IN THE UNITED STATES BANKRUPTCY COURT

(54)

FOR THE DISTRICT OF UTAH

COUNTER COPY - DO NOT REMOVE - [redacted]

In re	)	
TERRACOR, et al.,	)	Bankruptcy No. 81-00599
Debtors.	)	Civil Proceeding No. 82P-00321
SENIOR CORP., a Delaware corporation,	)	
Plaintiff,	)	MEMORANDUM DECISION
vs.	)	
TERRACOR, a Utah corporation, THE WOODS MARKETING, INC., a Wisconsin corporation, TERRACOR UTAH, a Utah corporation, IAN M. CUMMING, C. BRUCE MILLER, K. ERIC GARDNER, H. ROGER BOYER, SARA BOYER, ELLIS R. IVORY, KATHRYN IVORY, CLIFTON R. JOHNSON, JOSEPHINE JOHNSON, FRANKLIN D. JOHNSON, KATHLEEN JOHNSON, GLENDON E. JOHNSON, BOBETTE JOHNSON, and JOHN DOES 1 through 100,	)	
Defendants.	)	

Appearances: Richard F. Levy, Stephen Novack, Steven C. Dupre, Mark A. Rabinowitz, Levy and Erens, Chicago, Illinois, Thomas A. Quinn, Kent H. Murdock, Ray, Quinney and Nebeker, Salt Lake City, Utah, for Senior Corp.; Daniel L. Berman, Gregg I. Alvord, Berman and Anderson, Salt Lake City, Utah, Douglas J. Parry, Rooker, Larsen, Kimball and Parr, Salt Lake City, Utah, for Ian M. Cumming, C. Bruce Miller and K. Eric Gardner.

INTRODUCTION AND BACKGROUND

This case raises questions concerning the torts of wrongful use of civil proceedings and abuse of process in Utah.

Terracor, Terracor Utah, and The Woods Marketing, Inc., affiliated entities, are debtors-in-possession (debtors), having filed petitions under Chapter 11 on February 24 and 27, 1981. Senior Corp. (Senior) has loaned millions of dollars to debtors for the development of five residential resort communities in Colorado, Idaho, Utah and Wisconsin.

This civil proceeding was commenced as a diversity action in federal district court on February 18, 1981, and removed to this court, pursuant to 28 U.S.C. Section 1478(a), on April 6, 1982. Senior is suing the principals of debtors, Ian M. Cumming, C. Bruce Miller, and K. Eric Gardner (defendants), for misappropriating proceeds from the loans.

Defendants answered and counterclaimed on August 10, 1981. A "Corrected Answer and Counterclaim" was filed January 8, 1982. The counterclaim has two counts. The first count alleges that the complaint was filed "without proper investigation, without a good faith belief that [it is] true, or with knowledge that Senior...does not have valid claims." It further alleges that the suit was brought, not to obtain judgment against defendants, but "for the purpose of intimidation and coercion to gain control over them in their capacities as officers of [debtors]," and that as a result, defendants "have been damaged in their business and reputation" and by the expense of litigation. The second count, in addition to the foregoing, avers that the complaint "was filed without merit and not asserted in good faith," and asks for attorneys fees pursuant to 9A UTAH CODE ANN., Section 78-27-56 (Supp. 1981).

Senior has moved to dismiss the counterclaim on the ground that it fails to state a claim upon which relief may be granted under Fed.R. Civ.Pro. 12(b)(6), made applicable herein by Fed.R. Bank.Pro. 712(b). Senior characterizes the first count as a claim for the wrongful use of civil proceedings. Senior argues that termination of its suit in favor of defendants is an element essential to this claim, and that defendants have not alleged, and cannot allege, this element because the suit is still pending. Senior describes the second count as a claim for abuse of process. Senior argues that not only the use of

process, such as the filing of a complaint, but also the misuse of process, such as threats of coercion, are elements essential to this claim, and that defendants have not alleged, and cannot allege, these elements since no misuse of process has occurred.

Defendants agree that litigation must terminate before it may be a predicate for the wrongful use of civil proceedings, but contend that there are exceptions to this rule in "unusual circumstances," or that the rule does not apply to counterclaims, and that Section 78-27-56 supports a right of action independent of the wrongful use of civil proceedings. Defendants also contend that litigation may be abusive in itself, as in a case where discovery is burdensome, and does not require a misdeed, apart from the proceedings, to become an abuse of process.

