ATTORNEY FOR APPELLANT:

WILLIAM H. TOBIN
South Holland, Illinois

ATTORNEY FOR APPELLEES:

MICHAEL V. KNIGHT
Barnes & Thornburg LLP
South Bend, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SPRING LAKE CHAPTER of the IZAAK WALTON LEAGUE OF AMERICA, INC.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 45A03-0705-CV-232
INDIANA DIVISION of the IZAAK WALTON LEAGUE OF AMERICA, INC., CHARLES SIAR, and EMIL GARCIA,	)	
Appellees-Defendants.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0506-CT-119

November 29, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff Spring Lake Chapter of the Izaak Walton League of America, Inc. ("Spring Lake") appeals a grant of summary judgment in favor of Appellees-Defendants Indiana Division of the Izaak Walton League of America, Inc., President Charles Siar, and Treasurer Emil Garcia (collectively, "the Indiana Division") upon Spring Lake's complaint for malicious prosecution and abuse of process. We affirm in part and reverse in part.

Issues

Spring Lake presents five issues for appeal, which we consolidate and restate as the following two issues:

I. Whether summary judgment was properly granted in favor of the Indiana Division upon the malicious prosecution claim; and

II. Whether summary judgment was properly granted in favor of the Indiana Division upon the abuse of process claim.

Facts and Procedural History

The Izaak Walton League of America, Inc. is a national not-for-profit organization devoted to the promotion of conservation and ecological programs and practice. In 1988, Indiana Division revoked the charter of the Hobart/MacJoy chapter of the organization because of misconduct. During November of 1988, Spring Lake was granted a charter by the national organization and took possession of the real property located at 4700 West 49th Avenue in Hobart, Indiana, formerly possessed by the Hobart/MacJoy chapter ("the Hobart property").

On May 22, 1989, the Newton Superior Court granted Indiana Division control of the Hobart/MacJoy chapter's assets including title to the Hobart property. However, Spring

Lake was appointed as "receiver" and remained in possession of the Hobart property. Indiana Division set up a management account into which Spring Lake deposited the income from bingo games, tent camping and "other operations." (App. 141.) With these funds, Spring Lake paid mortgage installments, insurance premiums and other expenses in connection with the Hobart property. Spring Lake also issued checks to "reimburse Division for its payment of attorney's fees, security guards and other such expenses in connection with the suspension of the Hobart chapter, the recovery of its assets, and the Hobart property." (App. 141-42.)

Bank One, the mortgagee of the Hobart property, threatened a foreclosure action unless the Indiana Division transferred ownership of the Hobart property to Spring Lake. At that time, the Hobart property was scheduled for a tax sale (for recovery of $38,959.42 in real estate taxes and penalties).[1]

Mary Wilusz, President of the Spring Lake chapter and also a member of the Board of Directors of Indiana Division, drafted a resolution providing that the Indiana Division would deed the Hobart property to Spring Lake without consideration. On September 13, 1993, the Indiana Division's Board of Directors adopted a resolution with the additional language as follows:

> In recognition of this deed SLC agrees to make the Division whole by repaying all monies expended by Division in the management and resolution of this issue to date and in the future.

(App. 13.) Indiana Division deeded the Hobart property to Spring Lake for a stated nominal price of $10.00.

On November 3, 1998, the Indiana Division sought reimbursement from Spring Lake for claimed expenses in connection with the defunct chapter and requested that Spring Lake representatives attend a board meeting to discuss making the Indiana Division whole. On November 25, 1998, Spring Lake's attorney requested documentation of expenses. On November 27, 1999, Spring Lake rejected the Indiana Division's request for reimbursement.

