NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

EDWARD C. LECKEY Appellant v. PHILIP J. URBAN AND CAROL R. URBAN, MARK J. GOLEN AND SUMMERS MCDONNELL HUDOCK GUTHERIE AND SKEEL, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 927 WDA 2012

Appeal from the Order Entered May 16, 2012
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): GD No. 11-021862

BEFORE: BOWES, J., LAZARUS, J., and COLVILLE, J.*

MEMORANDUM BY LAZARUS, J. Filed: March 12, 2013

Edward C. Leckey appeals *pro se* from the trial court's order sustaining Appellees Philip J. Urban and Carol R. Urban's, *et al.*, (Urbans) preliminary objections and dismissing Leckey's ***Dragonetti*** Act[1] complaint with prejudice.[2] After careful review, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] ***See*** 42 Pa.C.S. § 8351-55.

[2] In considering preliminary objections, all well-pleaded allegations and material facts averred in the complaint, as well as all reasonable inferences deducible therefrom, must be accepted as true. Pa.R.C.P. 1028(a). However, the court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion. ***Id***.

On appeal, Leckey presents one issue for our consideration: Did the withdrawal of the counterclaim by Defendant constitute a termination of the civil proceeding in favor of Plaintiff which had been [sic] begun by the filing of the counterclaim? Brief of Appellant, at 2.

On February 13, 2008, Leckey's vehicle skidded on ice in a parking lot, causing the side view mirror of his vehicle to strike the left front fender of the Urbans' truck.[3] Leckey filed a claim for damages against the Urbans and the company that owned the parking lot. In his claim, he asserted that the Urbans and the company were jointly and severally liable for the damage to his car's side view mirror. A district magistrate entered judgment in favor of the Urbans; Leckey appealed the decision and the case proceeded to the Court of Common Pleas, Arbitration Division.[4] The Urbans filed an answer, new matter and counterclaim against Leckey, seeking to recover the $872.38[5] in damages to their truck. Urban alleged in the counterclaim that his truck's trade-in value/condition was reduced by $500 as a result of the

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[3] Leckey's complaint alleged that Urban's vehicle was improperly aligned with the other vehicles in the parking lot.

[4] A default judgment, in the amount of $250.47, was entered in favor of Leckey against the owner of the parking lot.

[5] The board of arbitrators' award represented the Urbans' insurance deductible; the remaining $372.38 in property damage was the subject of an intercompany arbitration between Leckey's and the Urbans' insurers.

accident. The arbitrators awarded the Urbans $500.00, precipitating the Urbans' insurer to file a demand for the award against Leckey's insurer.

Leckey appealed the arbitration decision; a non-jury trial was scheduled before the Honorable Ronald W. Folino. Prior to the non-jury trial, the Urbans withdrew their counterclaim as a result of their insurer being paid $872.38 by Leckey's insurer. Ultimately, the Urbans were paid $500 by their insurer; they subsequently executed a full and complete release in favor of Leckey, his spouse and insurance carrier. Judge Folino ultimately found in favor of the Urbans, also noting that "[a]s to Defendant . . . Urban's Counter-Claim against [Leckey], counsel for Defendant . . . Urban has advised the Court that said Claim has been withdrawn." Non-Jury Verdict, 7/15/2010.

On January 3, 2012, Leckey filed the underlying ***Dragonetti*** action, alleging that the Urbans filed the counterclaim in the arbitration matter without probable cause, that the facts upon which the counterclaim were based were false,[6] that the counterclaim was filed for the purpose of harassing him, and that the Urbans' attorneys acted with gross negligence and without probable cause by presenting the counterclaim before the board of arbitrators.

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[6] Specifically, Leckey maintained that the trade-in value for Urbans' truck, post-accident, was deemed "excellent" and that he received the full retail value for the vehicle.