WRONGFUL USE OF CIVIL PROCEEDINGS

Utah recognizes a tort for the wrongful use of civil proceedings. See, Baird v. Intermountain School Federal Credit Union, 555 P.2d 877 (Utah 1976); Perkins v. Stephens, 503 P.2d 1212 (Utah 1972); Johnson v. Mount Ogden Enterprises, Inc., 460 P.2d 333 (Utah 1969); St. Joseph Stock Yards Co. v. Love, 195 P. 305, 311 (Utah 1921)(dictum); Cahoon v. Hoggan, 86 P. 763 (Utah 1906); Hamer v. First National Bank of Ogden, 33 P. 941 (Utah 1893); Wright v. Ascheim, 17 P. 125 (Utah 1888). Cf. Straka v. Voyles, 252 P. 677 (Utah 1927).[1] "[I]t is recognized," however, "only when the civil suit is shown to have been brought without probable cause, for the purpose of harassment or annoyance, and it is usually said to require malice. It seems quite obvious that except in the most unusual circumstances, a prerequisite to such a showing is that the prior suit terminated in favor of

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[1] The Restatement, overlooking the cases in the text, notes that Utah has not determined whether to recognize the tort of wrongful use of civil proceedings. RESTATEMENT OF THE LAW, Torts 2d, Section 674, at 438 (Appendix 1981).

the defendant therein." Baird v. Intermountain School Federal Credit Union, supra at 878.

Termination in favor of the defendant has never been articulated as a requirement of the tort in Utah. The quotation from Baird, while suggesting this result, nevertheless, in context, addresses the role of termination in determining probable cause.[2] See also, Hamer v. First National Bank of Ogden, supra at 943. See generally, RESTATEMENT OF THE LAW, Torts 2d, Section 875, comment b, at 458 (1977). Language in Cahoon v. Hoggan, supra, at 764, the only decision which mentions termination as an element of the tort, is dictum.[3]

If the issue were raised, however, Utah would require termination as an element of the tort. This conclusion is supported by the references in Baird, Cahoon, and Hamer. Likewise, in every case discussing the tort, the prior proceedings had terminated and, where plaintiff recovered, they had terminated in his favor. See, Baird v. Intermountain School Federal Credit Union, supra at 878 (default judgment); Perkins v. Stephens, supra (facts incomplete); Johnson v. Mount Odgen Enterprises, Inc., supra at 335 (voluntary dismissal); St. Joseph Stock Yards Co. v. Love, supra at 306 (judgment affirmed on appeal); Cahoon v. Hoggan , supra at 763 (no cause of action); Hamer v. First National Bank of Ogden, supra at 943 (attachment dissolved); Wright v. Ascheim, supra at 125 (restraining

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2 Both the language recognizing the tort of wrongful use of civil proceedings and the idea of termination may be dictum in Baird. The plaintiff was sued on a note. Judgment was obtained and a supplemental order was issued. When plaintiff did not appear she was cited for contempt and arrested on a bench warrant. She sued to set aside the judgment and for misuse of legal procedure. Although the action arose from a civil context, its immediate antecedent was criminal contempt. Viewed in this light, the case was for malicious prosecution, and the opinion's concession that "under certain circumstances a cause of action may exist for the wrongful bringing of civil proceedings," Baird v. Intermountain School Federal Credit Union, supra at 878, is gratuitous. But cf. 1 F. Harper and F. James, THE LAW OF TORTS, Section 4.8, at 326 (1956). In any event, whether the action was for malicious prosecution or wrongful use of civil proceedings, the lack of termination does not appear to have been the basis for the ruling.

3 Cahoon, like Baird, may not have involved the wrongful use of civil proceedings. The concurring opinion observes that the suit was for wrongful attachment, not for "vexatious prosecution." Cahoon v. Hoggan, supra at 764.

order dissolved and cause dismissed). Moreover, the wrongful use of civil proceedings is a cousin to malicious prosecution.[4] On at least one occasion, Utah has defined the wrongful use of civil proceedings by analogy to malicious prosecution. See, Perkins v. Stephens, supra at 1212-1213. And, in Utah, malicious prosecution requires termination in favor of the defendant. See, Shippers' Best Express, Inc. v. Newsom, 579 P.2d 1316, 1317 (Utah 1978);[5] Singh v. MacDonald, 188 P. 631, 632 (Utah 1920) (dictum); Kennedy v. Burbidge, 182 P. 325, 326 (Utah 1919)(dictum); Kool v. Lee, 134 P. 906, 909 (Utah 1913)(dictum). Cf. Smith v. Clark, 106 P. 653, 659 (Utah 1910). This conforms to the nearly unanimous general view. See, e.g., 3 J. Dooley, MODERN TORT LAW: LIABILITY AND LITIGATION, Section 51.03, at 171 (1977); 1 F. Harper and F. James, THE LAW OF TORTS, Section 4.8, at 328 (1956); C. Morris and C.R. Morris, MORRIS ON TORTS 385 (1980); W. Prosser, HANDBOOK OF THE LAW OF TORTS, Section 120, at 853-854 (4th ed. 1971); RESTATEMENT OF THE LAW, Torts 2d, supra Section 674(b); Birnbaum, "Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Medical Malpractice Actions," 45 FORDHAM L. REV. 1003, 1026-1028 (1977); Note, "Malicious Prosecution: An Effective Attack on

