

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DIRECTV, INC.,

Plaintiff,

v.

Case No. 1:03-CV-731

ROD CARTER,

HON. GORDON J. QUIST

Defendant.

MEMORANDUM ORDER

The Court has before it Defendant's motion for leave to add a counterclaim against Plaintiff for abuse of process.¹ Plaintiff has filed a response in which it argues that Defendant's motion should be denied because the counterclaim would be futile. Plaintiff asserts that the proposed counterclaim is futile because it fails to properly allege the elements of an abuse of process claim and because the claim would be barred by the *Noerr-Pennington* doctrine.

Under Rule 15(a) of the Federal Rules of Civil Procedure, once a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party." Fed. R. Civ. P. 15(a). Rule 15(a) also provides that "leave shall be freely given when justice so requires." *Id.* The mandate that "leave shall be freely given" embodies "the principle that cases 'should be tried on their merits rather than the technicalities of the pleadings.'" Moore v. City of Paducah, 790 F.2d 557, 559 (6th Cir. 1986) (per curiam) (quoting Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982)). However, a court is not obliged to grant an amendment simply because a motion is made. See Johnson v. Ventra Group, Inc., No. 96-1463, 1997 WL 468332, (6th Cir.

¹Defendant's proposed counterclaim includes only one count, erroneously identified as "Count II" for abuse of process. No other claim is alleged, although Defendant makes several references to Fed. R. Civ. P. 11. The Court does not interpret, and will not consider, the proposed counterclaim to be a motion for Rule 11 sanctions.

Aug. 13, 1997) (per curiam). "A motion to amend a complaint should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile." Crawford v. Roane, 53 F.3d 750, 753 (6th Cir. 1995); see also Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962). An amendment is futile where the proposed claim would not withstand a Rule 12(b)(6) motion to dismiss for failure to state a claim. Blakely v. United States, 276 F.3d 853, 874-75 (6th Cir. 2002).

In order to establish a claim for abuse of process, a plaintiff must plead and prove: (1) an ulterior purpose; and (2) an act in the use of process which is improper in the regular prosecution of the proceeding. Friedman v. Dozorc, 412 Mich. 1, 30, 312 N.W.2d 585, 594 (1981) (citing Spear v. Pendill, 164 Mich. 620, 623, 130 N.W. 343, 344 (1911)). A valid abuse of process claim requires that the plaintiff allege that "the defendant has used a proper legal procedure for a purpose collateral to the intended use of that procedure." Bonner v. Chi. Title Ins. Co., 194 Mich. App. 462, 472, 487 N.W.2d 807, 812 (1992) (citing Vallance v. Brewbaker, 161 Mich. App. 642, 646, 411 N.W.2d 808, 810 (1987)). The gravamen of the action is that the defendant, having properly obtained process, uses that process for an improper purpose: "The subsequent misuse of the process, though properly obtained, constitutes the misconduct for which the liability is imposed." Friedman, 412 Mich. at 30 n.18, 312 N.W.2d at 594 n.18 (quoting Restatement (Second) of Torts § 682). The filing of a complaint, no matter how groundless, constitutes the proper use of process, is not an "irregular use of process," and cannot form the basis of an abuse of process claim. Id. at 30-31, 312 N.W.2d at 594-95. In Three Lakes Association v. Whiting, 75 Mich. App. 564, 255 N.W.2d 686 (1977), the Michigan Court of Appeals held that the plaintiffs' allegations were sufficient to show an improper use of process. The court found that the defendants used the lawsuit to obtain a collateral objective,

namely, to coerce the plaintiffs into giving up all opposition to the defendants' condominium project. Id. at 574, 255 N.W.2d at 690-91. The ostensible action for money damages was of secondary importance, as illustrated by the defendants' conduct during settlement negotiations. Id. The court stated that the defendants' "offer was premised on plaintiff ending all opposition to the project, be it proper or tortious, and may be viewed on this motion for summary judgment as a use of Action 926 as a club to obtain a purpose collateral to its proper purpose." Id. at 574, 255 N.W.2d at 691.

Defendant's proposed abuse of process claim is essentially that Plaintiff filed this case against Defendant not only for the purpose of obtaining damages from Defendant, but also for the purpose of supporting the goal of its "letter campaign" of threatening others into paying Plaintiff money to avoid a lawsuit. (Proposed Countercl. ¶¶ 32, 36.) Defendant's proposed claim is futile because it fails to sufficiently allege the elements of an abuse of process claim. First, with regard to the ulterior purpose requirement, the plaintiff must allege some corroborating act that demonstrates the ulterior purpose. Bonner, 194 Mich. App. at 472, 487 N.W.2d at 812. Although Defendant alleges that Plaintiff filed this and other cases without any reasonable investigation or verification of its signal theft claims, Defendant fails to allege any act by Plaintiff that corroborates Defendant's allegation that Plaintiff is using this and other cases for the purpose of coercing other individuals to make settlement payments to Plaintiff. Second, Defendant fails to allege any "irregular act" by Plaintiff in this case, other than its filing of the complaint against Defendant. In fact, the proposed claim lacks any allegation showing that Plaintiff has used this case for any improper purpose. Accordingly, Defendant's motion must be denied.

Defendant's proposed abuse of process claim must be rejected for another reason not cited by Plaintiff. That is, Defendant cannot maintain an abuse of process claim because he lacks standing to assert such a claim. See Deaton v. Gutierrez, 89 P.3d 672, 677 (N.M. Ct. App. 2003) (holding

that the defendants had no standing to assert claims for fraud, abuse of process, slander of title, prima facie tort, and negligence, because the defendants did not have title to the disputed property and could not demonstrate any injury as a result of the plaintiff's actions). In this case, Defendant alleges that Plaintiff is using this lawsuit in order to extract settlement payments from *others*. Defendant fails to allege how he could possibly suffer any injury as a result of the circumstances he alleges in support of his claim. For example, in paragraph 36 of the proposed counterclaim Defendant alleges that Plaintiff and/or its attorneys filed this suit "for the purpose of threatening and intimidating other individuals who [sic] into complying with their settlement demands," and in paragraph 37 Defendant alleges that Plaintiff "improperly utilized the process of this court in an attempt to extort financial settlement sums from thousands of individuals throughout the nation." (Proposed Countercl. ¶¶ 36, 37.) Defendant's lack of standing thus precludes his claim. See Assocs. Fin. Servs. Co. v. Bowman, Heintz, Boscia, & Vician, P.C., No. IP 99-1725-C-M/S, 2004 WL 826088, at *25 (S.D. Ind. Mar. 31, 2004) ("The Court agrees with Associates that Bowman Heintz does not have a legal right or interest with respect to the three actions described by Bowman Heintz as the object of Associates' alleged abuse of process. Without that legal right or interest, Bowman Heintz lacks standing to bring an abuse of process claim based on those actions.") Therefore,

IT IS HEREBY ORDERED that Defendant's Motion For Leave To Add A Counter-Claim (docket no. 16) is **DENIED**.²

Dated: June 15, 2004

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

²Having concluded that Defendant's proposed counterclaim is futile because it fails to state a claim and because Defendant lacks standing to assert an abuse of process claim, the Court finds it unnecessary to address Plaintiff's *Noerr-Pennington* argument.