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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2147-21

RICHARD REPACK,

Plaintiff-Appellant,

v.

ILONA AKIMOVA,

Defendant-Respondent.

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Submitted March 8, 2023 – Decided May 9, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey, Law  
Division, Middlesex County, Docket No. L-0483-21.

Cosner Law Group, attorneys for appellant (Rebecca A.  
Hand, on the briefs).

Marlo J. Hittman, attorney for respondent.

PER CURIAM

After six years of marriage, the parties divorced in 2018. The following  
year, plaintiff moved to vacate the judgment of divorce to seek an annulment.<sup>1</sup>

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<sup>1</sup> The trial court denied the motion. We affirmed the order. Repack v. Akimova,  
No. A-3014-19 (App. Div. May 18, 2021) (slip op. at 8).

Several days later, defendant applied for and was granted a temporary restraining order (TRO). After several days of hearings, the court dismissed the TRO in May 2020.<sup>2</sup>

In January 2021, plaintiff filed a complaint alleging claims of malicious prosecution and breach of the implied covenant of good faith and fair dealing. Defendant moved to dismiss under Rule 4:6-2. On February 4, 2022, the court granted the motion. We affirm.

### I.

The parties' dual judgment of divorce incorporated by reference a handwritten agreement in which they waived any claims for "spousal support, loans, reimbursements, alimony, equitable distribution, and any other claims whatsoever."

When defendant applied for a TRO in 2019, she alleged plaintiff committed the predicate acts of harassment and cyber harassment under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The TRO stated:

[PLAINTIFF] SENT MULTIPLE EMAILS TO VICTIM'S FAMILY IN RUUSSIA (sic) AS WELL AS TEXT MESSAGES TO HER AS WELL AS FRIENDS

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<sup>2</sup> The record does not include transcripts of the hearings nor the court's oral decision.

STATING THAT SHE RUINED HIS LIFE AND THAT HE WAS EXTREMELY HURT THAT SHE HAS SINCE REMARRIED. [PLAINTIFF] ALSO SENT RANDOM GIFTS TO HER THROUGH THIRD PARTY FRIENDS WHEN HE WAS SUPPOSED TO HAVE NO KNOWLEDGE OF WHERE SHE LIVED.

On the order denying a final restraining order, the Family Part judge checked the box stating "[t]he [c]ourt . . . determined that . . . [defendant]'s allegation of domestic violence has not been substantiated." We were not provided with the oral statement of reasons supporting the written order.

In count one of plaintiff's complaint he alleged:

10. Defendant lacked reasonable or probable cause for instituting the TRO case, as amended, against [p]laintiff, and did so . . . by her maliciously motivated retaliation, and to seek punishment of [p]laintiff, for filing his [m]otion to [v]acate [j]udgment to seek an annulment.

11. [D]efendant initiated the TRO case, as amended, maliciously or in willful or wanton disregard of . . . [p]laintiff's rights[.]

12. Defendant did not have an honest belief that . . . [p]laintiff was liable and the TRO case, as amended, was thereby falsely instituted by [d]efendant as there was no reasonable or probable cause for the alleged claims of domestic violence.

Regarding the second count, plaintiff stated:

16. Pursuant to the relationship between the parties, . . . [d]efendant had an affirmative duty of good faith

and fair dealing with respect to her dealings with . . .  
[p]laintiff.

17. [D]efendant's deliberate and knowing actions involving deception, fraud, false pretense, false promises and the underlying circumstances of her filing the TRO case, as amended, against [p]laintiff, constitutes a breach of the implied covenant of good faith and fair dealing.

Defendant moved to dismiss the complaint under Rule 4:6-2, asserting neither cause of action was cognizable and any amendment would be futile.

On February 4, 2022, the court granted the dismissal motion.<sup>3</sup> The order stated:

The motion for failure to state a claim for which relief could be granted is GRANTED with regard to [c]ount [o]ne of the complaint—malicious prosecution. In order for the plaintiff to prove the fourth element of malice in the context of the [PDVA], the plaintiff must allege that the defendant lied in her allegations. . . . Plaintiff fails to make such an allegation. If a judge issues a TRO on truthful allegations, then there can be no case for malicious prosecution in the context of the [PDVA]. The motion is further GRANTED with regard to [c]ount [t]wo of the complaint—breach of the implied covenant of good faith and fair dealing—because it sounds in contract. The only "contract" in this case is a vacuous Property Settlement Agreement.

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<sup>3</sup> An amended order was executed March 22, 2022. It deleted a citation to an unpublished opinion.

## II.

A Rule 4:6-2 (e) motion to dismiss for failure to state a claim upon which relief can be granted is reviewed de novo. Baskin v. P.C. Richard & Son, LLC, 246 N.J. 157, 171 (2021) (citing Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019)). "A reviewing court must examine 'the legal sufficiency of the facts alleged on the face of the complaint,' giving the plaintiff the benefit of 'every reasonable inference of fact.'" Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107). A court must search the complaint thoroughly "and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "[I]f the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Ibid. (quoting Dimitrakopoulos, 237 N.J. at 107). A motion to dismiss under Rule 4:6-2 is limited to "the pleadings themselves." Dimitrakopoulos, 237 N.J. at 107 (quoting Roa v. Roa, 200 N.J. 555, 562 (2010)).

"[A] dismissal with prejudice is 'mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted,' or

if 'discovery will not give rise to such a claim.'" Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 473 N.J. Super. 1, 17 (App. Div. 2022) (citations omitted), cert. denied sub nom. MAC Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 252 N.J. 258 (2022), and cert. denied sub nom. MAC Prop. Grp. LLC – The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co., 252 N.J. 261 (2022).

