IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JOHN H. BAUSCH, JR. Plaintiff	:	NO. 10 – 01,164
vs.	:	CIVIL ACTION - LAW
JOSEPH F. ORSO, ESQUIRE, CASALE & BONNER, P.C., PAUL SEMO, RICHARD HINKLE and JEAN RECLA, Defendants	:	

ORDER GRANTING MOTION FOR COMPULSORY NONSUIT

Plaintiff brought this action against Defendants under the "Dragonetti Act" and under the common law claim of "Abuse of Process". At the conclusion of Plaintiff's case, all Defendants moved for a compulsory nonsuit. After careful consideration of the evidence and the record in this case, Defendants' motion is hereby GRANTED.

Wrongful Use of Civil Proceedings is a tort which arises when a party institutes a lawsuit with a malicious motive and lacking probable cause. The common law claim has been codified by the "Dragonetti Act", set forth in relevant part as follows:

> (a) Elements of action. — A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings if:
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> (1) he acts 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 person against whom they are brought.
>
> ...

42 Pa.C.S. Section 8351.

We begin our discussion with the second element. Plaintiff contends the underlying proceedings terminated in his favor. Shortly before jury selection was to begin, Attorney Orso filed a motion with Judge Anderson for approval of a settlement with one of the other "players" in the amount of $17,500.00.[1] The motion for settlement noted that it was "extremely unlikely that any funds would be obtained from Bausch as he is judgment proof".[2] Upon approval of the settlement, the claim against Bausch was dismissed with prejudice.

We agree with Defendants, however, that the manner in which the underlying proceedings were terminated was not a "favorable termination", citing Hyldahl v. Denlinger, 124 F. Supp. 3d 483 (E.D. Pa. 2015).[3] While the proceedings against Bausch were "terminated", no determination was ever made, even in the form of an order for summary judgment or similar pre-trial disposition, which suggested that the initial Complaint was unfounded. Under all of the circumstances, we find that Plaintiff cannot prevail.

With respect to the first element of the Dragonetti Act, Plaintiff has failed to establish that Orso acted in a grossly negligent manner, without probable cause, or for a purpose other than that of securing an appropriate adjudication of the claim. Resolving issues of credibility in favor of Orso, the record reveals that before initiating the lawsuit against Bausch, Orso spoke with one of the principals of the investment firm issuing the suspect notes, the accountant for the issuing

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[1] Prior thereto, and during the course of those proceedings, Attorney Orso had secured a payment of $47,500.00 from one of the three brokerage houses with which Plaintiff had been formerly associated.

[2] Plaintiff had stated as much in a letter to investors. See CBO Exhibit #10.

[3] In Hyldahl, the Court noted that "[w]hile it is true that, under certain circumstances, the withdrawal of a suit may constitute a favorable outcome on the part of the party sued, it is not inevitably so. As stated earlier, this depends upon the specific circumstances surrounding the withdrawal." Hyldahl v. Denlinger, 124 F. Supp. 3d 483, 488 (E.D. Pa. 2015). The Court found the underlying matter before it had *not* terminated favorably for the plaintiff even though the suit had been withdrawn, based on a settlement with "the deep pocket in the case", the plaintiff's representations that he had no assets from whieh the defendants could recover, and threats made by the plaintiff against the defendants. The Court found the withdrawal "understandabl[e]". Id.

firm, a number of the investors and an investment advisor who was a friend of his. Through members of his firm, Orso researched the Securities Act and, while the evidence on this point was somewhat unclear, came to the conclusion that the issuance of the suspect promissory notes was in violation of the Pennsylvania Securities Act. Indeed, Orso even spoke with the issuer's attorney, Ann Pepperman, who had apparently previously given a contrary opinion as to the applicability of the Securities Act, and (almost incredibly) had the opportunity to review her file.

Some amount of time had expired between the initiation of the suit against Bausch and his affiliates and the resolution of a previous suit which resulted in a recovery in excess of one million dollars ($1,000,000.00) against the issuer of the promissory notes. Clearly, the filing of a Complaint against Bausch was not a spur of the moment gut reaction by Orso but, rather, the result of significant consideration, and was supported by probable cause whether Orso's legal conclusions were accurate or inaccurate and whether or not Orso would have been able to prevail at trial. We specifically find Orso was not negligent at all, much less grossly negligent, and that he possessed substantial cause to believe that he could prevail against Bausch and the other defendants in the underlying action. We reject as without foundation the suggestion of Bausch that he was included in the suit against the investment firms with which he was affiliated solely for the purpose of forcing those firms to settle. Such suggestion has no basis in either fact or logic.

Plaintiff has also failed to establish that Paul Semo, Richard Hinkle and Jean Recla acted without probable cause. As set forth in the Dragonetti Act, a person acts with probable cause if he "relies upon the advice of counsel, sought in

good faith and given after full disclosure of all relevant facts within his knowledge and information." 42 Pa.C.S.A. § 8352. Semo, Hinkle and Recla all testified that they relied on Bausch's "superior" investment knowledge to their detriment, and the suit was in fact based on that detrimental reliance. Clearly, Semo, Hinkle and Recla all sought the advice of counsel in good faith and reasonably relied on counsel's advice.

The Abuse of Process claim requires Plaintiff to show that Defendants used a legal process to accomplish a purpose for which the process was not designed, causing him harm. *See* Shiner v. Moriarty, 706 A.2d 1228 (Pa. Super. 1998). Again Plaintiff has failed. The lawsuit was clearly an effort to recover the lost investments, a purpose for which it was designed. In fact, Defendants even partially succeeded in that effort.

While not necessary to our decision, we address briefly the following additional issues:

A. Based on the testimony of Bausch himself that he felt he had an "obligation" to his investors which caused him to communicate in 2001 regarding the questionable financial status of the notes, as well as the facts developed at trial, we have no difficulty in determining a fiduciary relationship existed between Bausch and the investors. While that relationship was not "confidential", it was one in which, for the most part, the individual investors placed their confidence in Bausch as a result of his superior knowledge of investments. Moreover, the fact that Bausch sent the "warning letter" would have been a clear indication to the individual

investors that Bausch had inside information. The degree to which Bausch may have reviewed the ledger sheets maintained by the issuer is not particularly important; rather, the only reasonable conclusion to be reached regarding the issue of the sending of the warning letter, was that Bausch had learned something from those ledgers which made him uncomfortable.

B. While Defendants may not have shown that Bausch violated any provision of the Pennsylvania Securities Act, and while any violation of the Act by the issuer remains questionable, we believe Bausch had a fiduciary duty to advise his "clients" that the notes were not registered.

C. The actions of Bausch in collecting payments and delivering those payments (along with other paperwork) to the issuer clearly established him as an agent of the issuer or at least as an apparent agent in the minds of some of the investors.

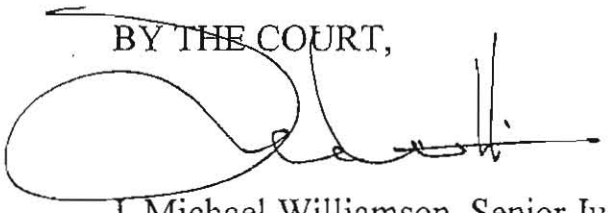
D. The contention of Orso that the Dragonetti Act is unconstitutional as applied to him has been resolved generally by the Pennsylvania Supreme Court (with the exception of the issue of punitive damages). Villani v. Seibert, 2017 Pa. LEXIS 939 (Pa. Apr. 26, 2017). Even had Plaintiff prevailed, however, punitive damages would not have been awarded.

Based on our resolution in favor of Defendants, it is unnecessary for us to consider Defendants' outstanding motion for relief based on spoliation of evidence, their motion to dismiss for lack of expert testimony,

and their motion to strike the request for legal fees for lack of evidence regarding reasonableness. Those motions are therefore DISMISSED as moot.

A compulsory nonsuit is hereby entered against Plaintiff and Plaintiff's Amended Complaint is hereby DISMISSED.

BY THE COURT,



DATE: 5.16.17

J. Michael Williamson, Senior Judge
Specially Presiding

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