed preliminary objections to [Appellants'] amended complaint.

Trial Court Amended Opinion, 9/26/13, at 1-2.¹

On March 4, 2013, Appellants filed a reply to Appellees' preliminary objections. Appellees, in turn, filed a counter-reply on March 14, 2013. On July 13, 2013, the trial court heard oral argument on Appellees' preliminary objections. Thereafter, on July 24, 2013, the trial court entered an order sustaining Appellees' preliminary objections and dismissing Appellants' amended complaint sounding in abuse of process, with prejudice. **See** Trial Court Order, 7/24/13 (dated 7/23/13) at 1. In support of its decision, the trial court reasoned that Appellants' claim that Appellees abused process by purposefully miscalculating the amount of attorney's fees incurred in the breach of contract action was entirely devoid of merit. **See** Trial Court Amended Opinion, 9/26/13, at 3. On July 29, 2013, Appellants filed a timely notice of appeal.²

On appeal, Appellants raise the following issues for our review.

- I. Was it error of law for the [trial] court to conclude: As a matter of law, a party cannot

¹ The record reflects that the trial court's September 26, 2013 amended opinion is nearly identical to its prior opinion filed September 23, 2013, and merely corrects the spelling of Appellant, Deborah Hargy's name. Additionally, we note that the amended opinion does not contain pagination. For the ease of our discussion, we have assigned each page a corresponding number.

² The trial court did not order Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), but, as noted, did address the substance of Appellants' claims in its September 26, 2013 opinion.

state a cause of action for Abuse of Process unless the complaining party has prevailed in an underlying action?

- II. Was it error of law for the [trial] court to conclude [A]ppellees were deemed to be merely carrying out process to its authorized conclusion when [A]ppellees remain in violation of Pa.R.P.C. 3.3, Candor to the Tribunal?

Appellants' Brief at 4.

Our standard of review of a trial court's decision to sustain preliminary objections is well settled.

[O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.

Richmond v. McHale, 35 A.3d 779, 783 (Pa. Super. 2012) (citation omitted).

In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. The impetus of our inquiry is to determine the legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven. This Court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion. When sustaining the trial court's ruling will result in the denial of claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt.

Conway v. The Cutler Group, Inc., 57 A.3d 155, 157-158 (Pa. Super. 2012) (citation omitted), *appeal granted*, 77 A.3d 1257 (Pa. 2013).

The crux of Appellants' claims on appeal is that the trial court erred in concluding that their amended complaint was legally insufficient because it was devoid of averments that would entitle them to relief on their abuse of process claim. Specifically, Appellants first argue that the trial court erred in concluding that they were unable to assert a cause of action for abuse of process because they had not prevailed in the underlying action. Appellants' Brief at 9-11. Appellants maintain the trial court erred in concluding that Appellees were not liable for abuse of process because they were "merely carrying out [the] process to its authorized conclusion." ***Id.*** at 12.

This Court has previously described the common law tort of abuse of process as follows.

The tort of "abuse of process" is defined as the use of legal process against another primarily to accomplish a purpose for which it is not designed. To establish a claim for abuse of process it must be shown that the defendant (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. This tort differs from that of wrongful use of civil proceedings in that, in the former, the existence of probable cause to employ the particular process for its intended use is immaterial. The gravamen of abuse of process is the perversion of the particular legal process for a purpose of benefit to the defendant, which is not an authorized goal of the procedure. In support of this claim, the [plaintiff] must show some definite act or threat not authorized by the process,

or aimed at an objective not legitimate in the use of the process ...[.]

Lerner v. Lerner, 954 A.2d 1229, 1238 (Pa. Super. 2008), quoting **Shiner v. Moriarty**, 706 A.2d 1228, 1236 (Pa. Super. 1998), appeal denied, 729 A.2d 1330 (Pa. 1998). In evaluating the primary purpose prong of the tort, “there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action.” **AI Hamilton Contracting Co. v. Cowder**, 644 A.2d 188, 192 (Pa. Super. 1994) (citation omitted).

