

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1267-09T1

UNIVERSITY COMMUNICATIONS, INC.,
d/b/a PEGASUS WEB TECHNOLOGIES
and JASON SILVERGLATE,

Plaintiffs-Respondents,

v.

NET ACCESS CORPORATION,

Defendant-Respondent,

and

KENNETH ELLMAN,

Defendant and Real Party
in Interest and Indispensable
Party-Appellant.

Argued January 20, 2011 - Decided September 19, 2011

Before Judges Fuentes, Gilroy and Nugent.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3626-08.

Kenneth Ellman, appellant, argued the cause pro se (Mr. Ellman and Feng Li, on the brief).

Ronald D. Coleman argued the cause for respondents University Communications, Inc., and Jason Silverglate (Goetz Fitzpatrick L.L.P., attorneys; Mr. Coleman, on the brief).

PER CURIAM

Defendant Kenneth Ellman appeals from the October 14, 2009 order of judgment dismissing at the close of his proofs at trial his counterclaims for breach of contract and abuse of process. We affirm the dismissal of his abuse of process claim, reverse the dismissal of his breach of contract claim, and remand for further proceedings.

Defendant Net Access Corporation (NAC)¹ is an internet service provider that provides internet access and related services to its customers. Plaintiff University Communications, Inc. (UCI), d/b/a Pegasus Web Technologies, was a customer of NAC. NAC provided internet services, space for servers, and other equipment to UCI. UCI, in turn, provided thousands of its customers with internet access and related services.

In 2003, the parties entered into a "Network Access Agreement" (Agreement) that expired on April 17, 2004, but automatically and continually renewed for three month periods until UCI gave notice to terminate the Agreement. In November 2003, UCI signed a security agreement and gave NAC a security interest in certain UCI property. Plaintiff Jason Silverglate, UCI's president and sole shareholder, signed the security

¹ Defendant Net Access Corporation did not file a brief and is not participating in this appeal.

agreement and personally guaranteed up to \$250,000 of UCI's debt. Ellman subsequently purchased from NAC the Agreement, security agreement, and UCI's debt.

In March 2004, NAC advised UCI that it owed interest for late payments on past invoices, and that UCI no longer met the credit worthiness standards of the security agreement. Concerned that NAC might "unplug" their internet access, and thereby terminate the internet access of their customers, UCI and Silvergate filed a complaint in the Chancery Division seeking, among other things, injunctive relief. They did not serve the complaint, however, because the parties were in negotiations for a new network access agreement.

After negotiations had begun, UCI and Silvergate decided to move to a new facility and exercised their contractual right to terminate the Agreement with NAC. Once again concerned about their customers, UCI and Silvergate filed an amended complaint in the Chancery Division, alleging, among other things, that if NAC shut down and "unplugged" their internet access, their customers would suffer irreparable harm. They joined Ellman as an indispensable party defendant because he claimed to have purchased UCI's debt to NAC.

NAC and Ellman filed a five-count counterclaim against plaintiffs for abuse of process and malicious abuse of legal

process (first count), "legal process maliciously abused" (second count), trespass and intentional damage to property, and tortuous interference with business practice (third count), unfair competition and contract performance interference (fourth count), and breach of contract (fifth count). Although UCI and Silverglate obtained preliminary injunctive relief, the action did not proceed to trial in the Chancery Division and was eventually transferred to the Law Division. Trial commenced on September 22, 2009.

Prior to trial, plaintiffs dismissed their affirmative claims but reserved the right to present them as setoffs. Ellman proceeded pro se on the breach of contract claim and the abuse of process and malicious abuse of legal process claims. The latter claims were based on Ellman's contention that UCI had filed the action for injunctive relief to avoid paying its debts. NAC proceeded on the remaining claims.

During Ellman's presentation of proofs, the trial court ruled that the invoices on which Ellman based his contract claim would be "accepted into evidence" subject to Ellman establishing that he was entitled to invoice UCI for UCI's debt to NAC. The court also advised Ellman that he had established a prima facie case. The court's determinations were based on the following facts. Ellman's first witness, Kathy Lopez, maintained billing

and accounting records for NAC and Ellman, and handled UCI's account. Lopez identified eight invoices for services provided by NAC to UCI that she had sent to Silvergate, UCI's contact person. She also identified a summary statement reflecting an outstanding principal balance of \$88,645, and a total balance of \$219,930.04, which included accumulated interest. According to Lopez, the invoices and statement were records "kept in the normal course of business." They reflected services provided to UCI by NAC through Ellman, and they were sent in Ellman's name because he had purchased the debt from NAC. Lopez frequently telephoned UCI about the invoice balances, and no one at UCI ever disputed the debt reflected by the invoices.