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In Baird, for example, the court observed that "[s]uch action is related to and arose as an adjunct to the action for malicious prosecution in criminal proceedings." Baird v. Intermountain School Federal Credit Union, supra at 878. For cases discussing the tort of malicious prosecution in Utah, see, e.g., Terry v. Zions Cooperative Mercantile Institution, 605 P.2d 314 (Utah 1979); Shippers' Best Express, Inc. v. Newsom, 579 P.2d 1316 (Utah 1978); Fuller v. Zinik Sporting Goods Co., 538 P.2d 1036 (Utah 1975); Haas v. Emmett, 459 P.2d 432 (Utah 1969); Potter v. Utah Drive-Ur-Self System, Inc., 355 P.2d 714 (Utah 1960); Wendelboe v. Jacobson, 353 P.2d 178 (Utah 1960); Olson v. Independent Order of Foresters, 324 P.2d 1012 (Utah 1958); Cottrell v. Grand Union Tea Company, 299 P.2d 622 (Utah 1956); Uhr v. Eaton, 80 P.2d 925 (Utah 1938); Thomas v. Frost, 27 P.2d 459 (Utah 1933); Sweatman v. Linton, 241 P. 309 (Utah 1925); Singh v. MacDonald, 188 P. 631 (Utah 1920); Kennedy v. Burbidge, 183 P. 325 (Utah 1919); Kool v. Lee, 134 P. 906 (Utah 1913); McKenzie v. Canning, 131 P. 1172 (Utah 1913); Smith v. Clark, 106 P. 653 (Utah 1910); Murphy v. Booth, 103 P. 768 (Utah 1909); Johnston v. Meaghr, 47 P. 861 (Utah 1897).

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In Shippers' Best Express, Inc. v. Newsom, supra, plaintiff sued for breach of a lease and defendant counterclaimed for malicious prosecution. The malicious prosecution claim, however, was not based upon the suit for breach of a lease. Rather, it arose from a previously terminated criminal proceeding which plaintiff had initiated against defendant. Indeed, Shippers' reiterates as "sound" the rule of termination, and

Spurious Medical Malpractice Claims?" 26 CASE WES. RES. L. REV. 653, 662-665 (1976); Note, "Counterclaim For Malicious Prosecution in the Action Alleged to be Malicious," 58 YALE L. J. 490 (1949).

Defendants do not disagree with these findings. They argue, however, that an exception to the rule of termination should be made in this case, or that the rule should not extend to counterclaims, and that, notwithstanding the rule, Section 78-27-56 supports an independent claim for attorneys fees.

Boiled to essentials, defendants' argument is that, for the sake of expedition and economy, all claims should be litigated together, rather than postponing the counterclaim until resolution of the complaint. This argument has been advanced by commentators, see, e.g., Wright, "Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading," 38 MINN. L. REV. 423, 444 (1954); Note, "Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis," 88 YALE L. J. 1218, 1233-1237 (1979); Note, "Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?" supra at 663-664, 684, and has been the subject of experiment by courts, see, e.g., Eiteljorg v. Bogner, 502 P.2d 970, 971 (Colo. App. 1972); Sonnichsen v. Streeter, 239 A.2d 63, 68 (Conn. Cir. Ct. 1967); Mayflower Indus. v. Thor Corp, 15 N.J. Super. 139,144, 83 A.2d 246, 251 (Ch. 1951), aff'd per curiam 89 A.2d 242 (N.J. 1952); Herendeen v. Ley Realty Co., 75 N.Y.S. 2d 836 (Sup. Ct. 1947), discussed in Note, "Counterclaim For Malicious Prosecution in the Action Alleged to be Malicious," supra.

