

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED
January 20, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

FRANCES MILLER BELL by Janet Snyder,) C/A NO. 03A01-9707-CV-00292
)
Plaintiff-Appellant,) KNOX CIRCUIT
)
v.) HON. WHEELER ROSENBALM,
) JUDGE
)
ICARD, MERRILL, CULLIS, TIMM, FUREN AND GINSBURG, P.A.; WILLIAM GORDON BELL; HUNTON & WILLIAMS; and LONG, RAGSDALE AND WATERS,)
) AFFIRMED
) AND
Defendants-Appellees.) REMANDED

WILLIAM R. WILLIS, JR., and ALAN D. JOHNSON, WILLIS & KNIGHT, Nashville, for Plaintiff-Appellant.

WILLIAM T. RAMSEY and W. DAVID BRIDGERS, NEAL & HARWELL, PLC, Nashville, for Defendant-Appellee Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.,

JOHN P. KONVALINKA and SUSAN KERR LEE, GRANT, KONVALINKA & HARRISON, Chattanooga, for Defendant-Appellee Hunton & Williams.

THOMAS S. SCOTT, JR., and DAN D. RHEA, ARNETT, DRAPER & HAGOOD, Knoxville, for Defendant-Appellee William Gordon Bell.

DARRYL G. LOWE, LOWE, SHIRLEY & YEAGER, Knoxville, for Defendant-Appellee Long, Ragsdale & Waters.

OPINION

Franks, J.

In this action claiming damages against defendants for abuse of process, the Trial Judge dismissed the complaint for failure to state the cause of action pursuant to T.R.C.P. Rule 12.02(6).

This action arose from a dispute over the property of Frances Miller Bell. Plaintiff herein, Frances Bell is the widow of Malvern Bell and defendant William Bell is Malvern's nephew. The other Defendants are various law firms that represented William Bell.

Plaintiff suffered a stroke in 1994 which left her physically impaired. She executed a durable power of attorney to allow her husband to manage her affairs. She was living in Florida at that time, but was subsequently moved to a nursing home in Knoxville.

Malvern Bell established a trust naming William Bell and four nieces as beneficiaries. William was also named as trustee. Malvern's health deteriorated, and he arranged a new power of attorney, which named Frances' daughter Janet Snyder as the alternate attorney-in-fact. Janet became attorney-in-fact after a doctor declared Malvern incompetent in October of 1995 and he died shortly thereafter.

After Malvern's death, Frances, through Janet, sued William Bell for conversion of her funds and misappropriation of a personal computer. These suits were consolidated. William retained the law firm of Defendant Icard, Merrill, Cullis, Timm, Furen & Ginsburg ("Icard Merrill") to defend him in these actions.

On December 11, 1995, William, represented by the defendant firm of Long, Ragsdale & Waters, filed a petition in Knox County Chancery Court for the appointment of a conservator for Frances. He nonsuited this petition on February 1, 1996. On February 15, 1996, Janet filed a conservatorship petition in the Knox County Chancery Court, and also filed an abuse of process and malicious prosecution suit against William on February 20, 1996. Defendant Hunton & Williams was retained to defend William in this action.

On June 4, 1996, William, through Long, Ragsdale & Waters, filed a second conservatorship petition. On July 1, 1996, Janet Snyder nonsuited the abuse of

process and malicious prosecution suit. On August 16, 1996, the Chancellor heard arguments to dismiss William Bell's second petition. Both Hunton & Williams and Long, Ragsdale & Waters represented William at this hearing. The Chancellor dismissed the second petition, and on August 19, 1996, William moved to intervene in the remaining conservatorship petition. Both Hunton & Williams and Long, Ragsdale & Waters represented Bell at this hearing. This motion was denied and Janet Snyder was appointed conservator on November 7, 1996. William filed a Motion to Reconsider on December 23, 1996, which was denied. On January 13, 1997, Frances Bell, through the conservator, filed this abuse of process suit. The Trial Court granted defendants' T.R.C.P. 12.02(6) motion to dismiss on March 21, 1997.

In reviewing the Trial Court's action taken pursuant to T.R.C.P. 12.02(6), we are required to construe the complaint liberally in favor of the plaintiff, taking all allegations as true. *Sullivant v. Americana Homes, Inc.*, 605 S.W.2d 246 (Tenn.App. 1980). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him or her to relief. *Id.*

Abuse of process is "the misuse of a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which the process is not designed." 1 Am.Jur. 2d *Abuse of Process* §1 (1994)¹. Abuse of process is comprised of :

(1) the existence of an ulterior motive, and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.

