United States Bankruptcy Court
District of New Mexico

Document Verification

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Submitted By: James E Burke

Comments: Memorandum Opinion on Plaintiff's Motion for Summary Judgment on Richmond Counterclaim and Order Denying Same

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re:
VDP, Inc.,
Debtor.

No. 11-01-17042 SL

VDP, Inc.,
Plaintiff,

vs.

Adv. No. 02-1239 S

Kendal M. Emery, et al.
Defendants.

MEMORANDUM OPINION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON RICHMOND COUNTERCLAIM and ORDER DENYING SAME

This matter is before the Court on the Motion for Summary Judgment on Richmond's Counterclaim filed by Plaintiff (doc. 73)(with Memorandum attached) and Defendant Richmond's Response (doc. 95). Plaintiff did not file a reply. Defendant Richmond is represented by Katherine Blackett. Plaintiff is represented by Steven E. Schmidt.

Federal Rule of Civil Procedure 56(c) provides, in part, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Therefore, if the Court finds that a material fact is

in dispute, summary judgment should be denied. The Court's task at summary judgment is not to assess the credibility of conflicting testimony. Starr v. Pearle Vision, Inc., 54 F.3d 1548, 1557 (10th Cir. 1995)(citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.")). Finally, the Court examines the factual record and reasonable inferences therefrom in the light of the nonmovant. Thomas v. International Business Machines, 48 F.3d 478, 484 (10th Cir. 1995); Cole v. Ruidoso Municipal Schools, 43 F.3d 1373, 1377 (10th Cir. 1994).

Whether a fact is material is determined by the substantive law governing the case. Anderson, 477 U.S. at 248. Therefore, the Court will briefly review the Counterclaim. Count I is for malicious abuse of process[1]. It

[1] In 1977 the New Mexico Supreme Court recognized an overlap between the former causes of action for "malicious prosecution" and "abuse of process", and combined them into a single cause of action called "malicious abuse of process." DeVaney v. Thriftway Marketing Corp., 953 P.2d 277, 283, 124 N.M. 512, 518 (1997). This tort has the following elements: 1) the initiation of judicial proceedings against the plaintiff by the defendant; 2) an act by the defendant in the use of process other than such as would be proper in the regular prosecution of the claim; 3) a primary motive by the

(continued...)

alleges that Plaintiff's lawsuit against Defendant was filed without probable cause, was not founded on known facts established after reasonable investigation, was filed for a purpose other than securing an adjudication of its claims and for a purpose for which the process is not designed, that is was filed for harassment and extortion, that it constitutes malice, was filed without excuse, and has caused Defendant to suffer and continue to suffer damages.[2]

Count II is for prima facie tort[3]. It alleges that Plaintiff's filing of this lawsuit was an intentional act,

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[1](...continued)
defendant in misuing the process to accomplish an illegitimate end; and 4) damages. Id.

[2] Plaintiff's reply (doc. 12) to the Counterclaim Defense 1 states "The counterclaims fail to state a claim upon which relief may be granted." The Court finds that Counterclaim 1 does state a claim for relief under New Mexico law. Counterclaim Defense 2 states that "Malicious Abuse of Process is not properly brought in this adversary proceeding pursuant to Bankruptcy Rule 7001, and should be dismissed." The Court finds that, with few exceptions, counterclaims are allowed to adversary proceedings. And, abuse of process counterclaims to adversary proceedings have been specifically recognized. Kwiat v. Doucette, 81 B.R. 184, 191-93 (D. Mass. 1987).