This argument may have practical appeal, but it is outweighed by policies which favor the rule of termination. Generally speaking, the rule assumes that suits for wrongful use of civil proceedings, in most instances, are brought

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holds that the rule is satisfied by a stipulated dismissal of the criminal proceedings. Id. at 1317. But cf. C. Morris and C.R. Morris, MORRIS ON TORTS 385 (1980); W. Prosser and Y. Smith, CASES AND MATERIALS ON TORTS 1090 n. 3 (4th ed. 1967); Joiner v. Benton Community Bank, 411 N.E. 2d 229, 231, (Ill. 1980).

without cause for their nuisance value or for spite. The rule reduces the threat of suits for wrongful use of civil proceedings, at once removing a disincentive to worthy claims, and discouraging a cycle of litigation. In short, "[s]ome margin of safety in asserting rights, though they turn out to be groundless and their assertion accompanied by some degree of ill-will, must be maintained. Otherwise litigation would lead, not to an end of disputing, but to its beginning, and rights violated would go unredressed for fear of the danger of asserting them" Melvin v. Pence, 130 F.2d 423, 426 (D.C. Cir. 1942). Fair trial of the main action should not be threatened by the introduction of evidence bearing upon malice, or by the tactical amendment of a counterclaim to name as a party, and thereby disqualify, counsel for plaintiff. Inconsistent judgments, where plaintiff prevails in the main action but loses the counterclaim in tort, should be avoided.[6]

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The court can envision procedures which might reconcile some of these policies with the need for expedition and economy in litigation. Indeed, the rules of civil procedure, such as Rules 13, 18(b), and 42(b), are designed for this purpose. See, e.g., Note, "Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?" supra at 663-664. The potential disqualification of counsel and the attendant prejudice to plaintiff, however, might be an insurmountable problem. In any event, there is no indication that Utah would qualify the rule of termination to this extent. Under these circumstances, the court is not at liberty to fashion a compromise between the objectives of the rule and the desires of defendants.

Defendants, however, point to the caveat in Baird that "except in the most unusual circumstances, a prerequisite to...a showing [of probable cause] is that the prior suit terminated in favor of the defendant therein." Baird v. Intermountain School Federal Credit Union, supra at 878 (emphasis supplied). They infer from this language that there are exceptions in "unusual circumstances" to the rule of termination. They argue that the magnitude and complexity of this case justify such an exception. But a departure from the rule of termination may not be read into this unspecific remark.

First, as noted above, the reference in Baird to the wrongful use of civil proceedings, and to the rule of termination, may be dictum.

Second, as noted above, this dictum refers to the role of termination in determining probable cause, not as an element of the tort. If plaintiff wins, this is conclusive evidence of probable cause, even though the judgment might be reversed on appeal. See, e.g., W. Prosser, supra Section 120, at 855; RESTATEMENT OF THE LAW, Torts 2d, supra Section 675, comment b, at 458; Note, "Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?" supra at 678-679; Note, "Counterclaim for Malicious Prosecution in the Action Alleged to be Malicious," supra at 491 and n.5. In Utah, a defendant may avoid this result by showing that the judgment was obtained by fraud or perjury. Cf. Kennedy v. Burbidge, supra at 327. These may be the "unusual circumstances" alluded to in Baird.

Third, in any event, the "unusual circumstances" are not identified. This could mean the exception, already recognized in the Restatement, for ex parte proceedings. RESTATEMENT OF THE LAW, Torts 2d, supra Section

Whether the tort is raised by counterclaim or in a separate action makes no difference in light of these policies, and indeed, the prevailing sentiment disfavors counterclaims. See, e.g., 3 J. Dooley, supraSection 41.06, at 172; 1 F. Harper and F. James, supra at 328 n. 15; C. Morris and C.R. Morris, supra at 385; W. Prosser, supra at 853 n. 32; RESTATEMENT OF THE LAW, Torts 2d, Section 674, at 440 (Appendix 1981); Birnbaum, supra at 1026-1027, 1080-1081; Note, "Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?" supra at 662-665; Note, "Counterclaim For Malicious Prosecution in the Action Alleged to be Malicious," supra; Schwab v. Doelz, 229 F.2d 749, 753 (7th Cir. 1956); The Savage is Loose Co. v. United Artists, 413 F. Supp. 555, 562 (S.D.N.Y 1976); Selas Corp. of America v. Wilshire Oil Co. of Texas, 344 F. Supp. 357, 359-360 (E.D. Pa. 1972); First Trust Co. of Montana v. McKenna, 614 P.2d 1027, 1032-1033 (Mont. 1980); Terminal Grain Corp. v. Freeman, 270 N.W.2d 806, 809 (S.D. 1978); Farmers Elevator Co. v. David, 234 N.W.2d 26, 33-34 (N.D. 1975); Babb v. Superior Court, 479 P.2d 279, 381 (Cal. 1971)(en banc); H & H Farms, Inc v. Hazlett, 627 P.2d 1161, 1166-1167 (Kan. Ct. App. 1981); Jackson v. Meadows, 264 S.E.2d 503, 505-506 (Ga. Ct. App. 1980); Friedman v. Roseth Corp., 74 N.Y.S. 2d 733 (N.Y. Sup. Ct. 1947).