On February 14, 2003, the Indiana Division filed a complaint against Spring Lake for breach of contract and unjust enrichment. On May 13, 2005, following a two-day bench trial, judgment was entered for Spring Lake. The trial court entered findings of fact and conclusions of law, providing in relevant part that: the claims were time-barred; the Indiana Statute of Frauds barred the breach of contract claim; there was no agreement (written or parol) mandating payment by Spring Lake in exchange for the deed; Spring Lake was not present at the adoption of the second resolution and thus could not have agreed to its terms; the requirement that Spring Lake "make Division whole" is too indefinite for enforcement; there was no corporate authority for the second resolution; the Indiana Division failed to provide supporting documentation of claimed expenses; summaries of expenses contained errors; and the Indiana Division failed to prove damages "to any degree of certainty." (App. 148.) However, the trial court declined to award Spring Lake attorney's fees for the Indiana Division's alleged prosecution or continuation of a frivolous, groundless, or unreasonable lawsuit.

On June 20, 2005, Spring Lake filed a complaint against the Indiana Division, alleging malicious prosecution, abuse of process, and criminal deception. On October 2, 2006, the

[1] At some point, the charitable tax exemption had apparently been revoked.

Indiana Division moved for summary judgment. On November 3, 2006, Spring Lake filed its memorandum in opposition to summary judgment. The Indiana Division was granted leave to substitute evidentiary exhibits and Spring Lake was granted leave to file an affidavit in response to one of the exhibits. On March 13, 2007, the trial court conducted a summary judgment hearing. On May 2, 2007, the trial court granted summary judgment in favor of the Indiana Division. Spring Lake now appeals.

Discussion and Decision

I. Malicious Prosecution

A. Summary Judgment Standard

When reviewing the propriety of a ruling on a motion for summary judgment, we apply the same standard as the trial court. See Atlantic Coast Airlines v. Cook, 857 N.E.2d 989, 994 (Ind. 2006). Our review of a summary judgment motion is limited to the materials designated to the trial court. Id. A party seeking summary judgment bears the burden to make a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Am. Mgmt., Inc. v. MIF Realty L.P., 666 N.E.2d 424, 428 (Ind. Ct. App. 1996). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. Id. The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002).

On appeal, the appellant bears the burden of persuasion, but we will assess the trial court's decision to ensure that the parties were not improperly denied their day in court. Ind. Health Ctrs., Inc. v. Cardinal Health Sys., Inc., 774 N.E.2d 992, 999 (Ind. Ct. App. 2002). A factual issue is genuine if it is not capable of being conclusively foreclosed by reference to undisputed facts. Am. Mgmt, Inc., 666 N.E.2d at 428.

B. Analysis

Malicious prosecution consists of the following elements: prosecution, without probable cause, with malice, termination in favor of the original defendant, and damages to the defendant. 19 Indiana Law Encyclopedia, Malicious Prosecution § 1 (2003). The trial court concluded that the summary judgment materials designated by the Indiana Division demonstrated that it had probable cause to file the lawsuit at issue and thus it negated an element of Spring Lake's malicious prosecution claim.

Probable cause exists '"when a reasonably intelligent and prudent person would be induced to act as did the person who is charged with the burden of having probable cause."' City of New Haven v. Reichhart, 748 N.E.2d 374, 379 (Ind. 2001) (quoting Maynard v. 84 Lumber Co., 657 N.E.2d 406, 409 (Ind. Ct. App. 1995), trans. denied).

The designated materials reveal that the Indiana Division transferred the Hobart property deed to Spring Lake without monetary consideration. The transfer saved the Hobart property from imminent foreclosure or tax sale. There was no express agreement reached, whether written or oral, providing that Spring Lake would pay a certain sum to the Indiana Division in the future. Approximately ten years later, despite the lack of a contractual

agreement, and despite obvious Statute of Frauds[2] and statute of limitations[3] concerns, the Indiana Division brought a lawsuit against Spring Lake. These circumstances do not demonstrate that the officers of the Indiana Division could have formed a reasonable belief that the Indiana Division had a meritorious legal claim against Spring Lake.

