Whitmore v. Phillips, No. 770-10-08 Rdcv (Cohen, J., Feb. 2, 2009)

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STATE OF VERMONT
RUTLAND COUNTY

MELISSA WHITMORE and DAVID WHITMORE	)	**Rutland Superior Court Docket No. 770-10-08 Rdcv**
Plaintiffs,	)	
v.	)	
THOMAS PHILLIPS, KIMBERLY PHILLIPS, TOWN OF WALLINGFORD, FULLER SAND AND GRAVEL, INC., WILLIAM LOHSEN, JOHN DOE and/or JANE DOE, employees or agents of the Town of Wallingford whose identities are currently unknown,	)	
Defendants	)	

DECISION ON DEFENDANTS' MOTION TO DISMISS

This matter came before the Court on defendants Thomas Phillips and Kimberly Phillips's Motion to Dismiss pursuant to V.R.C.P. 12(b)(6), filed on October 29, 2008. Defendants seek dismissal of Counts II-V of Plaintiffs' Complaint. On November 10, 2008, defendants Town of Wallingford and William Lohsen filed a Motion to Dismiss, citing the same reasons advanced by defendants Phillips in their Motion to Dismiss.

Plaintiffs Melissa Whitmore and David Whitmore (the "Whitmores") are represented by Christopher J. Larson, Esq. Defendants Thomas Phillips and Kimberly Phillips (the "Phillips") are represented by Frank H. Langrock, Esq. Defendants Town of

Wallingford and William Lohsen (the "Town") are represented by Marikate E. Kelley, Esq. and Phillip C. Woodward, Esq.

Background

This case arises out of the alleged operation of a commercial gravel pit on the property of Thomas Phillips and Kimberly Phillips located in the Town of Wallingford. Plaintiffs Melissa Whitmore and David Whitmore are neighbors of the Phillips defendants.

The Phillips purchased property (the "Phillips Property") in the Town of Wallingford on March 29, 2006. This property abuts property owned by the Town ("Town Property"). Over a number of years, the Town has removed gravel from the Town Property pursuant to Act 250 Permit number 1R0797.

Shortly after purchasing the Phillips Property, defendants Phillips and the Town entered into a Memorandum of Agreement to expand the gravel pit operation on the Town Property onto the Phillips Property as well. Under the terms of the Memorandum of Agreement, the Town and the Phillips agreed that they would file a joint application for amendment of the Town's existing Act 250 Permit, that the Phillips would extract gravel from the Town Property as well as from the Phillips Property, that, after the gravel was extracted from both properties, the Phillips would give the Phillips Property to the Town, and that the Phillips would give the Town $50,000.

On November 15, 2006, the Phillips, the Town, and Fuller Sand and Gravel, Inc. (the "Applicants") filed an application with the District Commission for an Act 250

Permit amendment to the 1R0797 permit. The Whitmores were granted party status before the District Commission, and opposed the permit application. The Whitmores were represented by counsel throughout the proceeding, and they hired their own experts to review and opine on the impacts from the project. According to the Whitmores, they expended a great deal of time and money on this opposition.

On or about March 23, 2007, the Commission issued an order denying the permit application. The Commission found that the Applicants failed to meet their burden of proof, or that the project would have undue adverse impacts in multiple areas. The Applicants did not enter an appeal from the denial, and the permit became final thirty days after issuance.

On September 23, 2007, the Applicants moved the District Commission to reconsider the denial. Pursuant to 10 V.S.A. § 6087(c) the Applicants were required to certify by affidavit to the District Commission and all parties of record that the deficiencies noted by the District Commission had been corrected. According to Plaintiffs, the Phillips defendants falsely certified that all of the deficiencies cited by the March 23, 2007 decision had been corrected. Plaintiffs allege that the Phillips defendants had done little or nothing to address the deficiencies.

After the motion for reconsideration was filed, Plaintiffs filed a motion to dismiss, based on the fact that the affidavit was untrue. After oral argument, the District Commission granted Plaintiff's motion to dismiss. The applicants then filed a motion to alter that decision, and the District Commission convened another merits hearing. Further motions were filed, and further days of hearings were conducted.

