What Is "Favorable Termination" for Purposes of Asserting a Dragonetti Claim?

Avoiding Liability

By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the Philadelphia office of the law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.

The statutory tort, wrongful use of civil proceedings, 42 Pa.C.S. § 8351 *et seq.,* a/k/a the Dragonetti Act, essentially contains three elements: whether the Dragonetti defendant had acted "in a grossly negligent manner or without probable cause" in the underlying action; whether he had acted "primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based" and whether "the proceedings have terminated in favor of the person against whom they are brought." The third element — whether "the proceedings have terminated in favor of the person against whom they are brought"— has been the object of much case law because it is not always apparent when a "favorable termination" has occurred. The Superior Court of Pennsylvania has made the most recent revisit to this issue — albeit in a non-precedential opinion — wherein the underlying matter concerned a landlord/tenant dispute.

In *Pinardo v. Dorsey,* 2017 Pa. Super. Unpub. LEXIS 3703, tenant, acting pro se, had brought several lawsuits against his former landlord, all commencing in Philadelphia Municipal Court. The first alleged that landlord had illegally evicted him and sought damages for conversion of property. Judgment was entered in favor of tenant and landlord appealed to the Philadelphia Court of Common Pleas wherein landlord ruled tenant to file a complaint, which he failed to do. Accordingly, "the case was dismissed for failure to file a timely complaint." Tenant thereafter petitioned the court to reopen the petition of non pros, which the trial judge denied.

Thereafter, tenant, again acting pro se, brought a second action in the Philadelphia Municipal Court requesting the return of his security deposit from landlord. Once again, tenant prevailed, and landlord once again appealed to the Philadelphia Court of Common Pleas, at which point tenant had retained counsel. This case was also ultimately dismissed without prejudice because tenant had again failed to file a timely complaint. But this time the court granted tenant's motion to open judgment but then, after tenant filed a complaint, the court sustained landlord's preliminary objections but dismissed the action without prejudice.

Tenant thereafter filed a third and fourth action, also filed in Philadelphia Municipal Court. "But shortly thereafter, [tenant] voluntarily dismissed both cases because of some confusion surrounding proper docket information."

Then followed a fifth lawsuit, again in Philadelphia Municipal Court by tenant against landlord for, among other things, landlord's allegedly "taking [tenant's] personal property from the leased premises." Landlord asserted preliminary objections raising, among other things, "issues regarding res judicata and the failure of [tenant] to attach a required writing to the complaint[,]" i.e. the lease, without offering any explanation as to why a copy of the lease was not attached. The court sustained the preliminary objections but dismissed the lawsuit without prejudice. But following further litigation, the court conducted a settlement conference, wherein the case settled when landlord agreed to, and in fact did, return the escrow to tenant.

Landlord then brought a Dragonetti action against tenant and his counsel. Eventually, the trial court granted tenant's and his counsel's summary judgment motions on the basis that landlord could not show a sufficient "favorable termination" for purposes of the tort of wrongful use of civil procedure with respect to any of the underlying actions. The trial court noted that each of the first four actions was dismissed without prejudice, which did not constitute a "favorable termination." The trial court further held that the outcome of the fifth action by tenant cannot also be construed as a "favorable termination" because it was resolved by settlement and not on the merits. The trial court reasoned that the sufficient "favorable termination" requires that it must be on the merits, and here the merits were never judicially determined.

In affirming the grant of summary judgment, the Superior Court disagreed with the trial court that "favorable termination" requires resolution of the merits. Based upon prior case law, the court noted that "final termination of the case against whom the proceedings are brought initially depends on the circumstances under which the proceedings are withdrawn."

The court cites *D'Elia v. Folino*, 933 A.2d 117 (Pa. Super. 2007) as an example where the underlying matter was resolved on the merits, and yet the Dragonetti plaintiff cannot satisfy the "favorable termination" requirement. In that case, the trial court granted summary judgment in favor of a defendant doctor in a medical malpractice case. He then agreed that he would not sue the plaintiff for wrongful use of civil procedure if she agreed not to appeal the summary judgment. But this was subject to one condition — plaintiff agreed not to pursue her malpractice action as long as the defendant doctor could reserve his right to sue her lawyer for Dragonetti. Quoting case law, the court in *D'Elia* noted the "final termination of the case against whom the proceedings are brought initially depends on the circumstances under which the proceedings are withdrawn." The action terminated as a result of an agreement. Therefore, it did not constitute a "favorable termination" because the underlying matter was advanced to its conclusion because of the agreement, notwithstanding that the plaintiff's attorney was not a party to that agreement, and notwithstanding that there had been a judicial determination on the merits.

