

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL**

GPM INVESTMENTS, LLC	:	August Term, 2010
<i>Plaintiff</i>	:	No. 00905
v.	:	Commerce Program
SHAHINA ENTERPRISES, LLC et al.	:	
<i>Defendants</i>	:	Control No. 10100515

OPINION

Plaintiff’s Preliminary Objections require this Court to determine whether Defendants may maintain the claims of Abuse of Process, Civil Conspiracy and Intentional Infliction of Emotional Distress asserted in Counts I, II and III of their Counterclaim. For the reasons below, Defendants may not maintain the claims.

Background

Plaintiff, GPM Investments LLC (“Plaintiff,”) sells and distributes motor fuels.

Defendant Shahina Enterprises, LLC (“Shahina,”) owns and operates a gasoline station and convenience store located at 3281 Fox Street, Philadelphia, Pennsylvania (the “Fox Street Station.”) Defendant Nushil Enterprises, LLC (“Nushil,”) owns and operates a gasoline station and convenience store located at 2401-21 West Allegheny Avenue, Philadelphia, Pennsylvania (the “Allegheny Station.”) Individual Defendant Nushin Khan, a/k/a/ Nushin Kahn (“Kahn,”) is affiliated with Shahina and Nushil, and owns the real property on which the Fox Street and Allegheny Avenue Stations are located.

Defendant MNB Enterprises, Inc. (“MNB,”) owns and operates a gasoline station and convenience store located at 5051 Wissahickon Avenue, Philadelphia, Pennsylvania (the “Wissahickon Station.”) Individual Defendant George Thomas, a/k/a/ George E. Thomas, III (“Thomas,”) is affiliated with MNB, and owns the real property on which the Wissahickon Station is located.

On January 12, 2007, Plaintiff entered into a “Master Supply Agreement” with Defendants Shahina, Nushil and MNB. Pursuant to the Master Supply Agreement, Shahina, Nushil and MNB agreed to buy gasoline exclusively from Plaintiff for a period of ten years.¹ The contract specified the minimum amount of gasoline which Shahina, Nushil and MNB were required to buy every month throughout the duration of the contract. Under the Agreement, Shahina, Nushil and MNB agreed to be jointly and severally liable for their respective obligations.²

On the same day, January 12, 2007, Plaintiff entered into a “Security Agreement” with Shahina, Nushil and MNB. Pursuant to the Security Agreement, Shahina, Nushil and MNB granted Plaintiff a security interests in their respective inventories, proceeds, equipment, supplies and items of personal property.³

On the same day, January 12, 2007, Plaintiff entered into a “Capital Improvement Agreement” with Shahina, Nushil and MNB. Pursuant to the Capital Improvement Agreement, Plaintiff agreed to loan funds to Shahina, Nushil and MNB for improvements upon the gasoline stations and convenience stores.⁴ Under the Capital

¹ Master Supply Agreement, ¶ 1, Exhibit A to the Complaint.

² Master Supply Agreement, ¶ 23, Exhibit A to the Complaint.

³ Security Agreement, Article 1.01, attached as Exhibit B to the Complaint.

⁴ Capital Improvement Agreement, pp. 1-2, Exhibit C to the Complaint.

Improvement Agreement, each Defendant agreed to be jointly and severally liable for any the funds provided by Plaintiff.⁵

On January 19, 2007, Defendant Kahn executed in favor of Plaintiff a mortgage upon the Fox Street Station (the “Fox Street Mortgage.”) The Fox Street Mortgage stated that “in consideration of the indebtedness to be incurred” under the Master Supply Agreement and Capital Improvement Agreement, “and as security for Payment ... of all amounts due or to become due under the Agreements,” Kahn grants unto Plaintiff all of his rights, title and interest in the “land with the buildings and improvements thereon ... located at 3281 Fox Street, Philadelphia, Pennsylvania, 19129.”⁶ On the same day, Defendant Thomas executed a similar mortgage upon the Wissahickon Avenue Station (the “Wissahickon Avenue Mortgage”). The Wissahickon Avenue Mortgage granted to Plaintiff the rights, title and interest in the “land with the buildings and improvements thereon ... located at 5051 Wissahickon Avenue, Philadelphia, Pennsylvania, 19144.”⁷ In both mortgages, Kahn and Thomas agreed to confess judgment in favor of Plaintiff “upon the occurrence and during continuance of an event of default.”⁸

