

NO. 15359

IN THE SUPREME COURT OF THE STATE OF HAWAII

JOHN RAPP,)	CIVIL NO. 90-1496
)	
Plaintiff-Appellant,)	APPEAL FROM THE ORDER GRANTING
)	DEFENDANT'S MOTION TO DISMISS,
v.)	OR, IN THE ALTERNATIVE, FOR
)	SUMMARY JUDGMENT FILED
GARY VICTOR DUBIN,)	NOVEMBER 11, 1990, FILED
)	APRIL 29, 1991
Defendant-Appellee.)	FIRST CIRCUIT COURT
)	
)	HONORABLE PATRICK YIM
)	HONORABLE ROBERT G. KLEIN
)	JUDGES

MEMORANDUM OPINION

Caroline L. ...
SUPREME COURT OF HAWAII

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MEMORANDUM OPINION

Plaintiff John Rapp (Rapp) appeals the April 29, 1991 "Order Granting Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment Filed November 11, 1990, as to All Claims and All Parties" (April 29, 1991 Order). We affirm.

In the mid-1980s, a dispute involving the partners of the Orchid Isle Group, a Hawaii limited partnership, and its involvement in the development of The Prince Kuhio Plaza Shopping Center in Hilo, Hawaii, generated three lawsuits. The initial lawsuit was Civil No. 86-0952. Rapp was counsel for plaintiffs Charles R. Kozak (Kozak) and others. Defendant Gary Victor Dubin (Dubin) was co-counsel for defendants DarRob Enterprises Pacific, Ltd. (DarRob), and others. Civil Nos. 86-3868 and 86-4311 followed.

DarRob was the general partner of the Orchid Isle Group. On April 29, 1986, in Civil No. 86-0952, DarRob filed a twenty-count counterclaim. Nine of the counts were against Rapp and others. Count VI was an abuse of process claim against Rapp.

Kozak, and others. In his November 13, 1987 memorandum in opposition to Rapp's motion for summary judgment, Dubin stated why his clients had filed a counterclaim against Rapp:

Counterclaimants . . . are not suing [Rapp] as an attorney; [Rapp] is being sued in this action as a principal in an intentional conspiracy to accomplish a hostile takeover of partnership property unlawfully, with deception and misrepresentation, for his own personal gain unrelated to any compensation of his as Plaintiffs' attorney, as a result of his malicious acts before and during the filing of the Complaint.

* * *

When this action began in March of 1986, [Rapp] purported to be merely the attorney for the Plaintiffs, with no substantive stake in the proceedings. . . .

Indeed, when in April 1986 Counterclaimants first secured evidence that [Rapp] was a principal in Kozak Investors, they sought immediately to disqualify him as an attorney in this action; he objected, stating under oath in his contra affidavit that all of his contacts to that date had been "solely in my capacity as attorney for the plaintiffs",

This pretense was maintained until in discovery Counterclaimants learned from HonFed officials that [Rapp] before and as he was first filing the Complaint . . . had applied himself as a Kozak Investor to buy the shopping center, while keeping his identity as a purchaser hidden from everyone.

[Rapp], claiming to be a mere attorney, had agreed to be listed as a part of the Kozak Investors buying group in a HonFed loan application and had even submitted his own financial statements and tax information in order to get the loan as a principal.

All of the counts of the counterclaim against Rapp were dismissed by circuit court orders entered prior to the jury trial.

On February 24, 1989 the jury returned its special verdict. It found (1) that DarRob and another of Dubin's clients breached fiduciary duties they owed to the Orchid Isle Group and

awarded \$3.00 nominal damages and \$25,000.00 punitive damages; (2) that Rapp's client, Kozak, committed abuse of process against DarRob and awarded \$1.00 nominal damages and \$800,000.00 punitive damages.

The April 28, 1989 Final Judgment also (1) ruled in favor of Rapp's client and ordered the transfer back to DarRob of the 85 units in Orchid Isle Group previously transferred by DarRob to Darlene Bjerke and the 50 units in Orchid Isle Group previously transferred by DarRob to Morio Omori; (2) dismissed all other claims and counterclaims with prejudice; and (3) awarded certain costs and attorney fees including \$7,500.00 attorney fees to Rapp from Orchid Isle Group.