Upon careful review, we discern no error on the part of the trial court in concluding that Appellants failed to establish a *prima facie* cause of action for abuse of process. As noted, the trial court entered an order on July 24, 2013, sustaining Appellees’ preliminary objections, and dismissing Appellants’ amended complaint sounding in abuse of process, with prejudice. **See** Trial Court Order, 7/24/13 (dated 7/23/13) at 1. In support of said order, the trial court reasoned that Appellants’ amended complaint was legally insufficient because it was devoid of averments that would entitle them to relief on their abuse of process claim. Specifically, the trial court concluded as follows.

As a matter of law, a party cannot state a cause of action for Abuse of Process unless the complaining party has prevailed in an underlying action. **Feingold v Hendrzak, LLP**, 15 A.3d 937 (Pa. Super. [2011]). Here, [Appellants] have not

and do not aver as much in their complaint. Further, the complaint is without legal basis because there is no liability for abuse of process where [Appellee] has done nothing more than carry out the process to its authorized conclusion. **Lerner v Lerner**, 954 A.2d 1229 (Pa. Super 2008).

Trial Court Amended Opinion, 9/26/13, at 2 (citation formatting corrected).

Relying on this Court's decisions in **Feingold** and **Disante v. Russ Financial Co.**, 380 A.2d 439 (Pa. Super. 1977), Appellants maintain that the trial court's determination that a party cannot state a cause of action for abuse of process unless the complaining party has prevailed in an underlying action is inapposite. **See** Appellants' Brief at 9-10. To the contrary, Appellants contend that, pursuant to both **Feingold** and **DiSante**, a party does not necessarily have to prevail in the underlying action to state a cause of action for abuse of process. **Id.** We conclude, however, that this distinction is immaterial to the trial court's determination in this case.

Our review of both **Feingold** and **DiSante** reveals that the trial court dismissed the abuse of process claim in these cases based on the legal insufficiency of the complaint. **See Feingold, supra** at 942; **DiSante, supra** at 441. Furthermore, in the case *sub judice*, the record supports the trial court's determination that Appellants' amended complaint was legally insufficient in that it failed to establish a *prima facie* cause of action for abuse of process. Moreover, Appellees in this instance have merely acted in accordance with the applicable law in seeking enforcement of the judgment awarded in their favor, and "ha[ve] done nothing more than carry out the

process to its authorized conclusion.” **See** Trial Court Amended Opinion, 9/26/13, at 2. This Court has long held that “there is no liability [for the tort of abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” **See Lerner, supra**. Appellants’ claims to the contrary, alleging malfeasance on the part of Appellees in misrepresenting the attorney’s fees incurred in the underlying breach of contract action, have been found to be without merit by this Court. **See J & V Developers, supra** (unpublished memorandum at 29-31).³ Accordingly, we conclude there is no merit to Appellants’ claim that the trial court committed an error of law in concluding that Appellants failed to establish a *prima facie* cause of action for abuse of process.

Appellants next argue, albeit in the alternative, that they established a claim for abuse of process given Appellees’ alleged “failure to come forth ... and inform the [trial] court, pursuant to Pa.R.P.C. 3.3 (Candor to the Tribunal) that an attorney fee and cost invoice ... overstated permissible fees and costs awarded to them....” Appellants’ Brief at 10, 13. For the following reasons, we disagree.

Pennsylvania Rule of Professional Conduct 3.3 provides, in pertinent part, as follows.

³ We discuss this holding more fully *infra*.

Rule 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

...

Pa.R.P.C. 3.3.

The explanatory comments to Rule 3.3. further provide, in relevant part, as follows.

A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Id. Explanatory Comment 13, *Duration of Obligation*.