The Indiana Division nevertheless contends that the existence of probable cause was necessarily determined in the former lawsuit, because the trial court declined to award attorney's fees to Spring Lake for the Indiana Division's alleged pursuit of a frivolous, groundless, or unreasonable lawsuit. Collateral estoppel or issue preclusion bars subsequent litigation of an issue necessarily adjudicated in a former lawsuit, if the same issue is presented in a subsequent lawsuit. Ins. Co. of N. Am. v. Home Loan Corp., 862 N.E.2d 1230, 1233 (Ind. Ct. App. 2007), reh'g denied.

However, we do not agree with the Indiana Division's contention that the trial court's refusal to order attorney's fees as a sanction is equivalent to a determination of probable cause. The language of Indiana Code Section 34-52-1-1(b) does not entitle a litigant to an award of attorney's fees at any time a lawsuit was filed without probable cause. That section permits the trial court discretion to award attorney fees to the prevailing party if the other party:

> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable or groundless;

[2] Indiana Code Section 32-21-1-1(b)(4) provides that a person may not bring an action involving any contract for the sale of land absent a writing signed by the party to be charged or the party's authorized agent.

[3] Indiana Code Section 34-11-2-7(1) provides that actions on accounts and contracts not in writing must be commenced within six years after the cause of action accrues.

(2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
(3) litigated the action in bad faith.

Ind. Code § 34-52-1-1(b). A claim or defense is "frivolous" if it is taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action, or if the lawyer is unable to support the action taken by a good faith and rational argument for an extension, modification, or reversal of existing law. Kahn v. Cundiff, 533 N.E.2d 164, 170 (Ind. Ct. App. 1989), summarily aff'd, 543 N.E.2d 627 (Ind. 1989). A claim or defense is "unreasonable" if, based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would consider that the claim or defense was worthy of litigation. Id. at 170-71. A claim or defense is "groundless" if no facts exist which support the legal claim presented by the losing party. Id. at 171.

"Whereas the statute providing for award of the attorney fees for an action or defense on a claim or defense which is frivolous, unreasonable, or groundless does not require a finding of an improper motive, an action for malicious prosecution requires a finding of malice." Crosson v. Berry, 829 N.E.2d 184, 189 (Ind. Ct. App. 2005), trans. denied. Accordingly, a malicious prosecution claim is separate and distinct from a claim for statutory attorney fees under Indiana Code Section 34-52-1-1. Kopka, Landau & Pinkus v. Hansen, et al., No. 49A02-0611-CV-987, slip op. at 15, (Ind. Ct. App. Oct. 18, 2007).

In summary judgment proceedings, Spring Lake had no obligation to come forward with any designated facts to demonstrate the existence of a genuine issue for trial unless and until the Indiana Division made its prima facie showing of the absence of genuine issues of

material fact and its entitlement to judgment as a matter of law. Am. Mgm't, Inc., 666 N.E.2d at 424. The Indiana Division was required to negate one or more elements of the malicious prosecution claim in order to demonstrate its entitlement to judgment as a matter of law. It challenged a single element, attempting to show that it had probable cause to support the former lawsuit, and was unable to do so.[4] The trial court erred by granting summary

[4] Contrary to the dissent's assertion, we do not hold that a plaintiff who files a complaint outside of the statute of limitations or in violation of the Statute of Frauds commits malicious prosecution, as a matter of law. Here, the alleged cause of action suffered from numerous infirmities. There was no writing signed by the party to be charged, hence there existed an obvious Statute of Frauds problem. Had there existed a viable exception to the Statute of Frauds so as to permit an oral contract for a real estate sale, the six-year statute pertaining to an oral contract had lapsed years in advance of the lawsuit. The property was not taken by Spring Lake without consideration, because Spring Lake saved the property from foreclosure and paid back taxes. Moreover, to the extent that the Indiana Division claimed that a Board of Directors Resolution was enforceable against Spring Lake, the obligation to "make the Division whole" was indefinite and illusory, and Spring Lake did not affirmatively assent to the Resolution. (App. 13.) Finally, the Indiana Division lacked adequate documentary evidence of its claimed damages. At the conclusion of the underlying trial, the trial court found that the Indiana Division had made no accounting of which of its claimed expenses had been reimbursed from the management account into which Spring Lake made deposits.

