

IN THE COURT OF COMMON PLEAS OF MON



2011-25251-0222 4/7/2015 9:58 AM # 10248234

Order

Rept#Z2372988 Fee:\$0.00

Mark Levy - MontCo Prothonotary

CIVIL ACTIC

[Redacted]

No.

[Redacted]

v.

RANDEE FELDMAN, ESQUIRE

MEMORANDUM AND ORDER sur:
DEFENDANT, RANDEE FELDMAN, ESQUIRE'S MOTION FOR
RECONSIDERATION OF THE APRIL 27, 2012 ORDER DENYING DEFENDANT
FELDMAN'S PRELIMINARY OBJECTIONS TO PLAINTIFF'S AMENDED
COMPLAINT

DEMCHICK-ALLOY, J.

APRIL 6, 2015

On March 27, 2015, defendant Randee Feldman, Esquire (defendant) filed a motion for reconsideration of the order filed by the undersigned judge on April 27, 2012, which order sustained some of her preliminary objections to plaintiff's amended complaint and overruled others. The matter was thereafter reassigned to the Honorable Judge Richard P. Haaz. In view of the coordinate jurisdiction rule, the Court Administrator forwarded the motion for reconsideration to the undersigned judge for disposition. This memorandum and order explains the reasons for the order of April 27, 2012 and for the denial of the motion for reconsideration.

I. Reasons for the order of April 27, 2012

A. Facts

Plaintiff is proceeding pro se. She has filed the instant action to recover damages against the lawyer who represented her ex-husband in their divorce action, and who continues to represent him in the ongoing domestic relations action. The amended complaint consists of the following five counts, which are pled in great factual detail:

3

- I. **“Abuse of process and tortious interference with contractual relations,”** the contract at issue being a prospective re-negotiation of the note secured by a mortgage on the marital home.
- II. **“Abuse of process and tortious interference with contractual relations,”** the contracts at issue being consumer credit account agreements with Home Depot and Macy’s.
- III. **“Abuse of Process and fraud,”** the alleged fraud being: (a) representations made to the court by defendant in the underlying divorce action regarding continuation of a hearing; and (b) issuance of defective checks by defendant to plaintiff’s lawyers pursuant to a court order.
- IV. **“Fraud upon the court,”** the alleged fraud being representations made to the court by defendant in the underlying divorce action regarding an allegedly fraudulent conveyance of the husband’s business.
- V. **“Intentional infliction of emotional distress,”** the distress being that suffered by plaintiff and her children as a result of the alleged loss in value of the family’s income and assets, which damaged the credit ratings of plaintiff, caused the plaintiff emotional distress manifesting in physical illness, caused one of their daughters to drop out of college and caused one of their sons to suffer severe depression.

Defendant filed six preliminary objections:

- I. Demurrer to all counts based on “absolute privilege”
- II. Demurrer to the “abuse of process” claims (Counts I-III)
- III. Demurrer to the “tortious interference with contractual relations” claims (Counts I and II)
- IV. Demurrer to the “fraud claims” (Counts III and IV, incorrectly specified by defendant as Counts II and III)
- V. Motion to strike prayer for punitive damages

VI. Demurrer to claim for intentional infliction of emotional distress (Count V)

Defendant submitted a brief that attempted to add three motions to strike that were not included in the preliminary objection: a motion to strike all claims based on res judicata; a motion to strike count IV, fraud upon the court; and a motion to strike paragraph 42 of the amended complaint for insufficient specificity. The attempt to add objections in the brief will be addressed first. The remaining preliminary objections will be addressed in the order in which they were raised.

B. Discussion

1. Attempted objection by brief

These attempted objections were not considered on their merits and were correctly overruled for several reasons:

- a. The Pennsylvania Rule of Civil Proceedings lists the pleadings that are allowed in civil actions. A preliminary objection is among the pleadings listed, but a brief is not. Pa.R.C.P. 1017. It follows that the brief may not function as a pleading, hence a judge may not lawfully to treat it as such by entering an order purporting to reach the merits of the objections raised in the brief but not the preliminary objections.
- b. The brief did not include a notice to plead (most likely because it would not have made sense to include one in a non-pleading). As a consequence of the lack of a notice to plead, plaintiff was not required to file a responsive pleading, Pa.R.C.P. 1026(a), nor would there have been a lawful way of filing a responsive pleading to a non-pleading in any case. Plaintiff would have been denied her right to due process of law if the court

had addressed the merits of the motions to strike without giving her an opportunity to file a responsive pleading.

