

ELECTRONICALLY FILED - 2017 JUL 03 11:35 AM - BEAUFORT - COMMON PLEAS - CASE#2016CP0702253

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TONJA McALLISTER,

Plaintiff,

v.

SUSAN CATO and CAPA OF BEAUFORT,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-07-02253

ORDER

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SEP 29 2017

SC Court of Appeals

This matter came before the Court on Defendants' Motion to Dismiss the Plaintiff's Complaint under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Defendants filed their Motion to Dismiss on March 3, 2017. Plaintiff filed her Memorandum in Opposition on June 20, 2017. A hearing was held on June 22, 2017 at the Beaufort County Courthouse. Jeff Bogdan was present and argued on behalf of the Defendants. Brooks Derrick was present and argued on behalf of the Plaintiff. For the reasons set forth below, Defendants' Motion to Dismiss is GRANTED.

**BACKGROUND**

In January 2008, Plaintiff was arrested for embezzling approximately \$66,000 from Defendant CAPA of Beaufort (Child Abuse Prevention Association), a non-profit charitable organization who at the time was Plaintiff's employer.<sup>1</sup> Plaintiff was charged with Breach of Trust with Fraudulent Intent in an amount greater than \$5,000 and, after pleading guilty, was sentenced to three years in prison, suspended on five years' probation and payment of costs, assessments,

<sup>1</sup> Some of these facts were presented as background for the Court and are outside of the Complaint. The Court does not believe that its consideration of these facts, which are a matter of public record, is necessary to grant Defendants' Motion to Dismiss under Rule 12(b)(6).

and \$58,097.50<sup>2</sup> in restitution to CAPA. Neither of the Defendants here were parties to that criminal case.

On October 24, 2013, days before Plaintiff's five-year probation period was scheduled to expire, she appeared before the court on a hearing to revoke her probation. Neither of the Defendants called for or instituted this hearing. Plaintiff claims that the only issue before the court was whether she satisfied the part of her sentence that required her to pay CAPA restitution. Plaintiff claims that Defendant Susan Cato, who at the time was CAPA's executive director, informed the court that Plaintiff had not satisfied the restitution payments. Specifically, Plaintiff claims that Defendant Cato told the court "Well, I'm disappointed that probation can't be extended, because she does owe the money. . . . So, you know, she does owe the money. She stole the money. So, it's just unfortunate that she hasn't been able to pay it. But, that doesn't diminish the fact that she still owes the money." The Court then revoked Plaintiff's probation and sentenced her to two years in prison, or to pay the remainder of the restitution, which was converted to a Civil Judgment.

Plaintiff appealed the court's decision to revoke her probation and the Court of Appeals reversed and remanded based on case law stating that probation cannot be revoked for simply failing to pay restitution, unless there is a finding of a willful failure to pay as well as inadequate alternative methods of punishment. On remand, Plaintiff's probation and outstanding restitution were discharged and she became and remains a free woman.

Now, on the three-year anniversary of the October 24, 2013 hearing, Plaintiff filed this action against Susan Cato and CAPA alleging abuse of process as the sole cause of action. Plaintiff bases her abuse of process claim on the statement that Defendant Cato made at the October 24,

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<sup>2</sup> The original balance of the restitution was \$66,610.58, but Plaintiff paid a portion of it at her sentencing.

2013 hearing. Plaintiff takes issue with the fact that Ms. Cato informed the Court that Plaintiff had not paid all of the restitution she owed. Plaintiff does not contend that she had paid all of the restitution, or that Defendant Cato said anything that was not true. Instead, Plaintiff claims that, since CAPA had been made whole by receiving benefits from its own insurance carrier, plus partial restitution from the Plaintiff, Defendant Cato's act of telling the Court that Plaintiff had not entirely paid her ordered restitution amounts to an abuse of process. Plaintiff claims that her restitution obligation should have been set-off by the amount CAPA received from its own insurance carrier, and Ms. Cato should have informed the Court that the restitution obligation was therefore satisfied.