Nor does Section 78-27-56 alter this result. It provides: "In civil actions, where not otherwise provided by statute or agreement, the court may award reasonable attorney's fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith."[7] It is unclear whether

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674(b). See also, W. Prosser, supra at 853-854 ("necessary exceptions" include ex parte proceedings, and "proceedings ancillary to a civil suit, such as attachment or arrest under civil process, as to which, if they are themselves unjustified, it is unnecessary to show a favorable termination of the main action").

Fourth, defendants have cited no controlling authorities, nor have they advanced compelling reasons, for equating "unusual circumstances" with the magnitude or complexity of a case. Indeed, many cases are large and complex. Permitting an exception to the rule of termination in these circumstances would not be "unusual," at least in the sense of infrequency.

7 The parties have assumed that Section 78-27-56 is available as a remedy to defendants, although the scope of that remedy is the subject

Section 78-27-56 was meant to support a right of action, akin to the wrongful use of civil proceedings, with all the accoutrements of litigation, such as discovery and trial. Rather, it may have been intended to empower a judge, once a case ends, to award fees, like costs, upon his assessment of the merits of a claim. Section 78-27-56 looks more like a cost statute than a right of action, because it is confined to fees and does not authorize payment for other damages, such as for harm to reputation, which would be recoverable in tort.[8] Moreover, reference to the "prevailing" party is reminiscent of the rule of termination, suggesting that a claim for fees may not be entertained until one side wins. In contrast to the ambiguity of Section 78-27-56, at least one jurisdiction, by statute, has expressly abrogated the rule of termination. See, e.g., Gem Trading Company, Inc. v. Cudahy Corporation, 588 P.2d 1222, 1226 (Wash. Ct. App.

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7 (Cont'd)
of disagreement. Section 78-27-56 was enacted on February 19, 1981, and became effective on May 12, 1981. Senior filed its complaint, the act which ostensibly violates Section 78-27-56, on February 18, 1981, one day before the law was passed, and several months before it became effective. In Utah, statutes are applied prospectively, not retroactively, from the date they become effective, unless otherwise provided. 7A UTAH CODE ANN., Section 68-3-3 (1978). Whether Section 78-27-56 is applicable in a suit commenced before May 12, 1981, therefore, may be questioned. The parties have not raised and the court will not address this issue.

The parties have also assumed that a state fee statute is enforceable in a federal court. This assumption may be correct in diversity cases in federal district courts, where under the aegis of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and "where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." 6 MOORE'S FEDERAL PRACTICE ¶54.77[2], at 1712-1712 (1981). See, e.g., Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 259 n. 31 (1975); Hefley v. Jones, No. 80-1692 (slip opinion at 10-11) (10th Cir., September 7, 1982); Bickford v. John E. Mitchell Co., 595 F.2d 540, 545 (10th Cir. 1979). The applicability of the Erie doctrine in bankruptcy courts, however, has been questioned. Compare, e.g., Countryman, "The Use of State Law in Bankruptcy Cases (Part I)," 47 N.Y.U. L. REV. 407, 409-411 (1972) with Hill, "The Erie Doctrine in Bankruptcy," 66 HARV. L. REV. 1013, 1024-1036 (1953). Moreover, because courts of bankruptcy traditionally have been courts of equity, their rules of procedure for assessing fees have been different from other federal and state tribunals. See, e.g., Rule 754, Fed.R. Bank. Pro.; 1 COLLIER ON BANKRUPTCY ¶2.71 (14th ed. 1974); 13 id. ¶754.07. It is unclear whether these differences were eliminated in 1978 by 28 U.S.C. Section 1481 which empowers courts of bankruptcy to act as courts of law and equity. But cf. Proposed Rule 7054, Preliminary Draft of Proposed New Bankruptcy Rules and Official Forms, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (March 1982). The parties have not raised and the court will not address these issues.