- c. “All preliminary objections shall be raised at one time,” Pa.R.C.P. 1028(b), hence defendant was prohibited from raising some objections in the brief filed after the preliminary objections.
- d. The motion to strike based on res judicata is a type of preliminary objection that raises issues of fact based on the record in a different case. Because a judge may not take notice of the record in another case, *Naffah v. City Deposit Bank*, 13 A.2d 63 (Pa. 1940), defendant was obligated to support this particular motion to strike by averring supporting facts in a preliminary objection pleading. Defendant failed to do so (and also failed adequately state the facts necessary to sustain the objection in the brief). Because defendant failed to state this motion to strike in a pleading, plaintiff lacked an opportunity to admit or deny those facts paragraph-by-paragraph (see Pa.R.C.P. 1022) in a responsive pleading, hence the court could not follow the process for resolving any issues of material fact regarding the motion to strike. Pa.R.C.P. 1028(c)(2) & note.

2. Demurrer to all counts based on “absolute privilege”

Statements made in judicial proceedings are absolutely privileged as to civil liability for libel, slander or defamation. *See, e.g., Post v. Mendel*, 507 A.2d 351, 355 (Pa. 1986). Plaintiff has not sued defendant for libel, slander or defamation. Defendant cited no authority for the proposition that the “absolute privilege” applies to other theories of liability. To the contrary, “[a]n attorney is personally liable to a third party when he is guilty of fraud, collusion, or a malicious or *tortious act*, and he is liable, as anyone else, when he encourages and induces another to commit a trespass.” *Adelman v. Rosenbaum*, 3 A.2d 15, 18 (Pa. Super. Ct. 1938)

(italics supplied). In *Adelman*, the Superior Court of Pennsylvania affirmed a judgment entered against a lawyer in a suit alleging abuse of process brought by plaintiffs based on the manner in which the lawyer enforced a judgment in an underlying lawsuit. In view of the similarity between *Adelman* and this case, there is no authority to support a claim that the defendant in this suit is immune from plaintiff's claims. Therefore this objection was correctly overruled.

3. Demurrer to the "abuse of process" claims (Counts I-III)

A judge must sustain a demurrer if the plaintiff is not entitled to relief when all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts are accepted as true, but if doubt exists as to whether a demurrer should be sustained, the demurrer was properly overruled. *Krentz v. Consolidated Rail Corp.*, 910 A.2d 20, 26 (Pa. 2006).

Pennsylvania common law defines a cause of action for abuse of process as follows:

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. 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. This tort differs from that of wrongful use of civil proceedings in that, in the former, the existence of probable cause to employ the particular process for its intended use is immaterial. 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.

[]

The gravamen of the misconduct for which the liability stated ... is imposed is not the wrongful procurement of legal process or the wrongful initiation of criminal or civil proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish. Therefore, it is immaterial that the process was properly issued, that it was obtained in the course of proceedings that were brought with probable cause and for a proper purpose, or even that the proceedings terminated in favor of the person instituting or initiating them. The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed....

Lerner v. Lerner, 954 A.2d 1229, 1238-39 (Pa. Super. Ct. 2008) (citations omitted). A lawyer may be liable for the tort of abuse of process for acts he or she carried out on behalf of a client.

Adelman.

Count I of plaintiff's complaint avers that defendant told her client to stop making support payments in violation of a court order, with knowledge that plaintiff needed the support payments to pay the mortgage on the home she shared with her children. Count I further avers that because plaintiff's ex-husband stopped making support payments, she sold her home because she could no longer afford it. The legal process was not designed to enable one spouse to disobey a support order so as to gain an advantage over the other spouse in a divorce action by causing the other spouse and the children to lose their family home. "An attorney may be held liable for an abuse of process, where the acts complained of are his own personal acts, or the acts of others wholly instigated and carried on by him." *Adelman* (quoting 1 Am.Jur. p. 189, § 31). Therefore this demurrer to Count I was properly overruled.

