

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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|---------------------------------|---|-------------------------------|
| ELLORA’S CAVE PUBLISHING, INC., |) | CASE NO.: 5:14-cv-02331 |
| et. al. |) | |
| |) | |
| Plaintiff, |) | Judge |
| |) | |
| v. |) | |
| |) | |
| DEAR AUTHOR MEDIA |) | <u>PLAINTIFF’S MOTION FOR</u> |
| NETWORK, LLC, et. al., |) | <u>SUMMARY JUDGMENT</u> |
| |) | <u>ON DEFENDANT’S</u> |
| Defendants, |) | <u>COUNTERCLAIM</u> |

Plaintiffs, Ellora’s Cave Publishing, Inc., and Jasmine-Jade Enterprises, Inc. (hereinafter collectively “EC”), respectfully move the Court for an Order granting Summary Judgment in their favor on Defendant, Dear Author Media Network, LLC’s (hereinafter “Dear Author”), Counterclaim. As demonstrated more thoroughly below, there remains no genuine issue of material fact or law and Plaintiffs are entitled to judgment as a matter of law.

I. STATEMENT OF FACTS

EC is an online publisher of female-oriented romance novels. Dear Author is a media outlet who publishes articles on its blog entitled “Dear Author.” Jennifer Gerrish-Lampe is the owner and principal of Dear Author, writing under the *nom du plume* Jane Litte. On September 14, 2014, Ms. Lampe wrote and published on the Dear Author blog an article entitled “The Curious Case of Ellora’s Cave.” This article contained numerous false and defamatory statements regarding Plaintiff’s financial position, financial practices, and continued viability as

a publishing company, as well as the integrity of the EC's principals. As a direct result of these defamatory statements, EC has suffered damage in the loss of authors, damage to reputation and goodwill, and loss of revenue. See the Declaration of Patricia Marks, attached hereto as Exhibit 1. On September 26, 2014, EC filed this action in the Court of Common Pleas of Summit County, Ohio, seeking damages and injunctive relief.

On October 20, 2014, Dear Author removed the action to the Federal District Court based on asserted diversity jurisdiction. On October 22, 2014, Dear Author filed a counterclaim against EC, asserting one count of Abuse of Process. EC timely replied to this Counterclaim on November 10, 2014.

II. ARGUMENT AND LAW

Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Patterson v. Central Mills, Inc.*, 112 F.Supp.2d 681, 684 (N.D. Ohio, 2000), quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548 (1986). “The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact.” *Id.* “The burden then shifts to the nonmoving party who ‘must set forth specific facts showing that there is a genuine issue for trial.’” *Id.*, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505 (1986); Fed.R.Civ.P. 56(e).

Once the moving party has established that no genuine issue for trial exists, the nonmoving party “cannot rest on its pleading or merely reassert its previous allegations.” *Id.*, quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Rule 56(e) “requires the nonmoving party to go beyond the unverified pleadings and

present some type of evidentiary material in support of its position.” *Id.*, quoting *Celotex*, 477 U.S. at 324 (internal formatting removed).

When ruling on a motion for summary judgment, the evidence of the non-moving party must be construed as true, all doubts resolved against the moving party, all evidence viewed in the light most favorable to the nonmoving party, and all inferences drawn in favor of the nonmoving party. *Id.*, citing *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072 (1992). Summary judgment is proper only when “the pleadings, depositions, answers to interrogatories, and admissions on file, along with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Id.*, citing Fed.R.Civ.P. 56(e).

Dear Author has raised a sole counterclaim of abuse of process by the EC. However, Dear Author has failed to present any basis for this counterclaim. In order to prevail on a claim of abuse of process, Dear Author must show “(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) direct damage has resulted from the wrongful use of process.” *Turner v. Lerner, Sampson & Rothfuss*, 776 F.Supp.2d 498, 507 (N.D. Ohio 2011), quoting *Voyticky v. Village of Timberlake, Ohio*, 412 F.3d 669, 676 (6th Cir. 2005). An abuse of process is a claim that “the legal procedure has been set in motion in proper form, with probable cause and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior prupose for which it was not designed.” *Id.*, quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 297, 626 N.E.2d 115, 1994-Ohio-503.