Defendants responded to the Plaintiff's Complaint by filing a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

#### LAW/ANALYSIS

Rule 12(b)(6) provides the defense of "failure to state facts sufficient to constitute a cause of action."

The abuse of process cause of action allows relief for a party damaged by another's misuse of the legal system. Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002).

As a threshold matter, Plaintiff cannot maintain this suit because neither of the Defendants initiated the legal process that Plaintiff claims they abused. Plaintiff did not cite to any South Carolina case that endorsed an abuse of process cause of action against a witness to a legal proceeding who did not initiate, prosecute, or maintain the proceeding. Instead, South Carolina case law shows that abuse of process claims, whether they have been ultimately found to be meritorious or not, are made against a person or entity who initiated the legal process that the plaintiff claim was abused. See e.g. Pallares v. Seinar, 407 S.C. 359, 364-65, 756 S.E.2d 128, 130

(2014) (alleging defendant abused process by improperly filing a petition with the probate court alleging plaintiff was mentally ill and in need of a mandatory mental evaluation and by filing for restraining orders); Swicegood v. Lott, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008) (alleging abuse of process against a Sheriff who had plaintiff arrested that resulted in an eighteen hour imprisonment); Food Lion, Inc., 351 S.C. at 68, 567 S.E.2d at 252 (alleging abuse of process against defendant for funding and directing a civil lawsuit be filed against plaintiff); Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 485, 413 S.E.2d 9, 11 (1991) (alleging abuse of process against a person who unjustifiably filed a *lis pendens* against plaintiff's property).

Here, the legal process, generally, was the criminal proceeding that the State of South Carolina initiated and prosecuted. Neither of the Defendants initiated or maintained the criminal case against Plaintiff, and Plaintiff's Complaint does not allege that they did. The more specific legal process was the October 24, 2013 hearing regarding Plaintiff's probation and restitution, which was initiated by the South Carolina Department of Probation, Parole, and Pardon Services. See S.C. Code Ann. §17-25-322(C) (the SCDPPPS "must initiate legal process to bring every probationer, whose restitution is six months in arrears, back to court, regardless of willful failure to pay"). Neither of the Defendants called for this hearing, and Plaintiff's Complaint does not allege that they did. Defendant Cato was merely a victim witness at the October 24, 2013 hearing. Since the Defendants did not initiate the process that Plaintiff claims they abused, Defendants cannot be liable for abusing that process. Accordingly, Plaintiff's Complaint fails to set forth facts that, if accepted as true, would support her sole abuse of process cause of action. Therefore, Plaintiff's Complaint must be dismissed in its entirety.

Alternatively, Plaintiff's Complaint fails to allege facts to satisfy the two necessary elements of an abuse of process tort. A plaintiff alleging abuse of process in South Carolina must

assert two essential elements: 1) an “ulterior purpose,” and 2) a “willful act in the use of the process not proper in the conduct of the proceeding.” Hainer v. Am. Med. Int’l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). As to the first element, “[a]n ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process.” First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Cl. App. 1994). An allegation that a defendant had a bad motive of an ulterior purpose is insufficient, standing alone, to support an abuse of process claim. Palleres, 407 S.C. at 371, 756 S.E.2d at 233. Further, if a defendant has an incidental or concurrent motive of spite or simply seeks to gain a collateral advantage from the process, there is no abuse of process. Id. “The tort centers on events occurring outside the process; the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but the use of the process as a threat or a club. Id. The second element, a “willful act,” has been described as “[s]ome definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process[.]” Hainer, 328 S.C. at 136, 492 S.E.2d at 107. The “willful act” element consists of three components: (1) “a ‘willful’ or overt act”; (2) “in the use of the process”; (3) “that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.” Food Lion, Inc., 351 S.C. at 71, 567 S.E.2d at 254 (citations omitted).