8 The history of Section 78-27-56, insofar as it can be reconstructed, suggests that it was designed as a cost statute. Utah, like most jurisdictions, adheres to the American Rule for awarding attorneys fees, viz., in the absence of a contractual or statutory provision which dictates otherwise, each party to litigation pays his own attorneys fees. This rule was derived, in part, from the belief that fees were costs, and that costs

1978). An equally plain declaration of legislative intent is necessary to accomplish the same result in Utah. For these reasons, the counterclaim for wrongful use of civil proceedings, standing alone or in tandem with the allegations under Section 78-27-56, is dismissed.[9]

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8 (cont'd)

were a creature of statutes which could not be enlarged by judicial fiat. See, e.g., Western Casualty and Surety Company v. Marchant, 615 P.2d 423, 426-427 (Utah 1980); Ranch Homes, Inc. v. Greater Park City Corporation, 592 P.2d 620, 625-626 (Utah 1979); Nelson v. Newman, 583 P.2d 601, 603-605 (Utah 1978); Leger Construction, Inc. v. Roberts, Inc., 550 P.2d 212, 215-216 (Utah 1976); American States Ins. Co. v. Walker, 486 P.2d 1042, 1044 (Utah 1971). Cf. Frampton v. Wilson, 605 P.2d 771, 773-774 (Utah 1980). In Utah, the rule has exceptions, for example, where "litigation.....was not resorted to in good faith, but was merely spiteful, contentious or obstructive." Western Casualty and Surety Company v. Marchant, supra at 427. See also, Ranch Homes, Inc. v. Greater Park City Corporation, supra at 625-626; American States Ins. Co. v. Walker, supra at 1044. Critics, however, view the rule as obsolete, and the exception for bad faith litigation as overstrict. They have argued for reform, either through abolition of the rule, or enlarging the exception for vexatious lawsuits. See, e.g., Birnbaum, supra at 1082-1088; Ehrenzweig, "Reimbursement of Counsel Fees and the Great Society," 54 CALIF. L. REV. 792 (1966); Kuenzel, "The Attorney's Fee: Why Not a Cost of Litigation?" 49 IOWA L. REV. 75 (1963); Mayer and Stix, "The Prevailing Party Should Recover Counsel Fees," 8 AKRON L. REV. 426 (1975); McLaughlin, "The Recovery of Attorneys' Fees: A New Method of Financing Legal Services," 40 FORDHAM L. REV. 761 (1972); Stoebuck, "Counsel Fees Included in Costs: A Logical Development, 38 U. COLO. L. REV. 202 (1966); Note, "Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process," 44 U. CHI. L. REV. 619 (1977); Note, "Court Awarded Attorney's Fees and Equal Access to the Courts," 122 U. PA. L. REV. 636 (1974); Note, "Use of Taxable Costs to Regulate the Conduct of Litigants," 53 COLUM. L. REV. 78 (1953); Note, "Deterring Unjustifiable Litigation by Imposing Substantial Costs," 44 ILL. L. REV. 507 (1949). In this milieu, Section 78-27-56 was introduced as H.B. 100 in the 1981 General Session of the Utah legislature. As proposed, H.B. 100 abolished the American Rule and permitted courts to award fees to prevailing parties in civil suits. It was amended, however, by the House Judiciary Committee to allow fees only "if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith," and was enacted in this form. Given these circumstances, Section 78-27-56 may have been intended to broaden slightly or merely to codify the exception for bad faith litigation as it had existed in Utah. The paucity of procedural guidance under Section 78-27-56 is probably due to an assumption by the legislature that the rules for taxing costs, post-judgment, would be used in enforcing the statute.

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Because the motion is resolved on these grounds, it is unnecessary to decide whether Utah would follow what is known as the "English Rule." Most jurisdictions hold that wrongful use of civil proceedings entails the absence of probable cause, an improper motive, and termination. A "substantial minority" of jurisdictions, which follow the English Rule, impose an additional requirement that the proceedings result in

ABUSE OF PROCESS

The tort of abuse of process has been defined as the use of "a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed." RESTATEMENT OF THE LAW, Torts 2d, supra Section 682. This tort is different from the wrongful use of civil proceedings in that "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." Id. comment a, at 474. In order to be actionable, "there must be use of the process for an immediate purpose other than that for which it was designed and intended. The usual case of abuse of process is one of some form of extortion, using the process to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it." Id. comment b, at 475.

