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Torts--Wrongful Institution of Lunacy Proceedings--Insufficiency of Complaint in Stating an Action for Abuse of Process or Malicious Prosecution (Hauser v. Bartow, 273 N.Y. 370 (1937))

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TORTS—WRONGFUL INSTITUTION OF LUNACY PROCEEDINGS—INSUFFICIENCY OF COMPLAINT IN STATING AN ACTION FOR ABUSE OF PROCESS OR MALICIOUS PROSECUTION.—Without plaintiff's knowledge, defendant who had no reason to doubt plaintiff's sanity, instituted proceedings to have him adjudged incompetent with the intention thereby of being in a position to control his property and prevent his executing a new will. The court, in reliance on defendant's false statement that plaintiff was so violently insane that it would be unsafe to have him appear, appointed her committee of his person and property in which capacity she then took over the management of his estate. When plaintiff learned of the appointment, he applied to the court for an order vacating its original order which application was granted to the extent of ordering that the competency of plaintiff be determined by a jury. Upon the jury's finding that plaintiff was competent, defendant was discharged as committee and was thereafter paid commissions on the account which had been filed by her. An action for abuse of process was then instituted. *Held,* complaint dismissed. No abuse of process is shown for in her capacity as committee defendant did no act which was not within the scope of her duties, or in excess of the powers granted to her; no case for malicious prosecution is made out since the former proceeding was not terminated in favor of plaintiff. *Hauser* v. *Bartow,* 273 N. Y. 370, 7 N. E. (2d) 268 (1937).

The gravamen of an action for abuse of process is its wilful use for a purpose not justified by law and to effect an object not within its proper scope.[1] The action lies for the improper use of process after it has been issued, not for maliciously causing process to issue.[2] Numerous are the ways in which process may be abused, as for instance: making an excessive attachment not for the purpose of securing a debt but to injure the debtor;[3] employing a subpoena not to compel attendance as a witness but to coerce payment of a debt;[4] arresting a person and by threats of imprisonment exacting a release;[5] or compelling him to surrender property to which the other is not entitled;[6] the using of process by a magistrate not to hear a case, but to chide, under the guise of judicial action, a lawyer who displeases him.[7] In all these cases there was present first, an ulterior purpose in causing process to issue, and secondly, an act not warranted by the

[1] Foy v. Barry, 87 App. Div. 292, 84 N. Y. Supp. 335 (1st Dept. 1903); Kashdan v. Wilker Realty Co., 197 App. Div. 659, 189 N. Y. Supp. 138 (1st Dept. 1921).

[2] Lobel v. Trade Bank of New York, 132 Misc. 643, 229 N. Y. Supp. 778 (1928).

[3] Zinn v. Rice, 154 Mass. 1, 27 N. E. 772 (1891).

[4] Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207 (3d Dept. 1897).

[5] Foy v. Barry, 87 App. Div. 292, 84 N. Y. Supp. 335 (1st Dept. 1903).

[6] Grainger v. Hill, 4 Bing. (N. C.) 212 (1838) (Case of first impression).

[7] Dean v. Kochendorfer, 237 N. Y. 384, 143 N. E. 229 (1924).

process. The action will lie though there is no ulterior motive, but it will not lie unless an act is done not warranted by the process.[8]

In the instant case defendant's motive in causing process to issue was alleged to be bad. That alone is no basis for the action. The right of individuals to use the machinery of the law is so valuable that mere bad motive will not vitiate that right.[9] Plaintiff failed because there was no act done not authorized by the process.[10]

The court then considered the plaintiff's pleading as stating a case of malicious prosecution. Here, the gravamen is the malicious bringing of a suit without probable cause for so doing.[11] This action is better known than the one for abuse of process, but too often is confused with it.[12] While in the action for abuse of process it is not necessary to prove a prior, favorable determination in favor of the plaintiff, or malice in the defendant, or lack of probable cause,[13] in

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[8] Instant case at p. 374. "Nowhere in the complaint can there be found any allegation that respondent did any act by virtue of the order adjudging the appellant incompetent and appointing her as committee of his person and property which was not within the scope of her duties as such committee or was in excess of the powers granted to her as such committee. Therefore, the complaint fails to state a cause of action for abuse of process."; McClerg v. Vielee, 116 App. Div. 731, 102 N. Y. Supp. 45 (2d Dept. 1907); Assets Collecting Co. v. Myers, 167 App. Div. 133, 152 N. Y. Supp. 930 (1st Dept. 1915) ("They [the defendants] did nothing with the process of the court. They had no control over the process of the court. They made use of it in no way, either to effect a settlement, to obtain securities or to obtain money"); Lyons v. Scriber, 174 N. Y. Supp. 332 (1918) ("There is no allegation in the complaint whereby any result not lawful or properly attainable under the process of the court has been secured. No matter if the defendants were actuated solely by malice and how unjustifiable their acts may have been, that is a matter which related solely to acts before the process was issued and for which an action for malicious prosecution lies").