The key to whether there was a "favorable termination" depends upon whether the underlying action ended in "a non-litigious fashion," notwithstanding the non-participation of one or more parties who were plaintiffs or represented plaintiffs in the underlying action. Accordingly, the court held that "[a]lthough favorable termination is called for, there is no requirement that it be based upon the merits, and to impose such requirement would lead to unjust results."

Based upon the foregoing, the court held that "the underlying proceedings did not terminate in favor of [landlord]. However, unlike the trial court, [the Superior Court] did not reach this conclusion because a final adjudication of the merits was necessary." Rather, the court found that the first four of the underlying actions did not terminate in landlord's favor because tenant continued to litigate in the fifth action for "the same offense" as the previous four actions were litigated without resolution on the merits and then settled.

What these cases show is that the circumstances surrounding the termination of the underlying action must be carefully examined. The issue is whether the defendant in the underlying action, latter the Dragonetti plaintiff, had entered into any agreement with a plaintiff in the underlying matter bringing it to a conclusion. This is true regardless of whether money

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Retina Assoc. v. Retinovitreous Assoc., 2017 PA Super. 380 (Dec. 7, 2017) — Members of limited liability corporation who only approve actions of designated managers may be liable for breach of general duty of good faith, i.e., fiduciary duty. Non-managing members may be liable for breach of general duty of good faith.

COMMON PLEAS

PUNITIVE DAMAGES — motor vehicle accident — plaintiff rear-ended by defendant while stopped — USE OF CELL PHONE — calling — texting — DRIVING AT UNSAFE SPEED WHILE USING PHONE — allegations in complaint — preliminary objection overruled

Lopez v. Wilson, 59 Northampton 812 (Jan. 20, 2017) — Preliminary objection overruled to punitive damages claim when plaintiff was rear-ended by defendant who was, according to complaint, talking and texting on cell phone while operating vehicle at excessive speed.

SPOLIATION OF EVIDENCE — OIL FURNACE AND PARTS — recent service — fire soon thereafter — request to preserve allegedly defective parts — Pa.R.C.P. 4019 — dilatory and uncooperative conduct — motion for sanctions and summary judgment granted

Erie Ins. Exch. v. Bernville Qual. Fuels, 110 Berks 53 (Oct. 20, 2017) — Sanctions including summary judgment imposed when party, asserting negligence in inspecting and servicing oil furnace in home led to fire, failed to retain allegedly defective parts despite request to do so after experts for plaintiff and defense had examined furnace.

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COMMONWEALTH COURT

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City of Phila. v. Alberts Rest., No. 1647 C.D. 2016 (Dec. 4, 2017) — Denial of request for continuance of less than 24 hours is manifestly unreasonable when other party was granted continuance to proceed without presence of other party; late appearance of counsel at settlement and late filing of settlement memoranda does not constitute pattern of misconduct.

CIVIL RIGHTS

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Paluch v. Dept. of Corr., No. 364 M.D. 2016 (Nov. 28, 2017) — Complaint asserting DOC use of interest and investment income held in inmate general welfare fund is improper dismissed for failure to state claim.

By Timothy L. Clawges

Timothy L. Clawges is counsel to the Pennsylvania House of Representatives Judiciary Committee. He also writes case digests for the PBA Criminal Justice Section Newsletter.

CRIMINAL LAW

SUPERIOR COURT

THIRD-DEGREE MURDER — involuntary manslaughter — reckless driving — VEHICLE TRAVELING TWICE POSTED SPEED LIMIT — pedestrians struck and killed by defendant — SUFFICIENCY OF EVIDENCE — malice — intersection where accident occurred at crest of hill — nighttime — victims wearing dark clothing — no pedestrian crosswalks — intersection not intended for pedestrian traffic — weight of

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had or had not changed hands as part of that agreement and regardless of whether there had already been a judicial determination on the merits. This is also true even if not all plaintiffs or their counsel were parties to that agreement.

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