Here, Plaintiff claims that Defendants abused the process because Susan Cato told the Court that Plaintiff still owed restitution to CAPA, even though CAPA had already been made whole by another source. Plaintiff believes that her restitution should have been set off by the amount CAPA received from its own insurance carrier, such that she did not owe CAPA any more restitution as of the October 2013 hearing. The Court need not decide whether Plaintiff was

entitled to a set-off or whether she still owed restitution. The purpose of the October 2013 hearing was to determine what restitution Plaintiff owed. According to Plaintiff's Complaint, Defendant Cato simply told the court that Plaintiff still owed restitution. Even if that statement was false, and even if Ms. Cato knew it was false, the statement does not amount to an abuse of process. A determination of restitution was the exact objective of the hearing. It was the court's function to determine what, if any, restitution Plaintiff still owed. Ms. Cato's statement was just one factor for the court to consider. Ms. Cato's statement that Plaintiff still owed restitution, even if false, was still not aimed at an illegitimate objective. Accordingly, Plaintiff's Complaint fails to set forth facts that, if accepted as true, would support its sole abuse of process cause of action. Therefore, it must be dismissed in its entirety.

Finally, the Court does not agree that Plaintiff was entitled to set off her restitution obligation by the amount CAPA received from its own insurer. When a person "is convicted of a crime which has resulted in pecuniary damages or loss to a victim, the court must hold a hearing to determine the amount of restitution due the victim or victims of the defendant's criminal acts . . . and in addition to any other sentence which it may impose, the court shall order the defendant make restitution or compensate the victim for any pecuniary damages." S.C. Code Ann. §17-25-322(A). The victim has the right to be present and be heard on the issue of restitution. Id. In State v. Morgan, 417 S.C. 338, 790 S.E.2d 27 (Ct. App. 2016), the Court of Appeals of South Carolina discussed the interplay between criminal restitution awards and civil recoveries. The Court of Appeals adopted the reasoning that "[u]like a civil claim for damages, the purpose of restitution is twofold: (1) to compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." Id. at 342, 790 S.E.2d at 30. Morgan argued that because *his* insurance carrier paid a civil settlement to the victim and the victim executed a covenant not to

execute any judgment against Morgan, the circuit court could not require Morgan to pay the victim restitution. The Court of Appeals disagreed, and allowed the restitution order to stand, finding that “the constructs of restitution and civil damages are separate and distinct.” *Id.* at 344, 790 S.E.2d at 30. In a footnote, the Court of Appeals suggested that Morgan may be entitled to a restitution set-off in the amount paid by *his own* insurance carrier.

Here, Plaintiff was not responsible, either personally or through another source, for tendering an amount of money to CAPA that exceeded the restitution due. Instead, CAPA was compensated partly by the Plaintiff, but mostly by its own insurance carrier as a result of insurance coverage for which CAPA paid premiums. Plaintiff is not entitled to a reduction of the restitution that she owed CAPA because CAPA’s insurance carrier payed benefits on the policy, for which CAPA paid premiums. See *In re W.B. Easton Const. Co., Inc.*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer). See also *Fanning v. Hicks*, 284 S.C. 456, 327 S.E.2d 342 (1985) (finding that a criminal’s satisfaction of the court’s restitution order by paying the restitution to the victim did not preclude the victim from seeking additional money from the criminal in a civil suit). Further, relieving the Plaintiff or her court-imposed restitution payments because CAPA received benefits from its own insurance carrier would circumvent the second purpose of restitution: to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.

CAPA had a right to the entire restitution amount from the Plaintiff, regardless of the amount they had already collected from their own insurance carrier. Accordingly, Ms. Cato’s statement was not an abuse of process and Plaintiff’s Complaint must be dismissed.

IT IS HEREBY ORDERED THAT Defendants’ Motion to Dismiss is GRANTED.



**Beaufort Common Pleas**

**Case Caption:** Tonja Mcallister VS Susan Cato , defendant, et al

**Case Number:** 2016CP0702253

**Type:** Order/Dismissal

S/R. LAWTON McINTOSH

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