Count II of plaintiff's complaint avers that defendant repeatedly orally agreed to pay joint marital debt from a joint escrow account for their mutual benefit, but refused to do so in order to delay the progress of the divorce action and gain a relative advantage. (The harm to the wife was

expected to be greater than the harm to the husband, and wife avers that she incurred \$35,000 in legal fees that she would otherwise not have incurred and her credit rating was impaired). The legal process was not designed to enable a lawyer to take advantage of a client's opponent by breaking oral agreements, and therefore this demurrer to Count II was properly overruled.

Count III of plaintiff's complaint avers that defendant made multiple false representations to the court in the underlying divorce action in order to delay the disbursement of funds from the joint escrow account to plaintiff. Count III also avers that defendant intentionally drafted a check without the account routing number in order to further delay the disbursement of the funds. The legal process was not designed to enable a lawyer to take advantage of a client's opponent by making false representations to a judge and by intentionally drafting a defective check and therefore this demurrer to Count III was properly overruled.

4. Demurrer to the "tortious interference with contractual relations" claims (Counts I and II)

The elements of a cause of action for intentional interference with a contractual relation, whether existing or prospective, are as follows:

- (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party;
- (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring;
- (3) the absence of privilege or justification¹³ on the part of the defendant; and
- (4) the occasioning of actual legal damage as a result of the defendant's conduct.

13. "While some jurisdictions consider a justification for a defendant's interference to be an affirmative defense, Pennsylvania courts require the plaintiff, as part of his *prima facie* case, to show that the defendant's conduct was not justified." *Triffin v. Janssen*, 426 Pa.Super. 57, 626 A.2d 571, 574 n. 3 (1993) (citations omitted), *appeal denied*, 536 Pa. 646, 639 A.2d 32 (1994).

Ira G. Steffy & Son, Inc. v. Citizens Bank of Pennsylvania, 7 A.3d 278, 288-89 (Pa. Super. Ct. 2010). Defendant did not brief this demurrer, but the preliminary objection argued that plaintiff failed to plead the existence of a contract for both Counts I and II. This is incorrect as to Count II, as plaintiff pled that defendant interfered with payment of Home Depot and Macy's consumer credit accounts. As to Count I, plaintiff pleaded a prospective contractual relationship in the form of a restructuring of the payment on the note secured by the mortgage on the marital home. It is immaterial that Count I is styled as a claim for interference with an existing contract rather than a prospective contract, as a plaintiff need only plead facts, not a legal theory. *Weiss v. Equibank*, 460 A.2d 271 (Pa. Super. Ct. 1983).

Paragraph 35 of defendant's preliminary objection argued that she "holds a privilege or justification" because she "was representing her client in the course of a divorce action..." To the contrary, "[a]n attorney may be held liable for an abuse of process, where the acts complained of are his own personal acts, or the acts of others wholly instigated and carried on by him." *Adelman* (quoting 1 Am.Jur. p. 189, § 31). For the foregoing reasons, this demurrer was properly overruled.

5. Demurrer to the fraud claims (Counts III and IV, incorrectly specified by defendant as Counts II and III)

The elements of fraudulent misrepresentation are as follows:

- (1) A representation
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and,

(6) the resulting injury was proximately caused by the reliance.

Ira G. Steffy & Son, Inc. at 290.

In this demurrer, defendant objected to the claim in Count III that defendant issued a fraudulent check and the claim in Count IV that she supported her client's false testimony that his business had closed.