Instantly, Appellants contend that Appellees' failure to inform the trial court that the invoice they submitted to the Delaware County Court of Common Pleas in a related proceeding overstated permissible fees and costs awarded to them by approximately \$25,000.00 constituted a violation of Rule of Professional Conduct 3.3. Appellants' Brief at 13-14.

Upon review, we conclude that the record undermines Appellants' contention that Appellees violated Rule of Professional Conduct 3.3 by misrepresenting the attorney's fees incurred in the breach of contract action. As noted, Appellants' underlying claim for attorney's fees has already been addressed by a prior panel of this Court, and found to be both waived and entirely devoid of merit. Specifically, in ***J & V Developers***, this Court concluded as follows.

Appellants' final issue asserts that the order appealed contains a computational error that overstated the fee award by \$24,699.83. Appellants maintain that the ordered fees erroneously include amounts for the period March 15, 2011, the date of the verdict, until March 26, 2012, the date of the hearing on [Appellees'] petition for counsel fees.

...

Our review of the record reveals that the hearing on March 26, 2012, addressing [Appellees'] petition for attorney's fees, includes two volumes of testimony comprising 500 pages. Appellants fail to cite to any place in the record where they asserted to the trial court its erroneous inclusion of the above-described fees. Further, Appellants' argument fails to cite specific amounts that they contend were wrongly included. Thus, their lack of specificity in their argument prevents this Court from evaluating

the claim. Moreover, Appellants never raised the issue to the trial court. Appellants did not challenge the calculation in their post-hearing proposed findings and conclusions of law. Thus, the failure to raise the issue to the trial court is fatal to its consideration now.

...

Even if not waived, the issue has no merit. At one point during the redirect examination of [Appellees'] counsel, Paul Toner, who was testifying to the amounts deleted from the bill for counsel fees, Appellant Malloy stated, "[W]e'll just stipulate that he came up with a bill ... I don't think there's a need for him to go into every single line item ... I know what he's taken out." N.T., 3/26/12 Volume II, at 302-303 (emphasis added).

[Appellees'] initial claim for attorney's fees and costs was \$85,075.77. N.T., 3/26/12 Volume I, at 141; N.T., 3/26/12 Volume II, at 351, 365. During the March 26, 2012 hearing, the parties removed certain charges that were incurred prior to Judge Burr's bright-line date of July 28, 2009, in addition to those fees emanating from the drafting of the fee petition. Removal of those charges reduced the total amount to roughly \$60,000[,00]. N.T., 3/26/12 Volume II, at 367. Testimony at the March 26, 2012 hearing established that the fee amount of \$60,762.00 did not include charges incurred "after March 15, 2011," the date of the trial verdict, including "all of the fees incurred relating to the drafting of the Fee Petition ... [W]e removed those charges." *Id.* at 305; *see also id.* at 297.

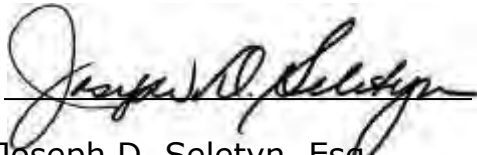
J & V Developers, supra (unpublished memorandum at 29-31) (footnote and citations to case law and pleadings omitted; citations to notes of testimony in original).

Accordingly, we conclude that, contrary to Appellants' contention, Appellees did not violate Rule of Professional Conduct 3.3. with respect to said attorney's fees, as these fees were already determined by the Court to be properly calculated.⁴

Based on the foregoing, we conclude that the trial court properly sustained Appellees' preliminary objections and dismissed Appellants' amended complaint sounding in abuse of process, with prejudice. Accordingly, we affirm the July 24, 2013 order of the trial court.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/4/2014

⁴ Additionally, Appellees' motion for attorney's fees, raised during oral argument on May 6, 2014, is hereby denied. Based on our disposition of Appellees' oral motion, we also deny Appellants' May 13, 2014 petition for leave to file post-submission communication pursuant to Pa.R.A.P. 2501(a).