On July 27, 1989 the circuit court entered an "Order Granting Defendant/Counterclaimant DarRob Enterprises Pacific, Ltd.'s Motion to Approve Settlement" (July 27, 1989 Order). The July 27, 1989 Order, which was signed by Rapp as "Attorney for Plaintiffs/Counterclaim Defendants", approved the settlement agreement to vacate the \$25,003.00 and \$800,001.00 awards contained in the April 28, 1989 Final Judgment in Civil No. 86-0952 and to dismiss Civil Nos. 86-3868 and 86-4311. It stated in relevant part that

WHEREAS, counsel for the Plaintiffs and Counterclaimants have stipulated to settle all the claims contained in the Second Amended Complaint and Counterclaim; and

* * *

WHEREAS, the Plaintiffs have agreed to release all claims against Orchid Isle Group or partners and to dismiss with prejudice all claims arising out of Orchid

Isle Group activities and to waive all claims for any payments from Orchid Isle Group;

* * *

The July 27, 1989 Order cancelled the monetary judgments, the award of attorney fees and costs, including the award to Rapp, and all claims and counterclaims, but it did not cancel the order for the transfer back to DarRob of the 85 and 50 Orchid Island Group units.

In the case now before us on appeal, Rapp, on May 16, 1990, sued Dubin for the torts of abuse of process and malicious prosecution seeking actual and punitive damages. In other words, after the claims against Rapp were dismissed and Rapp's clients settled with Dubin's clients, Rapp sued Dubin for abuse of process and malicious prosecution.

In Count I, Rapp alleged abuse of process. More specifically, Rapp alleged that Dubin (1) filed the April 29, 1986 counterclaim in Civil No. 86-0952; (2) filed the October 15, 1986 complaint in Civil No. 86-3868; (3) instigated and caused the filing of a November 18, 1986 complaint in Civil No. 86-4311; and (4) caused the filing of the November 17, 1987 counterclaim in Civil No. 86-4311. Rapp further alleged that Dubin engaged in these activities for one or more of the following purposes: (a) to pressure HonFed into making concessions on a loan owned by Orchid Isle Group to HonFed; (b) to force Rapp out of representing Kozak and other clients; (c) to pressure Rapp and Rapp's clients to drop or to settle their claims against Dubin's

clients; (d) out of spite, ill will, and/or malice; and/or (e) for attorney fees in excess of \$700,000.00.

A claim for abuse of process involves the following three essential elements: (1) the process was used primarily for a purpose for which it was not designed and intended; (2) a willful act in the use of the process which was not proper in the regular conduct of the proceeding; and (3) damages. Wong v. Panis, 7 Haw. App. 414, 772 P.2d 695 (1989).

In Count II, Rapp alleged malicious prosecution or wrongful institution of civil litigation. In addition to the matters alleged in Count I in connection with the abuse of process tort, Rapp complaint about Dubin's

claim that [Rapp] had caused actual damages of some \$100,000,000 by conspiring with persons such as William E. Simon, former treasury secretary of the United States, and Preston Martin, former vice chairman of the Federal Reserve Board, persons who [Rapp] had never met, spoken to, or had any contact with whatsoever.

A claim for malicious prosecution involves the following four essential elements: (1) that the prior proceedings were terminated in the plaintiff's favor; (2) that the prior proceedings were initiated without probable cause; (3) that the prior proceedings were initiated with malice; and (4) damages. Id. at 4.

On November 14, 1990 Dubin filed Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment.

On January 25, 1991 the circuit court's arbitration judge entered an "Order Removing Case from the Court Annexed Arbitration Program".

Thereafter, the circuit court entered the April 29, 1991 Order in which it stated, in relevant part, as follows:

1. With respect to [Rapp's] malicious prosecution claim, [Rapp] cannot under any circumstances prove that there was no probable cause in [Dubin's] actions resulting in [Rapp] being made a party defendant in the underlying suit or suits; and

2. With respect to [Rapp's] abuse of process claim, [Rapp] cannot show how process was abused in the underlying suit which resulted in [Rapp] being made a defendant therein.

In this appeal, Rapp contends that (1) Dubin's affidavit in support of his motion did not satisfy the requirements of Hawaii Rules of Civil Procedure Rule 56(e); (2) Rapp had not been allowed an adequate time to conduct discovery; and (3) Rapp's complaint alleged and evidence was submitted supporting an inference that one or more of the counts asserted by Dubin against Rapp were asserted without probable cause. Although Rapp implicitly admits that most of the counts asserted by Dubin against Rapp were supported by probable cause, Rapp does not specifically identify, and we did not locate, the count(s) he contends (1) were not supported by probable cause or (2) that contain an allegation by Dubin of Rapp's conspiracy with Messrs. Simon and Martin.

We conclude that Rapp has failed to carry his burden on appeal of overcoming the presumption of the correctness of the circuit court's ruling. Ala Moana Boat Owners' Ass'n. v. State, 50 Haw. 156, 434 P.2d 516 (1967).

Accordingly, we affirm the circuit court's April 29, 1991 "Order Granting Defendants' Motion to Dismiss, or, in the

Alternative, for Summary Judgment Filed November 14, 1990, as to
All Claims and All Parties".

DATED: Honolulu, Hawaii, January 27, 1991.

John Rapp,
plaintiff-appellant
pro se, on the briefs.

Gary Victor Dubin,
defendant-appellee
pro se, on the brief.

James A. Burns
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