Priest v. Union Agency, 125 S.W.2d 142, 143 (1939) (quoting 1 Am.Jur. *Abuse of*

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Abuse of process is distinguished from the related tort of malicious prosecution in that "malicious prosecution concerns maliciously causing process to issue while abuse of process concerns the improper use of process after it has been issued." 1 Am.Jur.2d *Abuse of Process* § 3 (1994).

Process § 3.)

The ulterior motive “may take the form of coercion to obtain a collateral advantage not properly involved in the proceeding itself.” 1 Am.Jur. 2d *Abuse of Process* §6 (1994). “[M]ere ill will or spite toward the adverse party in a proceeding does not constitute an ulterior or improper motive where the process is used only for the purpose for which it was designed and intended.” *Id.*

The complaint is more than 30 pages and recites background information in great detail. The gravamen of the complaint is that defendants employed the conservatorship proceedings to “scuttle” plaintiff’s Florida litigation. Arguably, the complaint alleges that defendants were motivated to obtain a collateral advantage not part of a regular conservatorship proceeding.

Assuming, *arguendo*, that the complaint alleges an ulterior motive, the Trial Court’s dismissal was proper because the complaint does not allege an improper act in the use of process. “[I]f the act of the prosecutor is in itself regular, the motive, ulterior or otherwise, is immaterial.” *Priest v. Union Agency*, 125 S.W.2d 142, 143 (1939) (quoting 1 Am.Jur. *Abuse of Process* § 3). “[T]he mere existence of an ulterior motive in doing an act, proper in itself, does not suffice; there must be such a use of it as in itself is without the scope of the process, and hence improper.” *Id.* “Improper acts may not be inferred from the existence of an improper motive alone . . . “ 1 Am.Jur. 2d *Abuse of Process* §25 (1994).

Moreover, the complaint does not allege any improper acts by defendants after process was issued. For abuse of process claims, “process” is generally defined as that “which emanates from or rests upon court authority, and which constitutes a direction or demand that the person to whom it is addressed perform or refrain from doing some prescribed act.” 1 Am.Jur. 2d *Abuse of Process* §2 (1994). Merely instituting civil proceedings is generally not sufficient to support an

abuse of process claim. 72 C.J.S. *Process* § 108 (1987).

Plaintiff contends that initiation of legal proceedings alone can constitute an abuse of process, citing cases from other jurisdictions. In *Priest*, however, the court noted that an action for abuse of process lies “for the improper use of process after it has been issued, not for maliciously causing process to issue.” 125 S.W.2d at 143 (quoting 1 Am.Jur. *Abuse of Process* § 3); *Also see Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F.Supp. 17, 19-20 (E.D. Tenn. 1972), *aff’d without opinion*, 477 F.2d 598 (6th Cir. 1973).

The Trial Court properly noted that plaintiff’s complaint contained:

no allegation from which proof then can be adduced to support that the defendants in the course of all these activities that have been attributed to them actually abused process; that is, they used the process of the Chancery Court after it was issued for some purpose for which that process was not designed in the prosecution of conservatorship proceedings.

T.C.A. § 34-13-102 permits any person with knowledge of an individual’s need for a conservator to apply for one. The only action cited in the complaint that is arguably outside the normal channels of conservatorship proceedings is Defendant Bell and Icard Merrill’s invoking in a Florida court “a Florida statute which suspends all powers of attorney once an ‘incapacity proceeding’ is instituted.” Presumably, this is a reference to Fla. Stat. Ann. § 709.08 (West 1997)².

The purpose of appointing a conservator is to secure proper management of a disabled person’s affairs and assets. *See* T.C.A. § 34-11-101(4). The Florida statute merely suspends powers of attorney and does not dismiss the underlying litigation. Since litigation is often a costly endeavor, it was not outside the purpose of the conservatorship process to seek to suspend the Florida suit until the parties

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§ 709.08(3)(c)(1) provides in part: “If any person or entity initiates proceedings in any court of competent jurisdiction to determine the principal’s incapacity, the authority granted under the durable power of attorney is suspended until the petition is dismissed or withdrawn.”

resolved the conservatorship issue. Accordingly, invoking the Florida statute did not constitute an abuse of process.

Finally, plaintiff contends the defendants engaged in a conspiracy to abuse process. To the extent that plaintiff's complaint fails to state a claim for abuse of process, it also fails to state a claim for conspiracy to abuse process. *See Merritt-Chapman & Scott Corp.*

Defendants asked for a finding of a frivolous appeal, pursuant to T.C.A. §27-1-122. This motion is overruled. Plaintiff cites authority from other jurisdictions arguably in support of her position. Additionally, the Trial Judge noted there is a "paucity" of Tennessee case law on the subject.

Accordingly, we affirm the judgment of the Trial Court and remand, with cost of the appeal assessed to the plaintiff.

Herschel P. Franks, J.

CONCUR:

Houston M. Goddard, P.J.

William H. Inman, Sr.J.