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9 (cont'd)

special damage, such as a seizure or property or an arrest of person. See, e.g., W. Prosser, supra Section 120, at 850-853; RESTATEMENT OF THE LAW, Tort 2d, 438 (Appendix 1981); Birnbaum, supra at 1020-1022; Note, "Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis," supra at 1218-1221, 1229-1230; Note, "Malicious Prosecution: An Effective Attack on Spurious Medical Malpractice Claims?" supra at 657-662; Buck v. Gale, 530 P.2d 1248 (Ore. 1975); Patrick v. McDonald, 266 P.2d 1047 (Wash. 1954). The question whether to follow the English Rule has been reserved in Utah. See, Johnson v. Mount Odgen Enterprises, Inc., supra at 335-336. Each case dealing with wrongful use of civil proceedings, however, has involved an element of special damage within the meaning of the English Rule. See, Baird v. Intermountain School Federal Credit Union, supra (arrest on bench warrant); Perkins v. Stephens, supra (injunction interfering with use of property); Johnson v. Mount Ogden Enterprises, Inc , supra (same); Cahoon v. Hoggan, supra (attachment interfering with use of property); Harmer v. First National Bank of Ogden, supra (same); Wright v. Ascheim, supra (injunction interfering with use of property). If the English Rule were followed in Utah, it would mandate dismissal of the claim for wrongful use of civil proceedings in this case, since there is no allegation of special damage.

These principles have been elucidated in two cases in Utah. In Crease v. Pleasant Grove City, 519 P.2d 888 (Utah 1974), the plaintiff had been convicted, upon the complaint of a city councilman, for violating an ordinance requiring payment of a monthly sewer charge. Plaintiff was sentenced to jail, but the sentence was suspended upon certain conditions. Plaintiff failed to meet these conditions and was incarcerated, but was released on a petition for habeas corpus. No further steps to enforce the conviction were taken for approximately 10 months. At that time, the mayor of the city approached plaintiff and offered to drop the criminal proceedings if the back charges were paid. Plaintiff refused, and several days thereafter he was again committed to jail. Upon his release, plaintiff sued the city councilman, alleging abuse of process. After noting that abuse of process is distinct from the wrongful use of civil proceedings, the court observed: "It is to be conceded that even though an action may have been properly initiated, and even though the process (the commitment) was lawfully issued, if it was used for an ulterior purpose for which it was not intended, that could be found to be actionable as an abuse of process. This is so because the essence of that cause of action is a perversion of the process to accomplish some improper purpose, such as compelling its victim to do something which he would not otherwise be legally obliged to do. On the other hand, if it is used for its proper and intended purpose, the mere fact that it has some other collateral effect does not constitute abuse of process. As specifically applied here, this is so even though it may incidentally and indirectly exert pressure for the collection of a debt." Id. at 890. The court, on this analysis, reversed a jury verdict in favor of plaintiff, holding that there was no evidence to show that the councilman "personally had anything to do.... with the issuance of the commitment." Id. at 890-891.

In Kool v. Lee, supra, plaintiff was employed by and leased her residence from the defendant. Defendant became dissatisfied and wrote a letter terminating her contract of employment, requesting her to vacate the home, and inviting her to come to his store for a settlement of accounts. A dispute arose concerning the amount due on each side, and a discussion, or an altercation, occurred at the store. Defendant, unhappy with this state of affairs, and believing he had been threatened at the store, obtained a warrant from a justice of the peace for the arrest of plaintiff, and caused it to be served on her in the nighttime. While plaintiff was in jail, defendant went with a teamster to the home, removed her goods, and replaced them with his own. When plaintiff was released and returned home, she "found the doors locked, [herself] evicted and dispossessed, [her] goods in [storage], and the defendant in possession." Id. at 908.

Plaintiff sued defendant for abuse of process. The lower court instructed the jury "that to entitle the plaintiff to recover it was not only necessary to prove 'that the defendant had an ulterior motive other than a purpose to vindicate the criminal law, to wit, the design of evicting the plaintiff and her husband from the premises, but that she was also required to prove some act on the part of the defendant, or at his instance or request, in the use of such criminal proceedings, other than such as would be proper in the regular prosecution of the charge,' and that the defendant could 'not be held responsible for merely setting the criminal law in motion and causing the arrest of the plaintiff and holding her in custody, even though such acts were done with the ulterior motive of evicting her from the premises of the defendant, but in order to recover the plaintiff must further show some distinct act or omission, as set forth in the complaint, accomplished at the instance or request of the

defendant, which amounted to a misuse or abuse of the process after it had been issued." Kool v. Lee, supra at 908.

Defendant argued on appeal that this instruction was error because it did not require plaintiff to show malice and a want of probable cause. The Supreme Court disagreed, ruling that the authorities required a showing of malice and a want of probable cause for malicious prosecution but not for abuse of process. Abuse of process embraces two elements: "'First, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceedings." [Citation omitted.] Id. at 909.[10] Defendant insisted that there was no evidence to satisfy these elements, "to show that an improper use was made of the warrant after it was issued." Id. at 910. The opinion, however, points to the eviction of plaintiff as an act which the arrest should not have been used to accomplish and thus as an abuse of process. On this basis, a jury verdict against defendant was upheld.