The Urbans filed preliminary objections to the complaint, alleging that Leckey had not recovered in his property damage action before either the district magistrate, the board of arbitrators, or in his arbitration appeal to the Court of Common Pleas. Accordingly, they claimed that, without proof that the legal proceedings terminated in Leckey's favor below, he could not recover in an action for wrongful use of civil proceedings. The court agreed, sustained the preliminary objections and dismissed Leckey's complaint with prejudice. This appeal follows.

Leckey claims that it was the Urbans' insurer, not his insurer, that paid the Urbans prior to the arbitration appeal. Moreover, he asserts that because he was unaware of either this payment or the execution of the release, the court cannot impute constructive knowledge of the settlement upon him. Finally, he claims that because the Urbans did not inform the trial judge in the arbitration appeal that their counterclaim had been *settled*, the court cannot consider it when ruling upon preliminary objections in the instant matter.

In assessing the propriety of a trial court's decision to sustain preliminary objections, an appellate court examines the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. ***D'Elia v. Folino***, 933 A.2d 117 (Pa. Super. 2007). The goal of the inquiry is to determine the

legal sufficiency of the complaint and whether the pleading would permit recovery if ultimately proven. ***Id.***

Wrongful use of civil proceedings is a tort arising when a person institutes civil proceedings with a malicious motive and lacking in probable cause. ***Rosen v. American Bank of Rolla***, 627 A.2d 190, 191 (Pa. Super. 1993). In Pennsylvania, this tort has been codified by statute, requiring a plaintiff to prove the following elements: (1) the defendant acted in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and (2) the proceedings have terminated in favor of the plaintiff. 42 Pa.C.S.A. § 8531(a).

Although the Urbans' insurer may have actually paid them the $500 demand, it was Leckey's insurer that first settled the counterclaim by paying the demand money to the Urbans' insurer. Thus, technically, the underlying arbitration appeal did not terminate in Leckey's favor where the $500 counterclaim was ultimately paid to the Urbans out of insurance funds originating from his own insurer. ***See D'Elia***, ***supra*** at 122 ("[a] withdrawal of proceedings stemming from a compromise or agreement does not, as a matter of law, constitute a termination favorable to the party against whom the proceedings have been brought originally."). Moreover, the reason why the Urbans withdrew their counterclaim was because they had settled with

Leckey's insurance carrier. Thus, the evidence does not show that the Urbans acted in a "grossly negligent manner or without probable cause" in the initial filing of their counterclaim, where it was filed *prior* to the arbitrator's decision and immediately withdrawn upon settlement with Leckey's insurer. ***See*** 42 Pa.C.S.A. § 8351(a).

Finally, it is of no moment that Leckey may not have known at the time that his insurance company paid the claim to the Urbans' insurer and executed a release in his favor. Leckey's insurer, acting on his behalf, ended the underlying counterclaim between the parties, leading to withdrawal of the counterclaim and entry of judgment on behalf of the Urbans – all "*un*favorable terminations"[7] for Leckey.

Finding that Leckey's complaint does not plead, with legal sufficiency, the elements to prove a claim under the ***Dragonetti*** Act, the trial court properly granted the Urbans' preliminary objections and dismissed his complaint with prejudice. ***D'Elia***, ***supra***.

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[7] To the extent that Leckey claims the trial court improperly considered the fact that the Urbans' insurer settled the claim because the Urbans never alleged that fact in the trial court, we find this claim to be meritless. The trial court's order specifically indicates that counsel for the Urbans advised the court their counterclaim had been withdrawn. The basis of this withdrawal, however, is predicated on the fact that the insurance company had paid the Urbans the $500 arbitration award and a full and complete release had been executed in the matter. These facts were clearly set forth in Leckey's ***Dragonetti*** Act complaint, ***see*** Plaintiff's Complaint, 12/21/2011, at ¶22, and, therefore, properly considered by the court when ruling upon the Urbans' preliminary objections. Pa.R.C.P. 1028(a).

Order affirmed.[8]

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[8] We, herein, deny Leckey's application for relief to quash the Urbans' appellate brief.