On March 12, 2008, Defendant Kahn granted Plaintiff an Open-End Mortgage and Security Agreement against the Allegheny Avenue Station (the “Allegheny Avenue Mortgage.”) The Allegheny Avenue Mortgage stated that “in consideration of the indebtedness to be incurred” under the Master Supply Agreement and Capital Improvement Agreement, “and as security for Payment ... of all amounts due or to

⁵ Capital Improvement Agreement, p. 2, Exhibit C to the Complaint.

⁶ Mortgage between Nushin and GPM Investments, LLC, attached as Exhibit D to the Complaint.

⁷ Mortgage between Thomas and GPM Investments, LLC, Exhibit E to the Complaint.

⁸ Mortgage between Kahn and GPM Investments, LLC at ¶ 39; Mortgage between Thomas and GPM Investments, LLC at ¶ 39, Exhibits D and E to the Complaint.

become due under the Agreements,” Kahn grants unto Plaintiff all of his rights, title and interest in the “land with the buildings and improvements thereon ... located at 2401-21 Allegheny Avenue, Philadelphia, Pennsylvania, 19132.”⁹ With this mortgage, Defendant Kahn agreed to confess judgment in favor of Plaintiff herein “after the occurrence of an event of default under the mortgage.”¹⁰

On February 2, 2010, Plaintiff filed Confession of Judgment actions against individual Defendants Kahn and Thomas.¹¹ The two Confession-of Judgment Complaints asserted that Kahn and Thomas had defaulted respectively on the Allegheny Avenue Mortgage and the Wissahickon Avenue Mortgage because Shahina, Nushil and MNB had defaulted on the Master Supply Agreement and Capital Improvement Agreement.¹² On February 23, 2010, Kahn and Thomas filed respective Petitions to Strike Off or Open the Confessed Judgments. On April 26, 2010, the Honorable Judge Idee C. Fox of the Court of Common Pleas, Philadelphia County, denied the Petitions to Strike-Off Confessed Judgments, but granted the Petitions to Open Confessed Judgments.¹³ There was no Opinion accompanying the Orders. Plaintiff has not appealed either Order.

On August 5, 2010, Plaintiff filed the instant Complaint against the Shahina, Nushil, and MNB entities, and against individual Defendants Kahn and Thomas. After filing the Complaint, Plaintiff filed a Praecipe to Settle, Discontinue and End Confessed

⁹ Open-End Mortgage and Security Agreement between Kahn and GPM Investments, LLC, Exhibit F to the Complaint.

¹⁰Open-End Mortgage and Security Agreement between Kahn and GPM Investments, LLC at ¶ 39, Exhibit F to the Complaint.

¹¹ GPM Investments, LLC v. Nushin Kahn, Docket No. 1002-00352 at ¶¶ 8-12; GPM Investments, LLC v. George Thomas, Docket No. 1002-00350 at ¶¶ 8-12.

¹² GPM Investments, LLC v. Nushin Kahn, Docket No. 1002-00352; GPM Investments, LLC v. George Thomas, Docket No. 1002-00350.

¹³ GPM Investments, LLC v. Nushin Kahn, Docket No. 1002-00352, Order dated April 26; GPM Investments, LLC v. George Thomas, Docket No. 1002-00350, Order dated April 26, 2010.

Judgment No. 1002-00350. Plaintiff has not filed a Praecipe to Settle, Discontinue and End the remaining Confessed Judgment, No. 1002-00352.