The discussion of the preliminary objection to the abuse of process claims, above, shows that Count III made detailed averments of facts that (expressly or by reasonable inference) allege defendant knowingly and intentionally made multiple material misstatements of fact to the court, to opposing counsel, and to plaintiff, with the intention of misleading them regarding the legitimacy of requests for continuances and the legitimacy of a check drawn from the joint escrow account. In Count IV, plaintiff avers that defendant knowingly had her client give false testimony and presented an exhibit (a paycheck made out to the client) that indicated that the husband's testimony, and her argument on behalf of the husband, was false with regard to the sale of the husband's business. The complaint does not, however, aver facts supporting an inference that anyone justifiably relied on the misrepresentations. Plaintiff and her lawyer certainly did not rely on any representations made by defendant to them, as the complaint shows that they did not believe her. As for the representations made to Judges Tilson and Wall, plaintiff cannot have relied to her detriment on statements made to someone else, especially when she and her lawyer did not believe them. The judges themselves did not justifiably rely on the alleged misrepresentations because judges make credibility determinations and weigh information (whether pertaining to an out-of-court request for a continuance or evidence placed

on the record in court), but they do not “rely” on representations of counsel or client testimony propounded by counsel. Therefore the demurrers to Counts III and IV were sustained.

6. Motion to strike prayer for punitive damages

“[I]n Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk.” *Hutchison ex rel. Hutchison v. Luddy*, 582 Pa. 114, 124, 870 A.2d 766, 772 (2005). Although punitive damages may never be awarded for conduct that is negligent or even grossly negligent, *id.* at 124, 870 A.2d at 771, they may be awarded for a claim based upon negligence if the plaintiff is able to prove to the jury that the defendant acted with the requisite state of mind, *id.* at 124, 870 A.2d at 771.

Defendant argued in conclusory fashion that she “did not engage in conduct that would invoke punitive damages under Pennsylvania law.” When reviewing a demurrer to a claim for punitive damages, the court does not look at evidence actually produced, but rather at averments pled in the complaint. *See Field v. Philadelphia Electric Co.*, 565 A.2d 1170, 1182 (Pa. Super. Ct. 1989) (court “must analyze whether the complaint’s allegations establish that the actor actually knew or had reason to know of facts which created a high risk of physical harm to plaintiff.”). “A demurrer is appropriate only if there is a certainty that no recovery is possible, and all doubts must be resolved in favor of the pleader.” *Id.* at 1183. Proof of the requisite state of mind might be accomplished with direct evidence, for example, if a defendant states that he or she subjectively appreciated the risk of the harm he caused, or failed to act in conscious disregard of the risk of the harm he or she caused, but circumstantial evidence may also reveal the requisite state of mind.

The Superior Court's opinion in *Adelman* is instructive as to defendant's argument in support of this preliminary objection:

We are unable to concur with the appellant's view that there was not sufficient evidence to enable the jury to find malice on the part of the defendant to support an award for punitive damages. Legal malice in cases of the character we are considering has been variously defined as "oppression," "outrage," "vindictiveness," "a wanton disregard of the rights of others". In *Nagle v. Mullison, supra*, 34 Pa. 48, 53, where a verdict for exemplary damages only was upheld the court said: "In every case of oppression, outrage, and vindictiveness on part of the trespasser, the damages may be estimated and given in a punitive shape, rather than merely as compensatory." *See, also, Thompson et al. v. Swank, supra; Fahrer v. Blumenthal et al., supra.*

Adelman at 17-18. This preliminary objection was properly overruled.

7. Demurrer to claim for intentional infliction of emotional distress (Count V)

"The gravamen of the tort of intentional infliction of emotional distress is outrageous conduct on the part of the tortfeasor." *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988, 991 (Pa. 1987). The Pennsylvania Supreme Court has not yet decided whether to recognize a cause of action for intentional infliction of emotional distress, but it has stated that if the tort "is to be accepted in this Commonwealth, at the very least, existence of the alleged emotional distress must be supported by competent medical evidence." *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988, 995 (Pa. 1987). At the pleadings stage, plaintiff is under no obligation to plead evidence, but she has pled that she has suffered physical illness as a result of defendant's conduct. Therefore her pleading was sufficient to withstand defendant's demurrer.

Defendant argued that she is immune from liability. This argument is incorrect. *Adelman*. She then argued that she may not be sued for intentional infliction of emotional distress because a lawyer is expected to present his client's claim to the court, and a lawyer is not required or expected to prejudge the client's claim. These arguments might be persuasive if the

complaint did not plead that defendant committed fraud and abuse of process in the course of the underlying litigation. An order sustaining the demurrer would be reversed if reviewed on appeal, hence the undersigned judge properly overruled the objection.