In his complaint and in the appellate briefs, plaintiff refers to "malicious prosecution" as his cause of action in count one. That claim requires a predicate criminal proceeding, and therefore is not applicable here. We presume plaintiff meant to plead "malicious use of process"—the civil counterpart.

In Mayflower Indus. v. Thor Corp., 15 N.J. Super. 139, 152 (Ch. Div. 1951), the Chancery Division set forth the requirements to sustain a claim for malicious use of process. To be actionable, the defendant must have instituted a suit without reasonable or probable cause actuated by malice; that terminated favorably for the party seeking to bring a claim for malicious use of process; and the party suffered a special grievance caused by the institution of the underlying civil claim.

A special grievance "consists of an interference with one's liberty or property and includes events such as the filing of a bankruptcy petition, granting

an injunction, filing a lis pendens[, ] or wrongful interference with the possession or enjoyment of property." Klesh v. Coddington, 295 N.J. Super. 51, 63 (Law. Div. 1996) (citing Penwag Prop. Co. v. Landau, 76 N.J. 595, 597-98 (1978)), aff'd and remanded on other grounds, 295 N.J. Super. 1 (App. Div. 1996). Mere inconveniences and costs of defense do not give rise to a special grievance. Ibid. (stating counsel fees, mental anguish, emotional distress, and alleged loss of reputation "flowing from the mere filing of any complaint" are not special grievances); Baglini v. Lauletta, 338 N.J. Super. 282, 300 (App. Div. 2001) (stating a special grievance must be more than the mere cost of defending the suit).

In addressing the first prong, the Mayflower court stated: "[r]easonable or probable cause for the institution of a civil suit is the presence of reasonable ground for belief that the cause of action exists supported by circumstances sufficient to warrant an ordinarily prudent man in the belief that it exists." 15 N.J. Super. at 153. This determination requires an evaluation of the totality of the circumstances and a "practical, common sense determination." Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 398 (2009) (quoting State v. O'Neal, 190 N.J. 601, 612 (2007)).

The second prong requires plaintiff to demonstrate malice. The Mayflower court reiterated, "malice in the law means nothing more than the intentional doing of a wrongful act without justification or excuse." 15 N.J. at 153 (quoting Brennan v. United Hatters, 73 N.J.L. 729, 744 (1906)). A wrongful act within this definition is "any act which in the ordinary course will infringe upon the rights of another to his damage . . . except [if it is] done in the exercise of an equal or superior right." Ibid. (quoting Brennan, 73 N.J.L. at 744-45). Because intent to commit a wrongful act is a condition of the mind, malice can be inferred from the surrounding circumstances. Id. at 162. These circumstances can sometimes be a want of probable cause, but a plaintiff must still show some extrinsic evidence of malice; mere lack of probable cause alone does not automatically warrant a finding of malice. Brunson, 199 N.J. at 395-96.

Applying these principles, we turn to plaintiff's allegations in his complaint.

Defendant was granted a TRO under two predicate acts in the PDVA—harassment, N.J.S.A. 2C:33-4, and cyber harassment, N.J.S.A. 2C:33-4.1. Plaintiff had to demonstrate defendant lacked reasonable grounds to believe



plaintiff committed either or both of those acts and an ordinarily prudent person would not find the circumstances warranted the issuance of a TRO.

Plaintiff has not satisfied this burden. He contends only that the TRO was dismissed after several hearing dates. But this only suffices to show the prior proceeding was not disposed in a manner adverse to him. The dismissal of the TRO does not establish that probable cause did not exist for its issuance. To the contrary, the municipal court found defendant's allegations of harassment and cyber harassment sufficient to grant the TRO. Moreover, plaintiff did not present any affidavit or certification in opposing the Rule 4:6-2 dismissal motion in which he denied the factual circumstances underlying the asserted predicate acts. Plaintiff cannot support his tort claim with only an order denying a final restraining order.

Plaintiff similarly cannot demonstrate malice. The complaint is bereft of any factual support upon which a court could draw reasonable inferences in plaintiff's favor that defendant obtained the TRO with malicious intent.

Because plaintiff did not satisfy the elements of a malicious use of process cause of action, the trial court did not err in dismissing the first count of the complaint.

In count two, plaintiff does not identify a contract that gave rise to his claim for breach of the implied covenant of good faith and fair dealing. He contends that in applying for a TRO, defendant breached "a recognized obligation of divorced persons to deal in good faith with one another."

As is well-established, all contracts in New Jersey "contain[] an implied covenant of good faith and fair dealing[, t]hat is, neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract[.]" Wood v. New Jersey Mfrs. Ins. Co., 206 N.J. 562, 577 (2011) (quoting Kalogeras v. 239 Broad Ave., L.L.C., 202 N.J. 349, 366 (2010)) (alterations in original).

Without identifying any contract between the parties, a cause of action for a breach of the implied covenant of good faith and fair dealing cannot stand. Even if plaintiff is claiming a breach of the covenant based on the parties' settlement agreement, both parties waived any and all claims that might have existed between them. Plaintiff cannot and does not allege he was deprived of the fruits of that agreement. The court properly dismissed count two.

We also discern no error in the court's dismissal of the complaint with prejudice. As stated in our analysis, the defects in the pleadings could not be corrected. Both causes of action lack legal merit.

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.



CLERK OF THE APPELLATE DIVISION