[3] "New Mexico first recognized a cause of action for prima facie tort in Schmitz v. Smentowski, 785 P.2d 726, 736, 109 N.M. 386, 396 (1990). The elements of this tort are: (1) an intentional, lawful act by defendant; (2) an intent to injure the plaintiff; (3) injury to the plaintiff; and (4) insufficient justification for the defendant's acts. Id. At 394, 785 P.2d at 734." Hagbeck v. Stone, 61 P.3d 201, 208, 133 N.M. 75, 82 (2002).

that Plaintiff intentionally failed to pay insurance premiums on behalf of Defendants and did not so inform Defendants, that Plaintiff failed to refund insurance premiums withheld from Defendants, that Plaintiff reported Defendants to the police for embezzling computer equipment and software, that Plaintiff made remarks to others that Defendants had stolen the items, that Plaintiff's objective was to injure Defendants, Defendants have been injured and continue to suffer injury, and there was an absence of justification for Plaintiff's acts.[4]

Plaintiff's Motion for Summary Judgment seeks only summary judgment on the issue of liability. The motion is based upon Defendant Richmond's deposition testimony that the amount of damages on his counterclaims were "yet to be determined" and that he did not know what they were. The Court, construing this evidence in the light most favorable to

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[4] Plaintiff's reply (doc. 12) to the Counterclaim Defense 1 states "The counterclaims fail to state a claim upon which relief may be granted." The Court finds that Counterclaim 2 does state a claim for relief under New Mexico law. Counterclaim Defense 3 states that "Prima Facie Tort of the counterclaims is not properly brought in this adversary proceeding pursuant to Bankruptcy Rule 7001, and should be dismissed." The Court finds that, with few exceptions, counterclaims are allowed to adversary proceedings. And, prima facie tort counterclaims to adversary proceedings have been specifically recognized. Bloor v. Shapiro, 32 B.R. 993, 1003 (S.D. N.Y. 1983).

the non-movant, does not find this to be an admission that there are no damages. See Zirin Laboratories Int'l., Inc. v. Mead-Johnson & Co., 208 F.Supp. 633, 634-35 (E.D. Mich. 1962):

> The weak point of defendant's argument is that it requires the court to make the inference, from Mr. Zirin's inability to recall any instances of damage, that no such damage in fact existed. This court believes, that, as a general rule, such an inference should be made, if at all, by the trier of fact, and not by the court on a motion for summary judgment. As well-put in 6 Moore, Federal Practice § 56.11(6), at 2080 (2d ed. 1953):
>
> > Rule 56(c) includes 'admissions on file' within its enumeration of materials that may be considered on a motion for summary judgment. This is quite proper for if a party has admitted certain facts that are admissible in evidence there is then no triable issue as to these matters. But courts should avoid turning an inference, which the trier of facts might draw, into an admission, and should insist that the statement or conduct of the party clearly measures up to an admission in the case at bar.

Furthermore, under New Mexico law, a plaintiff who prevails on a claim for malicious abuse of process may recover expenses of defending against the underlying claim. DeVaney, 953 P.2d at 290, 124 N.M. at 525. This recovery is not determinable until after the outcome of the case, so Richmond could not have known this damage amount at the time of the deposition. As to the prima facie tort claim, the complaint lists specific items of damage.

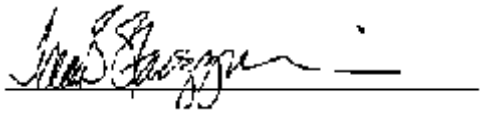
Defendant's Response (doc. 95) attaches an affidavit from Mr. Richmond. Paragraph 4 lists specific items of damage that

he is claiming. Paragraph 5 lists damages resulting from the abuse of process claim. The Court does not find this to be a "sham fact issue" where an affidavit contradicts earlier sworn testimony. See Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). Rather, it appears to be an attempt in the affidavit to explain prior confusion, or perhaps be based upon a review of pertinent evidence.

In conclusion, the Court finds that there is a material question of fact regarding damages, and that Plaintiff's Motion for Summary Judgment should be denied.

One other matter should be addressed. Plaintiff also seeks summary judgment on the issue of whether an arbitration was required before filing these counterclaims. There is no arbitration agreement before the Court, so summary judgment should be denied on this issue also.

IT IS ORDERED that Plaintiff's Motion for Summary Judgment on Richmond's Counterclaim is denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 15, 2004, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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