The invoices themselves were labeled "DUPLICATE INVOICE." Each invoice included the legend, "Kenneth Ellman - Owner of Network Access Agreement And Owner Of Security Agreement." The invoices included the dates on which services were rendered and identified the service provided, such as "Power," "Collocation Real Estate" and "Internet Bandwidth," as well as the amount charged for each service. When Ellman attempted to move the invoices and statement into evidence, plaintiffs objected because there was "no testimony that Mr. Ellman is entitled to invoice [UCI] for anything." The court ruled that "subject to

that foundation," the invoices and statement would be "accepted into evidence."

Ellman next called Blake Ellman, president and one of the founders of NAC. The witness reviewed the eight invoices and statement that had been conditionally admitted into evidence, and explained the services provided by NAC to UCI as reflected by the invoices. He also authenticated the Agreement and the security agreement.

The next witness, NAC chief operating officer Alexander Rubenstein, testified that the Agreement, security agreement, and all of UCI's debts were sold to Ellman. Rubenstein also testified that Ellman endorsed a check to NAC for \$90,000 to effectuate the sale of the UCI debt to him. During Ellman's examination of Rubenstein about the points of the security agreement, the court interrupted. The court explained to Ellman that he was attempting to anticipate plaintiffs' setoff proofs before plaintiffs presented them. The court stated: "[Y]ou proved your prima facie case. Again and again I've said it, it's an action on a book account. You've proved the invoices, services delivered, and nonpayment. That's the case." After explaining that Ellman would have the opportunity to rebut plaintiffs' setoff proofs, the court repeated: "And so, your prima facie case is in now three times. Three times it's in.

So why don't we go to the setoff proofs? The prima facie case on your book account claim is in three times." When Ellman responded that "[i]t's a question of how to introduce these proofs," the court reiterated: "You've introduced them three times."

After calling three other witnesses, including Silverplate, defendants rested their case. Plaintiffs moved under Rule 4:37-2(b) to dismiss the counterclaims.² The court granted the motion.

The court dismissed Ellman's breach of contract claim, noting conflicting testimony from witnesses about the dates of the invoices, and stating that the invoices had not been admitted into evidence, but only marked for identification. Consequently, the court determined that the jury would be left to speculate about the sums due, the dates of the invoices, and how they relate to the alleged sale to Ellman.

The court also dismissed without prejudice Ellman's abuse of process claim, determining that despite its label, it was pled as malicious use of process. After providing a comprehensive analysis of both causes of action, the court

² The order on judgment states the motion was made under Rule 4:40-1. The discrepancy is not material to this appeal. The standard of review is the same for both rules. See Verdicchio v. Ricca, 179 N.J. 1, 30 (2004).

concluded that it was "not appropriate to institute a suit or file a counterclaim [for malicious use of process] until the litigation has terminated in favor of the party who asserts the . . . action." The court also concluded Ellman had not established any basis for an award of damages.

Ellman argues that it was error for the court to dismiss the case under Rule 4:37-2(b) after he rested. He maintains that the trial court admitted his invoices into evidence, and curtailed his examination of witnesses by repeatedly telling him that he had established a prima facie case. Plaintiffs respond that the invoices were not admitted into evidence and therefore the trial court correctly concluded that Ellman had not established a prima facie case.

A court may grant a defendant's motion "for dismissal of the action . . . on the ground that upon the facts and upon the law the plaintiff has shown no right to relief." R. 4:37-2(b). Such motions shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor. Ibid. The "rule requires denial of the defendant's motion for involuntary dismissal at the close of plaintiff's case, . . . if the plaintiff has shown a prima facie case, i.e., any evidence including all favorable inferences to be drawn therefrom which can sustain a judgment in plaintiff's

favor." Pressler & Verniero, Current N.J. Court Rules, comment 2.1 on R. 4:37-2(b) (2011).

Here, during Ellman's direct examination of a witness, the trial court curtailed the examination and suggested that the parties proceed with plaintiffs' setoff claims because Ellman had established a prima facie case. The court had previously admitted defendants' invoices into evidence subject to Ellman laying a proper foundation. The court's conditional admission of the documents into evidence, coupled with its repeatedly telling Ellman that he had established a prima facie case and that the parties should move on to the presentation of plaintiffs' setoff proofs, likely caused Ellman to believe that the invoices had been admitted into evidence and that he had submitted sufficient proofs to establish his "book account" claim.

Had the invoices been admitted into evidence, Ellman's proofs would likely have been sufficient to establish a prima facie case, either of breach of contract or a "book account." The gravamen of Ellman's cause of action was UCI's alleged debt to NAC for services rendered, which remained due and owing at the time NAC sold the debt to him. Nonetheless, we need not reach that issue. We conclude that the statements of the trial court likely caused Ellman to terminate his proofs and believe,

as the trial court stated, that he had established a prima facie case. The subsequent ruling at the close of Ellman's proofs, that he had not established a prima facie case, was inconsistent with the court's previous statements.

Ellman also claims the trial court curtailed his right to present various tort claims, including his claim for abuse of process. That argument does not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION