

## Demurrer

### Wrongful Use of Civil Proceedings

Defendants claim Plaintiffs are unable to establish either that the underlying proceedings terminated in their favor or that Defendants instituted such proceedings without probable cause. The statute of limitations for this claim is two years.

The material facts upon which Plaintiffs base this claim are these. In 2006, Plaintiffs owned a dairy farm in Lehighton, Pennsylvania and decided to purchase additional cows to increase the farm's production. Plaintiffs responded to an advertisement by Defendants in which Defendants represented they specialized in farm loans. Rather than loan Plaintiffs the \$60,000.00 amount requested, Defendants required Plaintiffs to refinance with Defendants Plaintiffs' existing first mortgage of approximately \$311,000.00. In consequence, the amount Plaintiffs borrowed from Defendants was \$400,000.00. Plaintiffs allege that they were unable to afford the loan under the terms set by Defendants, that Defendants knew this, and that the terms set by Defendants provided for excessive fees and interest, and permitted Defendants upon foreclosure to obtain property with significant equity.

Plaintiffs further aver that, as expected by Defendants, Plaintiffs were unable to make the loan payments and became delinquent. As a result, Plaintiffs were forced to sell

their farm to pay off Defendants. This sale occurred on August 17, 2007. From the sale proceeds, Plaintiffs received \$9,000.00 and Defendants received \$591,000.00 as a payoff. Also on August 17, 2007, Defendants commenced two separate actions against Plaintiffs: an action in mortgage foreclosure and a confession of judgment. The mortgage foreclosure was discontinued with prejudice on September 19, 2007. The confession of judgment was marked satisfied on September 19, 2007. It is these two suits which form the basis of Plaintiffs' claim for wrongful use of civil proceedings.

Because the entry of a confession of judgment is considered a final judgment on the merits, this suit did not terminate in Plaintiffs' favor and Plaintiffs are unable to base their claim for wrongful use of civil proceedings upon it. Zhang v. Southern Financial Group, Inc., 980 F.Supp. 787, 792 (E.D.Pa. 1997). The same, however, cannot be said with respect to the mortgage foreclosure action which was discontinued with prejudice. Whether the involuntary withdrawal of suit is considered a termination in favor of the party against whom the suit was brought depends on the circumstances and presents a question of fact. Bannar, 701 A.2d at 248; DiLoreto v. Costigan 600 F.Supp. 2d 671 (E.D.Pa. 2009) CRUZ, 2008 WL 229503 (Pa. 2008).

Nevertheless, Defendants claim that the requirement that the proceedings be instituted without probable cause bars this action. Probable cause exists in a civil action if the claimant reasonably believes in the existence of the facts upon which the claim is based and reasonably believes that under those facts the claim would be valid. Broadwater v. Sentner, 725 A.2d 779, 783 (Pa.Super. 1999). Since Plaintiffs have acknowledged in their Third Amended Complaint that they were in default on their mortgage, Defendants argue that it cannot be denied that they had probable cause to file the complaint in foreclosure when they did. While this in fact may be the case, at this stage of the proceedings, we cannot so find. Preliminary objections in the nature of a demurrer may only be granted where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law.

#### ABUSE OF PROCESS

"Abuse of process" is defined as "the use of legal process against another primarily to accomplish a purpose for which it is not designed." *Shiner [v. Moriarty]*, 706 A.2d at 1236 (quoting *Rosen v. American Bank of Rolla*, 426 Pa.Super. 376, 627 A.2d 190, 192 (1993)).

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. *Id.* Abuse of process is, in essence, the use of legal process as a tactical weapon to

coerce a desired result that is not the legitimate object of the process. McGee v. Feege, 517 Pa. 247, 259, 535 A.2d 1020, 1026 (1987). Thus, the gravamen of this tort is the perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question.

Cruz v. Princeton Ins. Co., 972 A.2d 14, 15 (Pa.Super. 2009).

The statute of limitations for this claim is two years. See 42 Pa.C.S.A. § 5524(1).

A claim for abuse of process is qualitatively different and independent from a claim for wrongful use of civil proceedings. Rosen v. American Bank of Rolla, 627 A.2d 190, 192 (Pa.Super. 1993). As previously discussed, wrongful use of civil proceedings arises where the defendant maliciously institutes proceedings without probable cause and the proceedings terminate in favor of Plaintiffs. Abuse of process is the perversion of otherwise proper legal process that is pursued without legitimate purpose. Shaffer v. Stewart, 473 A.2d 1017, 1019 (Pa.Super. 1984). "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." DiSante v. Russ Financial Co., 380 A.2d 439, 441 (Pa.Super. 1977).

As with Plaintiffs' claim for wrongful use of civil proceedings, Defendants' demurrer is premature. Plaintiffs assert in their complaint that Defendants commenced the

foreclosure action and confessed judgment against them to convert and extort monies from Plaintiffs while attempting to shield Defendants from civil liability. As a matter of law, we cannot say that this is an insufficient basis upon which to make a claim for abuse of process.

Whether this claim is barred by the statute of limitations, is an affirmative defense to be raised in new matter and not by preliminary objections. We do note, however, that to the extent this claim is properly characterized as a new claim, not one encompassed within the claim for wrongful use of civil proceedings filed by Plaintiffs with the federal court, the federal court action does not toll the statute of limitations. See Ravitsch v. Pricewater House, 793 A.2d 939, 942 (Pa.Super. 2002). In this respect, Plaintiffs' reliance on Poulos v. Nicholaides, 2007 WL 1827140 (CA3 2007) is misplaced. Contrary to Plaintiffs' assertion, Poulos holds only that the time during which a claim is pending in federal court does not bar the action from being brought in state court after dismissal, not that the time during which a case is pending in federal court tolls the statute of limitations such that a new claim may be later added.