These authorities teach that abuse of process consists of not only the use of process for an ulterior purpose, but also some act perverting the process. This explains the formulations of the test that there must be "a wilful act in the use of the process not proper in the regular conduct of the proceeding" or "[s]ome definite act or threat not authorized by the process," or that where process is used as a club for collection of money, there must be "a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." W. Prosser, supra Section 121, at 857-858. Because there must be misuse of the process "there is no liability where the defendant had

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10 This was the essence of the instruction given by the lwer court which the opinion notes "substantially stated the law." Kool v. Lee, supra at 910.

done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." Id. at 857. The requirement of misuse renders sensible the dictum that "[t]he ulterior motive or purpose may be inferred from what is said or done about the process, but the improper act may not be inferred from the motive." Id. at 858. Indeed, the requirement of misuse accounts for the generalization, frequently made in order to distinguish malicious prosecution from abuse of process, that "malicious prosecution tends to turn upon what has occurred before the process is issued, and abuse of process upon what is done with it after its issue." 1 F. Harper and F. James, supra Section 4.9. at 330.

In Crease, there was process, the commitment, with a purpose not to vindicate the criminal law but to obtain payment of the sewer charges. The process, however, may not have been actionable if the mayor had not approached the plaintiff with the offer of settlement, and the implied threat, ultimately enforced, of incarceration. It was this threat, among other acts, which converted a use into an abuse of process.[11] In Kool, there was process, a warrant, with an ulterior purpose, the eviction. The process, however, would not have been actionable absent the act of eviction. In short, there must be process in some form,[12] a motive to use the process for a purpose other than that for which it is intended, and an act, such as threats during negotiations,

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[11] The court assumes that the process in Crease was actionable, since the complaint was not disposed of by motion to dismiss for failure to state a claim, and even though the councilman was acquitted on appeal because there was no evidence to connect him with the allegations of the complaint.

[12] The court concurs with defendants that process, for purposes of this tort, "has been interpreted broadly to encompass the entire range of 'procedures' incident to litigation," including discovery. Barquis v. Merchants Collection Association of Oakland, Inc., 496 P.2d 817, 824 n. 4 (Cal. 1972) (en banc). It does not follow, however, that discovery which may be burdensome, without more, is an abuse of process. There must be an act demonstrating that the discovery is other than in the ordinary course of a hard fought legal battle. If discovery is burdensome, but otherwise proper, defendants' remedy is not a counterclaim for abuse of process but a motion for a protective order as provided under Fed.R. Civ.Pro. 26(c), made applicable herein by Fed.R. Bank.Pro. 726.

which constitute an abuse of the process. See, e.g., 1 F. Harper and F. James, supra Section 4.9, at 330-331; W. Prosser and Y. Smith, CASES AND MATERIALS ON TORTS 1098 (4th ed. 1967); Birnbaum, supra at 1033-1042; Bretz, "Abuse of Process - A Misunderstood Concept," 20 CLEV. ST. L. REV. 401, 402 (1971); Spellers v. Spellers, 317 P.2d 613 (Cal. 1957)(en banc); Joseph v. Markevitz, 551 P.2d 571 (Ariz. Ct. App. 1976); Givert v. Wieboldt Stores, Inc.,347 N.E. 2d 242 (Ill. Ct. App. 1976).

In this case, the counterclaim alleges the use of process through complaint, summons, and discovery. It alleges an ulterior motive, viz., "the purpose of intimidation and coercion to gain control over [defendants] in their capacities as officers of [debtors]." But it does not allege some act abusive of process in furtherance of this end. If this is all that need be alleged and proved, then Senior may be liable on a showing that it used process while musing over but never acting upon the possibility of some collateral advantage. In the hugger-mugger world of complex litigation, the use of process unaccompanied by such thoughts would require a noble heart, indeed. The tort of abuse of process protects and preserves our freedom from litigation perverted to wrongful ends. We do not require and the law does not supply protection from litigation which contemplates but never acts upon these ends. The counterclaim, insofar as it purports to state a claim for abuse of process, must be dismissed. Defendants, if they are able within the constraints of Fed.R. Bank.Pro. 911(a), may file an amended counterclaim for abuse of process within 10 days from the date of this memorandum decision.

DATED this 27 day of September, 1982.

Ralph R. Mabey
United States Bankruptcy Judge