Plaintiff's Complaint alleges that Shahina, Nushil and MNB defaulted on the Master Supply Agreement and Capital Improvement Agreement by failing to pay for fuels, cigarettes and sundry items.¹⁴ According to the Complaint, individual Defendants Kahn and Thomas defaulted on their respective mortgages because Shahina, Nushil and MNB defaulted on the Master Supply Agreement and Capital Improvement Agreement. Count I of the Complaint asserts Breach of Contract against all Defendants. The Breach-of-Contract claim seeks recovery of all balances due under the various agreements, plus interests, if any, and contractual attorneys' fees. Count II of the Complaint asserts Unjust Enrichment against all Defendants. The Unjust-Enrichment claim seeks recovery of all monies received by Defendants from the sale of any delivered and unpaid gasoline, cigarettes and sundries, plus pre and post judgment interests, if any.

On September 12, 2010, all Defendants filed an Answer with New Matter and Counterclaim. In the Answer, Defendants deny all of the breaches and defaults alleged by Plaintiff. In the Counterclaim, Defendants assert against Plaintiff the claims of Abuse of Process in Count I, Civil Conspiracy in Count II, and Intentional Infliction of Emotional Distress in Count III. There are no other claims asserted in Defendants' Counterclaim.

On October 5, 2010, Plaintiff filed Preliminary Objections to the Counterclaim of Defendants and Defendants filed their Answer. However, Defendants filed their Answer upon Docket No. 1002-00352. This Docket Number stands for one of the two

¹⁴ Complaint, ¶¶ 23-30.

Confession-of-Judgment actions originally filed by Plaintiff. The Preliminary Objections are ripe for a ruling.

Discussion

The standard for preliminary objections is well settled:

[The] court may sustain preliminary objections only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief.

For the purpose of evaluating the legal sufficiency of the challenged pleading, the court must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts.¹⁵

I. Defendants may not maintain the claim of Abuse of Process asserted in Count I of their Counterclaim.

Defendants assert in their Answer with New Matter and Counterclaim that Plaintiff abused process by wrongfully instituting Confession of Judgment actions against them.¹⁶ Defendants conclude that they suffered injury because “as a direct and proximate result of [the wrongful] acts,” Defendants “were unable to secure alternative financing or funding.”¹⁷

Plaintiff moves against the claim of Abuse of Process, and asserts that the claim is legally insufficient because Defendants have not asserted any fact showing that the Confessed Judgments were wrongful.

In Pennsylvania,

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.

¹⁵ Mazur v. Trinity Area Sch. Dist., 961 A.2d 96, 101 (Pa. 2008).

¹⁶ Defendants’ Answer to the Complaint with New Matter and Counterclaim, ¶ 51.

¹⁷ Defendants’ Answer to the Complaint with New Matter and Counterclaim, ¶ 61.

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....

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...; and 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.¹⁸

In this case, Defendants note that Judge Idee C. Fox granted their Petitions to Open the Confessed Judgments of Plaintiff, and Plaintiff failed to appeal therefrom. Defendants assert that failure to appeal the Orders demonstrates that the Confessed Judgments were wrongful and had no merit.¹⁹ Defendants boldly conclude that Plaintiff abused the legal process by instituting wrongful Confession-of-Judgment actions.²⁰ These averments and conclusions are legally insufficient to sustain the claim of Abuse of Process. The averments and conclusions are legally insufficient because mere failure to appeal the Orders opening the Confessed Judgments does not show that the Confessed Judgments were wrongful. These averments and conclusions allege no “definite acts” undertaken by Plaintiff “to accomplish a purpose for which the process was not designed.” As asserted in the Answer with New Matter and Counterclaim, the claim of Abuse of Process is legally insufficient and Count I thereof is dismissed.

II. Defendants may not maintain the claim of Civil Conspiracy.

¹⁸ Lerner v. Lerner, 954 A.2d 1229, 1239 (Pa. Super. 2008).

¹⁹ Answer with New Matter and Counterclaims to the Complaint, ¶ 31 (filed on Docket No. 1002-00352).

²⁰ Answer with New Matter and Counterclaims to the Complaint, ¶ 51 (filed on Docket No. 1002-00352).