There is no liability for abuse of process if a party “has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” *Id.* In an abuse of process claim, there is usually some “coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.” *Id.*, quoting *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 662 N.E.2d 9, 14 (1996).

A party “cannot base an abuse of process claim upon the assertion that an action was improperly initiated.” *Gilman v. Schlagetter*, 777 F.Supp.2d 1084, 1099 (S.D. Ohio 2010), citing *Kremer v. Cox*, 114 Ohio App.3d 41, 682 N.E.2d 1006 (1996). An abuse of process claim requires that the claim is initiated with probable cause, but is subsequently perverted and used improperly. *Id.* “This element of probable cause distinguishes malicious prosecution (with its no-probable cause element) from abuse of process (without it).” *Id.*, citing *Hartman v. Moore*, 547 U.S. 250, 258, 126 S.Ct. 1695 (2006).

Dear Author has failed to state a claim for Abuse of Process. Dear Author does not assert that this action was a legitimate legal process brought on probable cause, which was subsequently perverted to an improper purpose. Instead, Dear Author claims only that there wasn't any probable cause for EC's suit. Counterclaim ¶¶9-10. Dear Author claims EC have commenced this action without probable cause and with malice. *Id.*, ¶11. These claims raised in the pleading are supported by Dear Author's understanding of its claim. Dear Author's representative testified that the sole basis for its counterclaim was the initiation of this lawsuit.

“Q: So it is your belief that this is just an exercise to silence critics?

A: Yes.

Q: Do you not believe that -- strike that.

As part of the allegations that you make in the Counterclaim, you have the allegation that -- and I'll just read it for you, Ellora and Jasmin have deliberately

perverted this legal process for their own personal benefits, specifically to intimidate other authors, editors, and cover artists into silence, so that they do not attempt to recover monies owed by them to Ellora and Jasmine.

Do you have any evidence of intimidation by either Ellora or Jasmine?

A: Yes.

Q: This lawsuit.”

Lampe depo., 246-47. The relevant portion of the transcript is attached hereto as Exhibit 2.

Dear Author’s representative, Ms. Lampe, is a licensed attorney who would be expected to understand the elements of the alleged counterclaim. However, she can point to no action other than the filing of the complaint as the claimed “abuse of process.” Dear Author has not articulated any abuse of process beyond an alleged lack of probable cause for EC’s Complaint. This is not a claim of abuse of process. Under Ohio law, the commencement or improper continuation of a proceeding without probable cause cannot support a claim of abuse of process, and Dear Author’s claim fails as a matter of law. *Ruff v. Runyon*, 60 F.Supp.2d 738, 749 (N.D. Ohio 1999).

At best, Dear Author has attempted to assert a claim for malicious prosecution. This is not a trivial error in pleading, and Dear Author’s counterclaim cannot be saved by merely recasting it as a claim of malicious prosecution. Malicious prosecution requires “1) the malicious institution of a prior proceeding against the plaintiff by the defendant; 2) the lack of probable cause for the filing of that prior suit; 3) the termination of that prior proceeding in the [moving party’s] favor; 4) the seizure of the plaintiff’s person or property during the course of the prior proceeding; and 5) injury or damages suffered by plaintiff as a result.” *Donohoe v. Burd*, 722 F.Supp.2d 1507, 1516-17 (S.D. Ohio 1989). In this case, there has been no prior

proceeding, no seizure of Dear Author's person or property and no finding in favor of Dear Author.

III. CONCLUSION

Based upon the foregoing, there is no genuine issue of material fact or law and Plaintiffs are due judgment in their favor on Dear Author's counterclaim of abuse of process. Therefore, Plaintiffs respectfully move this Court for a judgment entry dismissing the counterclaim with prejudice.

Respectfully submitted,

**NIEKAMP, WEISENSELL,
MUTERSBAUGH & MASTRANTONIO, LLP**

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of September, 2015 the foregoing was served upon all parties not in default and/or their counsel via filing with the Court's CM/ECF system.

/s/ Steven W. Mastrantonio

Steven W. Mastrantonio