The dissent apparently believes that probable cause was supportable by the testimony of Spring Lake's representative "that the property was worth approximately $200,000, that she understood that the Indiana Division expected some payment in exchange for the transfer of the property to Spring Lake, that Spring Lake accepted the property knowing that the Indiana Division expected payment, and that Spring Lake paid 'Nothing' in exchange for the Property." Dissent, at 13-14. However, this does not jibe with the deposition testimony of Mary Wilusz, presumably the "representative" referenced in the dissent.

When deposed in the malicious prosecution proceedings, Wilusz conceded, "the Bank says that it's valued in the $200,000.00 range." (App. 246.) However, she did not testify that the property had substantial equity upon transfer, after considering the liens and impending foreclosure. Nor did she ever concede that the Indiana Division rightfully expected payment for the equity if any. The transaction at issue was not the product of typical negotiations. Indeed, Wilusz specifically denied that Spring Lake "ever offer[ed] to buy the property from Indiana Division." (App. 243.) According to Wilusz, the Indiana Division had "no choice" inasmuch as "Monday morning was foreclosure day." (App. 243.) Wilusz's deposition testimony indicated her belief that the Indiana Division covertly expected payment, failed to advise Spring Lake of the expectation when tendering the deed, and thus (in Wilusz's view) the Indiana Division committed fraud. The expressed claim that the Indiana Division acted secretively and fraudulently is in direct opposition to the dissent's characterization of Wilusz's testimony as that which would essentially constitute an admission of contractual liability.

Furthermore, it was Wilusz's position that Spring Lake had paid more than its share of "expenses" of the defunct chapter (something commonly undertaken by the Indiana Division), in part paying with funds that Wilusz had personally loaned Spring Lake. Her deposition testimony squarely contradicted the contention that Spring Lake had in any manner assumed an ongoing debt or obligation to the Indiana Division by accepting the deed to the property.

judgment to the Indiana Division.

II. Abuse of Process

Spring Lake alleged that the Indiana Division committed an abuse of process by (1) filing officers' affidavits containing false statements pertaining to Mary Wilusz's involvement with the resolution for making the Indiana Division whole and (2) failing to properly participate in discovery by producing documents supporting the claimed expenses. Essentially, Spring Lake alleged perjury and dilatory tactics during discovery.

The trial court granted summary judgment to the Indiana Division, concluding that the conduct was fully addressed, or should have been addressed, in the former litigation. The trial court observed that, during the former litigation, Spring Lake moved to strike the affidavits without alleging their falsity, the motion to strike was denied, and the affidavits had evidentiary support in Wilusz's deposition testimony. With respect to the alleged failure to produce documents, the trial court concluded that this amounted to a discovery dispute that properly should have been addressed in the former litigation.

An action for abuse of process is not designed to redress all instances of wrongdoing in the course of discovery or trial. Rather, an action for abuse of process requires a finding of misuse or misapplication of process for an end other than that which it was designed to accomplish. Watson v. Auto Advisors, Inc., 822 N.E.2d 1017, 1029 (Ind. Ct. App. 2005), trans. denied. Abuse of process has two elements: (1) ulterior purpose or motives; and (2) a willful act in the use of process not proper in the regular conduct of the proceeding. Town of Orland v. Nat'l Fire & Cas. Co., 726 N.E.2d 364, 371 (Ind. Ct. App. 2000), trans. denied. If a party's "acts are procedurally and substantively proper under the circumstances then his

intent is irrelevant." Reichhart v. City of New Haven, 674 N.E.2d 27, 31 (Ind. Ct. App. 1996), trans. denied. No liability ensues when the defendant has done no more than carry out the process to its authorized conclusion, even though the party does so with bad intentions. Id.