On April 24, 2008, the District Commission issued a final ruling dismissing the request for reconsideration. In the final decision of dismissal, the District Commission concluded that "the affidavit of the applicants dated September 23, 2007, the foundation of the Applicants' motion for reconsideration, was grossly inaccurate." The Commission further stated "[i]f rules of the Natural Resources Board allowed sanctions for circumstances where a party makes representations which prove untrue, this Commission would have considered the imposition of such sanctions." Plaintiffs allege that they spend many thousands of dollars opposing the reconsideration.

During the time that the Act 250 application was proceeding, defendants were pursuing zoning and other permits for the Town Property and the Phillips Property. On May 30, 2006, the Town and Phillips defendants sought zoning approval for the proposed gravel pit project, and the permit was approved by the Town Zoning Board of Adjustment ("ZBA"). The permit allowed defendants to expand the Town's gravel pit onto the Phillips Property, but did not allow an expansion of volume above that allowed under the old permit.

Plaintiffs allege that after defendants' Act 250 application was denied, defendants changed their tactics in their attempt to begin operating a commercial gravel pit. Plaintiffs allege that defendants decided to characterize the project as a residential subdivision instead of a gravel pit, so that they could claim that the excavation was related to preparing the lots rather than obtaining the permits defendants would need for their actual intended use.

On October 24, 2007, the Phillips defendants applied for a zoning permit to subdivide the property into three lots. This permit was approved by the zoning administrator.

Plaintiffs allege that defendants have clear-cut land on the Phillips property and are operating an illegal commercial gravel pit in violation of the permits they have. Plaintiffs allege that the Town is complicit in this illegal operation because they have failed to take action to stop the gravel extraction.

On October 9, 2008 plaintiffs Melissa Whitmore and David Whitmore filed a Complaint against defendants Thomas Phillips, Kimberly Phillips, Town of Wallingford, Fuller Sand and Gravel, Inc., William Lohsen, and John Doe, seeking (Count I) Injunctive relief, and alleging (Count II) Malicious Prosecution, (Count III) Abuse of Process, (Count IV) Civil Conspiracy, (Count V) Fraudulent and Improper Representation and other Wrongful Conduct.

On October 13, 2008, the Court granted plaintiffs' Motion for a Temporary Restraining Order and ordered defendants to cease operation of the gravel extraction activities. A hearing was held on November 4, 2008 on the Motion for a Preliminary Injunction. On November 13, 2008, the Court issued a Decision denying the plaintiffs' Motion for Preliminary Injunction, holding that the Environmental Court, and not the Superior Court, had proper jurisdiction over the matter, and even if the Superior Court did have jurisdiction, the plaintiffs had failed show that they would suffer irreparable harm.

On November 17, 2008, plaintiffs filed an appeal with the Environmental Court from the decision of the Development Review Board of the Town of Wallingford, which

upheld the Zoning Administrator's decision not to take enforcement action regarding the property of defendant Thomas Phillips. On November 18, 2008, the Environmental Court denied plaintiffs Motion for Stay or other Injunctive Relief.

On November 26, 2008, plaintiffs filed a Motion for Permission to Appeal this Court's denial of plaintiffs Motion for Preliminary Injunction, pursuant to V.R.A.P. 5(b). On December 30, 2008, the Court denied plaintiffs' Motion for Permission to Appeal.

Discussion

A motion to dismiss for failure to state a claim upon which relief can be granted should only be granted when it is beyond doubt that there exist no facts or circumstances that would entitle plaintiff to relief; in reviewing disposition of a V.R.C.P. 12(b)(6) motion to dismiss, the court assumes that all factual allegations in the complaint are true, and the court accepts as true all reasonable inferences that may be derived from plaintiff's pleadings and assumes that all contravening assertions in defendant's pleadings are false. *Richards v. Town of Norwich*, 169 Vt. 44, 48-49 (1999).

Defendants seek dismissal of Counts II-V of Plaintiffs' Complaint. The Court will address each count in turn.

II. Malicious Prosecution

In order to recover for malicious prosecution, a plaintiff must demonstrate that (1) a party instituted a proceeding against the individual without probable cause, (2) that the party did so with malice, (3) that the proceeding terminated in that individual's favor, and (4) that the individual suffered damages as a result of the proceeding. *Siliski v. Allstate Ins. Co.*, 174 Vt. 200, 203 (2002) (citing *Chittenden Trust Co. v. Marshall*, 146 Vt. 543, 549, (1986)).