The essential elements required to maintain a claim for civil conspiracy are:

- (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose,
- (2) an overt act done in pursuance of the common purpose, and
- (3) actual legal damage.²¹

Defendants allege in their Answer with New Matter and Counterclaim that Plaintiff “entered into a wrongful an illegal conspiracy to injure and oppress” Defendants.²² However, Defendants have named no person or entity, other than Plaintiff, involved in the alleged conspiracy. Defendants have not identified anywhere in their pleadings the existence of co-conspirators, and have failed to allege that “two or more persons” combined to do an unlawful act. The claim asserting Civil Conspiracy asserted in the Counterclaim is legally insufficient, and Count II thereof is dismissed.

III. Defendants may not maintain the claim of Intentional Infliction of Emotional Distress.

In the Answer with New Matter and Counterclaim, Defendants assert that they “have been ... greatly injured in their good names, credit, and reputation to their great financial loss and damage,” and “have suffered severe physical, emotional distress and anguish, humiliation and embarrassment and various injuries,” “as a direct and proximate result of [Plaintiff’s] conduct.”²³

The Pennsylvania Supreme Court

has indicated that in order for a plaintiff to prevail on ... a claim [of intentional infliction of emotional distress], he or she must, at the least, demonstrate

²¹ *Phillips v. Selig*, 959 A.2d 420, 437 (Pa. Super. 2008).

²² Answer with New Matter and Counterclaim to the Complaint, ¶ 64 (filed on Docket No. 1002-00352).

²³ Answer with New Matter and Counterclaim to the Complaint, ¶¶ 72-73 (filed on Docket No. 1002-00352).

intentional outrageous or extreme conduct by the defendant, which causes severe emotional distress to the plaintiff.

* * *

Outrageous or extreme conduct" has been defined ... as conduct that is so outrageous in character, so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society.²⁴

It is for the court to determine, in the first instance, whether the actor's conduct can reasonably be regarded as so extreme and outrageous as to permit recovery.

Strickland v. University of Scranton and Srivastava, 700 A.2d 979, 987 (Pa. Super. 1997).

In Strickland, Harry Strickland ("Strickland,") a professor at the University of Scranton (the "University,") borrowed money from Indira Srivastava ("Srivastava"). A dispute arose as to whether Strickland repaid the loan, and Srivastava filed suit to collect the un-repaid loan. At the instigation of Srivastava, the local District Attorney began criminal investigations upon Strickland. Shortly thereafter, the University of Scranton and Strickland severed their employment relationship. For consideration received, Strickland resigned as professor, and renounced any cause of action or rights that could be asserted against the University. However, Strickland subsequently decided to sue the University and Srivastava. In the complaint, Strickland asserted the claim of intentional infliction of emotional distress. Preliminary objections were filed, and the trial court sustained the preliminary objections against the claim of intentional infliction of emotional distress.²⁵ Strickland appealed. Affirming on appeal, the Pennsylvania Superior Court explained that Srivastava "merely sought to collect monies she believed were owed to her." The Superior Court held that "We cannot, as a matter of law, find

²⁴ Swisher v. Pitz, 868 A.2d 1228, 1230 (Pa. Super. 2005).

²⁵ Strickland v. University of Scranton, 700 A.2d at 982-983.

[this] course of conduct to demonstrate the amount of outrageousness required to allow recovery for the intentional infliction of emotional distress.”²⁶

Similarly here, Plaintiff initiated Confession-of-Judgment proceedings against Kahn and Thomas to recover funds pursuant to the Master Supply Agreement, the Capital Improvement Agreement, and the Allegheny and Wissahickon Avenue Mortgages. By confessing judgments against the Defendants, Plaintiff “merely sought to collect monies [it] believed were owed to Plaintiff.” This Court cannot find that a mere attempt to recover funds pursuant to several agreements rose to the level of outrageousness as to require recovery for the intentional infliction of emotional distress. Defendants’ claim asserting Intentional Infliction of Emotional Distress is legally insufficient, and Count III thereof is dismissed.

By The Court,

Mark I. Bernstein, J.

Dated: February 28, 2011

²⁶ Strickland v. University of Scranton, 700 A.2d at 987.