In support of its motion for summary judgment, the Indiana Division designated materials to show that it made a regular and legitimate use of process by filing affidavits and other discovery materials in the course of its prosecution of its claims against Spring Lake. Thus, the Indiana Division made a prima facie showing that it acted in furtherance of a proper purpose, i.e., to establish its evidence in the case. Although the Indiana Division did not prevail upon its lawsuit, its use of process was facially legitimate.

Spring Lake did not then come forward with evidence that legal process had been used by the Indiana Division to accomplish an outcome other than that which the process was designed to accomplish. As the materials designated by the Indiana Division negated an element of an abuse of process claim, and Spring Lake did not come forward with evidence to rebut the prima facie showing, the Indiana Division was entitled to summary judgment upon this claim.

Conclusion

The grant of summary judgment upon the malicious prosecution claim is reversed. The grant of summary judgment upon the abuse of process claim is affirmed.

Affirmed in part; reversed in part; and remanded.

VAIDIK, J., concurs.

BAKER, C.J., concurs in part and dissents in part with opinion.

IN THE
COURT OF APPEALS OF INDIANA

SPRING LAKE CHAPTER of the IZAAK WALTON LEAGUE OF AMERICA, INC.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 45A03-0705-CV-232
INDIANA DIVISION of the IZAAK WALTON LEAGUE OF AMERICA, INC., CHARLES SIAR, and EMIL GARCIA,	)	
Appellees-Defendants.	)	

BAKER, Chief Judge, concurs in part and dissents in part.

I respectfully dissent from the majority's conclusion regarding Spring Lake's malicious prosecution claim. I believe that Indiana Division established that it had probable cause to institute the action against Spring Lake such that summary judgment in its favor was warranted. The majority concludes that probable cause was absent based on "the lack of a contractual agreement" and "obvious Statute of Frauds and statute of limitations concerns . . . ." Slip op. p. 7 (footnote omitted). I must disagree.

The record reveals that Spring Lake's representative testified that the property was worth approximately $200,000, that she understood that the Indiana Division expected some

payment in exchange for the transfer of the property to Spring Lake, that Spring Lake accepted the property knowing that the Indiana Division expected payment, and that Spring Lake paid "Nothing" in exchange for the Property. Appellant's App. p. 157. Lack of a written agreement notwithstanding, I believe that these facts gave the Indiana Division a reasonable belief that the charges contained in its complaint were legitimate—if nothing else, it had a viable unjust enrichment claim. See City of New Haven v. Reichhart, 748 N.E.2d 374, 380 (Ind. 2001) (holding that if a reasonably intelligent and prudent person in the original plaintiff's place could have believed that the charges contained in the complaint were legitimate, she had probable cause to file the complaint and the malicious prosecution claim must be dismissed as a matter of law).

As for the statutes of frauds and limitations, I do not believe it to be prudent to hold, as a matter of law, that a plaintiff who files a complaint outside of the statute of limitations or potentially in violation of the Statute of Frauds necessarily commits malicious prosecution. It is well established that a plaintiff need not plead in avoidance of an affirmative defense. See Nichols v. AMAX Coal Co., 490 N.E.2d 754, 755 (Ind. 1986) (holding that a plaintiff need not anticipate a statute of limitations defense and plead matters in avoidance in the complaint); Whiteco Indus., Inc. v. Kopani, 514 N.E.2d 840, 843 (Ind. Ct. App. 1987) (holding that a plaintiff need not plead their avoidance of a Statute of Frauds affirmative defense in a reply to the answer). It may be that the Indiana Division did not have a particularly strong case. Perhaps it can even be said that the case was weak. But I am not prepared to find that every plaintiff who files a weak case should be held liable for malicious prosecution. I believe that the Indiana Division had probable cause to file its

complaint; thus, I would affirm the trial court's dismissal of the malicious prosecution claim.

In all other respects, I concur with the majority.