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Litigation: Who Would Ever Have Thought That Sending A Preservation Letter Might Be Dangerous?

Article By:

Mack Sperling

There is probably nothing more routine in litigation today than a Plaintiff's counsel sending a "preservation letter." A preservation letter, if you've never sent or received one, is a letter sent at the outset of litigation -- or even before it begins -- telling the opposing counsel or party (or even a non-party) to make sure to withhold from destruction documents relevant to the claims.

But who would have ever thought that sending such a routine letter could form the basis for an abuse of process claim? Apparently it can, based on Judge Robinson's Opinion last month in *DDM&S Holdings, LLLC v. Doc Watson Enterprises, LLC*, 2016 NCBC 86.

Abuse Of Process

if you need a refresher on what a claim for abuse of process is, it is "the misuse of legal process for an ulterior purpose." Op. ¶23 (*quoting Chidnese v. Chidnese*, 210 N.C. App. 299, 310, 708 S.E.2d 725, 734 (2011)).

The requirement of an "ulterior purpose"? That is met when the party accused of the abuse of process takes some willful action after the lawsuit is filed which is aimed at getting the advantage of the opposing party in "some collateral matter." Op. ¶23.

Judge Robinson spoke to the routine nature of a preservation letter:

> Plaintiffs argue that a preservation of evidence letter can never serve as the basis for an abuse of process claim. Indeed, all other things equal, **there is nothing inherently improper about a plaintiff sending a letter to individuals who may have relevant evidence requesting that they preserve such evidence.** It is a routine litigation practice. The fact that is a routine litigation practice, however, does not mean that such an act can never be used to gain an advantage with respect to some collateral matter. North Carolina courts consistently hold that acts otherwise routine and permissible can constitute an improper act sufficient to satisfy the “act” element of an abuse of process claim.

Op. ¶27 (emphasis added).

The parties to the lawsuit had sold a database, which collected police reports from across the United States, to LexisNexis. The ulterior motive alleged by the Defendants (via a counterclaim) was that the preservation letter sent to LexisNexis to cause it to withhold distributions from a $2 million escrow fund established in connection with the sale. LexisNexiss did indeed instruct the escrow agent to withhold any distribution from the escrow fund. The non-payment of money from the escrow fund was alleged by the Defendants to be aimed at coercing and pressuring them to pay more money to the Plaintiffs (which the Defendants said they were not due per the terms of the sale to LexisNexis).

The Allegations Of A Pleading Are Assumed By A Court To Be True

Judge Robinson rejected the argument that a "preservation of evidence letter can never serve as the basis for an abuse of process claim." Op. ¶27. The allegations of the Defendants' counterclaim satisfied the bare bones pleading requirements for an abuse of process claim. As Judge Robinson observed, "[c]oercing a party into paying additional monies is not a purpose for which a preservation of evidence letter is intended." Op. ¶28. Even though the Plaintiffs denied that coercion was the purpose of their preservation letter, that wasn't enough for them to succeed on their motion to dismiss, as all allegations in a Complaint or counterclaim are accepted as true at the motion to dismiss stage.

This decision highlights the broad latitude that judges, both state and federal, are required to accord to the allegations in a pleading. Skepticism about the truth of the allegations in a Complaint or Counterclaim is hardly ever sufficient to support a dismissal. The U.S. Supreme Court said way back in 2009 (in *Ashcroft v. Iqbal*, 566 U.S. 662 (Souter, J., dissenting) that "[t]he sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."

The allegations surrounding the preservation letter in the DDM&S Holdings case aren't so "sufficient[ly] fantastical" as to fall into the category of little green men, trips to Pluto, or experiences in time travel.

But it remains to be seen whether this abuse of process claim can survive a motion for summary judgment.

What other innocent acts performed in connection with a lawsuit might form the basis for an abuse of process claim? What about talking to the press? Sending a notice of deposition or a subpoena?

I don't see an increase in abuse of process claims lying head based on preservation letters being sent. This ruling wouldn't stop me from sending a preservation letter.

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