II. Reasons for the denial of the motion for reconsideration

The instant motion for reconsideration necessarily attempts to re-litigate the preliminary objections previously pled, but it also raises new grounds for objection. To the extent that the motion for reconsideration simply re-argues the preliminary objections without averring new facts or supplying new authority, Part I of this memorandum and order fully addresses those arguments. The motion for reconsideration does, however, cite two Superior Court decisions, both decided after the order of April 27, 2012, in support of the argument that plaintiff's claims are barred by "absolute judicial immunity." The decisions, *International Portfolio v. Purplefish, LLC*, 401 EDA 2013 (Pa. Super. Ct. 2013) and *Miller v. DeCarle*, 1492 MDA 2013 (Pa. Super. Ct. 2014) are both table decisions and have no precedential authority.

In paragraphs 20 and 78 of the motion for reconsideration, defendant raises standing arguments not raised in her preliminary objections. All preliminary objections must be raised at one time. Pa.R.C.P. 1028(b). Because defendant could have objected to plaintiff's standing to bring her claims in her preliminary objections, *see Petty v. Hospital Service Ass'n of Northeastern Pa.*, 967 A.2d 439, 443 (Pa. Commw. Ct. 2009) (preliminary objection challenging standing cognizable as objection to lack of capacity to sue, Pa.R.C.P. 1028(a)(5)), she may not raise that objection now in her motion for reconsideration. See Pa.R.C.P. 1028(b) (all preliminary objections must be raised at one time). Similarly, in paragraphs 23-25 of the motion for reconsideration, defendant objects that plaintiff lacks the capacity to sue because she lacks a special relationship with defendant, but she is now barred from raising this objection by

operation of Pa.R.C.P. 1028(b).

In paragraphs 39-40 of the motion for reconsideration, defendant demurs to plaintiff's claims for tortious interference with contractual relations because "the mortgage modification at issue was merely a prospective agreement." Part I of this memorandum shows that the undersigned judge considered that argument at the time defendant filed her preliminary objections, and because it was fairly implied by the preliminary objections, the undersigned judge does not believe the argument to be a new objection barred by Pa.R.C.P. 1028(b). Nonetheless, the undersigned judge rejected this argument for the reasons stated above in Part I.

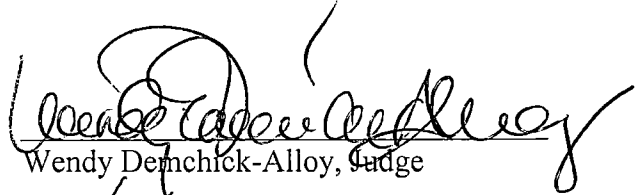
Defendant raises numerous demurrers to plaintiff's claims for interference with contractual relations in paragraphs 42-53 and 55-59 of her motion for reconsideration. None of those demurrers were raised in her preliminary objections. Therefore she may not raise them now by way of an application for reconsideration of the order denying those preliminary objections that she raised in a timely manner. Pa.R.C.P. 1028(b).

In paragraphs 70-77 and 79-81, defendant demurs to the claim for intentional infliction of emotional distress, arguing the amended complaint fails as a matter of law to allege "outrageousness." This argument was addressed and rejected for the reasons stated above in Part I. In paragraphs 82-87, defendant argues that the averments of fact in the amended complaint are insufficient as a matter of law to support an award of punitive damages. This argument was addressed and rejected for the reasons stated above in Part I.

III. Disposition

For all of the foregoing reasons, the undersigned judge denies defendant's motion for reconsideration of the order of April 27, 2012.

BY THE COURT,


Wendy Demchick-Alloy, Judge

copies of the above memorandum and order sent on 4/6/15
to the following:

Paul C. Troy, Esquire; Kane Pugh Knoell Troy & Kramer, LLP; 510 Swede Street; Norristown,
PA 19401-4886; by first-class mail

[REDACTED]
Honorable Judge Richard P. Haaz, by inter-office mail