Assuming that all factual allegations in the complaint are true, and accepting as true all reasonable inferences that may be derived from plaintiff's pleadings, (1) the Phillips applied for reconsideration, the Whitmores were a party, and the Phillips lacked probable cause, (2) the affidavit underlying the motion for reconsideration contained false information and the Phillips were admonished by the District Commission for filing the false affidavit, (3) the proceeding terminated in favor of the Whitmores, as the motion for reconsideration was denied, (4) the Whitmores spent money on legal fees defending the motion for reconsideration.

The element of malice may be inferred from proof of a lack of probable cause. *Chittenden Trust Co. v. Marshall*, 146 Vt. 543, 550 (1986) (citing *Northern Oil Co. v. Socony Mobil Oil Co.*, 347 F.2d 81, 84 (2d Cir.1965); *Ryan v. Orient Insurance Co.*, 96 Vt. 291, 296 (1923)).

Assuming that all factual allegations in the complaint are true, and accepting as true all reasonable inferences that may be derived from plaintiff's pleadings, it is not beyond doubt that there exist no facts or circumstances that would entitle plaintiff to relief for the claim of malicious prosecution against the Phillips defendants.

In alleging malicious prosecution, however, plaintiffs do not differentiate among defendants. Therefore the Court assumes that this count is also alleged against the Town of Wallingford and William Lohsen. Plaintiffs have failed to state a claim upon which relief can be granted regarding their count of malicious prosecution against Town of Wallingford and William Lohsen because there is no allegation that these defendants brought the motion for reconsideration at issue.

<u>*III. Abuse of Process*</u>

A plaintiff alleging the tort of abuse of process is required to plead and prove (1) an illegal, improper or unauthorized use of a court process, (2) an ulterior motive or an ulterior purpose, and (3) resulting damage to the plaintiff. *Wharton v. Tri-State Drilling & Boring*, 2003 VT 19, ¶ 11, 175 Vt. 494 (citing *Jacobsen v. Garzo*, 149 Vt. 205, 208 (1988)).

"There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Jacobsen*, 149 Vt. at 207 (quoting Prosser and Keeton on the Law of Torts § 121, at 898 (5th ed. 1984)).

Plaintiffs have not alleged that the Phillips filed for reconsideration for any purpose other than to obtain the Act 250 permit, which had previously been denied. While plaintiffs allege that the Phillips filed for reconsideration with bad intentions, the Phillips defendants did nothing more than carry out the process to its authorized conclusion – the denial of the motion for reconsideration by the District Commission. Plaintiffs, therefore, fail to state a claim upon which relief can be granted.

IV. Civil Conspiracy

Plaintiffs allege that all of the defendants conspired together to circumvent legal processes and operate a commercial gravel pit on the Phillips Property and the Town Property, causing damages to the plaintiffs.

Plaintiffs, however, have not pleaded any damage to their own property as a result of the gravel pit operation on the Phillips Property or Town Property, either in nuisance or in trespass. Without allegation of any damages to their own property, plaintiffs fail to state a claim upon which relief can be granted.

V. Fraudulent and Improper Representation and Other Wrongful Conduct

By plaintiffs' own admission, this cause of action has not been recognized in Vermont, nor is this is a claim for "fraud" in the traditional sense. *Plaintiffs' Opposition to Defendant's Motion to Dismiss*, Nov. 12, 2008.

The concept of "fraud upon the court" does exist in Vermont, but the only available remedy is that a party may be relieved from a final judgment, order, or proceeding. V.R.C.P. 60(b)(3). Therefore, plaintiffs fail to state a claim upon which relief can be granted.

ORDER

Defendants Thomas Phillips and Kimberly Phillips's Motion to Dismiss, filed October 29, 2008, is DENIED, as to Plaintiffs' Count II - Malicious Prosecution.

Defendants Thomas Phillips and Kimberly Phillips's Motion to Dismiss, filed October 29, 2008, is GRANTED, as to Plaintiffs' Counts III-V.

Defendants Town of Wallingford and William Lohsen's Motion to Dismiss, filed November 10, 2008 is GRANTED, as to Plaintiffs' Counts II-V.

Dated at Rutland, Vermont this _____ day of ________________, 2009.

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Hon. William Cohen
Superior Court Judge