[9] Docter v. Riedel, 96 Wis. 158, 71 N. W. 119 (1897).

[10] See note 8, *supra*.

[11] EDGAR, TORTS (3d ed. 1936) § 82. The elements to be proved in this tort are, (1) prior termination of the former proceeding in favor of the present plaintiff, (2) a lack on the part of the prosecuting party of probable cause to believe the prosecuted person guilty of the offense charged if the prosecution was a criminal one or to believe that the prosecutor had a meritorious case if the proceeding complained of was civil, (3) malice in fact on the part of the prosecuting party in instituting the proceeding of which the plaintiff complains, (4) and damages, which are inferred if the proceeding maliciously prosecuted was a criminal one but must be proved if it was civil.

[12] See, for example, Coulter v. Coulter, 73 Colo. 144, 214 Pac. 400 (1923). In that case the facts were substantially the same as in the instant case, where defendant was alleged to have a bad motive in instituting lunacy proceedings. The court, on p. 403, said, "The present action is not one for malicious prosecution, but for malicious and wrongful abuse of process in instituting these lunacy proceedings upon a false affidavit and for an atrocious purpose." It is submitted that in that case the action for abuse of process was not made out inasmuch as no act was shown which was not warranted by the process, mere bad motive being insufficient.

[13] Once the tort is committed it cannot matter how the former proceeding turns out. Dishaw v. Wadleigh, 15 App. Div. 205, 44 N. Y. Supp. 207 (3d Dept. 1897); Bebinger v. Sweet, 6 Hun 478 (N. Y. 1876); Zinn v. Rice, 154 Mass. 1, 27 N. E. 772 (1891); Sneeden v. Harris, 109 N. C. 349, 13 S. E. 920

the action for malicious prosecution these elements must be proved.[14] There is a class of cases in which it is unnecessary to prove prior, favorable determination, *i.e.*, cases in which the original proceeding was without personal service, and the defendant therein had no opportunity to defend himself.[15] Plaintiff relied on these cases. The court held that they were inapplicable inasmuch as the plaintiff, herein, submitted to the court's jurisdiction to prove that he was competent. Because of this, and because plaintiff chose not to contest the validity of the original order, made without notice to himself, under which defendant was appointed committee, and because of the rendering of an account by defendant on which she was paid commissions, there was a conclusive adjudication that the original order was valid. There is no doubt, however, that in a proper case, an action for malicious prosecution will lie against one who wrongfully institutes lunacy proceedings.[16]

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(1891); Wildee v. McKee, 111 Pa. 335, 2 Atl. 108 (1886); Smith v. Nippert, 76 Wis. 86, 44 N. W. 846 (1890); Grainger v. Hill, 4 Bing. (N. C.) 212 (1838).

[14] See note 11, *supra*. The reason for requiring that the plaintiff prove a prior, favorable determination is that otherwise, there would be the possibility of two judgments in conflict on the same issue.

[15] Fay v. O'Neill, 36 N. Y. 11 (1867); Matter of Blewitt, 131 N. Y. 541, 30 N. E. 587 (1892); Bump v. Betts, 19 Wend. 421 (N. Y. 1838); Cardival v. Smith, 109 Mass. 158 (1872); Swensgaard v. Davis, 33 Minn. 368, 23 N. W. 543 (1885); Apgar v. Woolston, 43 N. J. L. 57 (1881).

[16] Burt v. Smith, 181 N. Y. 1, 73 N. E. 495 (1905); Reade v. Halpin, 193 App. Div. 566, 184 N. Y. Supp. (3d Dept. 1920), *aff'd*, 230 N. Y. 588, 130 N. E. 905 (1921) (For purpose of action, lunacy proceeding is a *criminal* one); Kellogg v. Cochran, 87 Cal. 192, 25 Pac. 677 (1890); Barton v. Woodward, 321 Idaho 375, 182 Pac. 916 (1919); Lockenour v. Sides, 57 Ind. 360, 26 Am. Rep. 58 (1877).