FOR PUBLICATION

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

KEITH WAIBEL, as Trustee for the Junior Larry Hillbroom Trust; MARCIANO IMEONG, and NAOKO IMEONG, Plaintiffs, vs. MYRON A. FARBER; JOHN FRANCIS PERKIN; BRUCE JORGENSEN; and THE ST. PAUL FIRE & MARINE INSURANCE COMPANY, Defendants. JOHN FRANCIS PERKIN, Third-Party Plaintiff1 Counterclaim Defendant, vs. DAVID J. LUJAN, Third-Party Defendant/ Counterclaim Plaintiff.	CIVIL ACTION NO. 01-0236D ORDER GRANTING COUNTERCLAIM DEFENDANT JOHN FRANCIS PERKIN'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION / PROCEDURAL HISTORY

This matter came before the Court for a hearing on March 15, 2004, at 9:00 a.m., in courtroom 220A, to consider Counterclaim Defendant John Francis Perkin's MOTION FOR SUMMARY JUDGMENT (hereinafter "MSJ"). Counterclaim Plaintiff David J. Lujan ("Lujan") was

represented by counsel Edward Arriola, Esq., Pedro M. Atalig, Esq., Stephanie Flores, Esq., and Joseph Camacho, Esq. Counterclaim Defendant John Francis Perkin ("Perkin") was represented by Vicente T. Salas, Esq.

The original Plaintiffs' action against the original Defendants in this matter was removed to the NMI Federal District Court on December 13, 2002. By an order of the Federal District Court dated January 10, 2003, the Plaintiffs' claims were dismissed with prejudice. That order was lodged with the CNMI Superior Court on September 4,2003. Lujan's "fourth-party" action against Perkin and St. Paul Fire & Marine Insurance Co. (Perkin's insurer) was remanded back to the CNMI Superior Court by the Federal Court's Order of February 24, 2003. Lujan's complaint against Perkin's insurer, the St. Paul Fire & Marine Insurance Co., was dismissed by this Court on statute of limitations grounds. *See* ORDER GRANTING FOURTH-PARTY DEFENDANT ST. PAUL'S MOTION TO DISMISS DAVID J. LUJAN'S THIRD PARTY ("FOURTH PARTY") COMPLAINT PURSUANT TO COM. R. CIV. P. RULE 12(B)(6) (December 1,2003). The Court then granted Perkin's voluntary motion for dismissal of his third-party complaint against Lujan. *See* ORDER GRANTING PERKIN'S MOTION TO DISMISS PERKIN'S THIRD-PARTY COMPLAINT AGAINST THIRD-PARTY DEFENDANT DAVID J. LUJAN (December 2,2003). The only action remaining in this case is Lujan's Counterclaim against Perkin, for "malicious prosecution" (more accurately titled "Wrongful Civil Proceedings." or "Wrongful Use of Civil Proceedings").

Lujan's counterclaim against Perkin was filed on August 28,2003. *See* THIRD-PARTY DEFENDANT DAVID J. LUJAN'S SECOND AMENDED ANSWER AND COUNTERCLAIM. In his counterclaim, Lujan alleged that Perkin, acting in his capacity as the *attorney* for Myron A. Farber, *wrongfully instituted a civil action aguinst Lujan* in the Federal District Court on April 5, 2000 (NMI District Ct. Civ. Action No. 00-0014) (hereinafter "the Federal Action"). In that action, Farber alleged that Lujan had failed to pay him a $600,000.00 "bonus fee" for services

rendered by Farber in helping Lujan to prove and settle the claims of pretermitted heir Junior Larry Hillbroom. Lujan's client, as to the Estate of Larry L. Hillblom, Junior's putative biological father. Perkin and co-counsel Bruce Jorgensen, Esq., filed on behalf of Farber a Petition for a Temporary Restraining Order as well as a Complaint against Lujan and the original Plaintiffs in this case. *See* PERKIN'S AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, Ex. F. Farber sought recovery from Lujan under the theories of breach of contract, breach of warranties, quantum meruit, and for Preliminary Injunction to Enjoin Fraudulent Transfers. *Id.* In his counterclaim, Lujan stated that

> Perkin acted without probable cause in bringing said action against Lujan in that Perkin did not honestly and reasonably believe that there existed legal grounds for said action and further, that Perkin had no facts or evidence to establish any breach of contract, breach of warranties, quantum meruit, fraudulent conveyance, or breach of express or implied warranties of authority on the part of Lujan and the Plaintiffs or any one of them.

See THIRD-PARTY DEFENDANT DAVID J. LUJAN'S SECOND AMENDED ANSWER AND COUNTERCLAIM at 8. In Lujan's prayer for relief, he sought compensatory damages from Perkin, excluding attorney's fees or costs.[1] Lujan also sought punitive damages. *Id.* at 9.

The Court, having reviewed the pleadings and having considered the arguments of counsel, now GRANTS the MOTION FOR SUMMARY JUDGMENT, for the reasons that follow.

II. ISSUES

a. Whether genuine issues of material fact remain as to whether Lujan can prove by a preponderance of the evidence that Perkin lacked probable cause in initiating and pursuing Farber's claims in the Federal Action.

b. Whether genuine issues of material fact remain such that a reasonable juror could determine by a preponderance of the evidence that Perkin acted primarily for a purpose other than to secure the proper adjudication of Farber's claims in the Federal Action.

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[1] This is consistent with the order dismissing the Federal action, which provided that each party would bear their respective attorney's fees and costs as to the dismissed claims. *See* Ex. I to MSJ.

III. ANALYSIS

A. Summary Judgment Standard & Burden of Proof.

A party moving for summary judgment bears the "initial and ultimate burden" of establishing its entitlement to summary judgment: that is, showing that no genuine issue of material fact exists, and that he or she is entitled to judgment as a matter of law. Com. R. Civ. P. 56(c); *see* also *Santos v. Santos*, 4 NMI 206, 210 (1994) (internal citation omitted). Where (as in this case) the movant for summary judgment is a defendant, he or she must show that undisputed facts establish every element of an asserted defense. Id. If, after viewing the facts in the light most favorable to the non-moving party, the Court finds as a matter of law that the moving party is entitled to relief, the Court will enter summary judgment for the moving party. Cabrera v. Heirs *of DeCastro*, 1 NMI 172, 176 (1990). "Summary judgment is proscribed where a reasonable inference can be deduced under which the nonmoving party could recover." In re Estate of Roberto, 2002 MP 23, ¶ 16, *citing* Custro *v.* Hotel Nikko *Saipan, Inc.*, 4 NMI 268, 272 (1995).

In an action for Wrongful Civil Proceedings, the Plaintiff must ultimately prove by a preponderance of the evidence that, *inter alia,* the Defendant did not have probable cause for his action; that the Defendant's primary purpose was something other than the proper adjudication of the claims; and that the proceedings terminated in the Plaintiffs favor. Restatement (Second) of Torts, § 681A (1977). Perkin has argued that Lujan cannot satisfy two of these requirements: namely, that Perkin lacked probable cause, or that Perkin's primary purpose was something other than the proper adjudication of Farber's claims. Perkin bears the initial burden of demonstrating that there is no genuine issue of material fact that Lujan cannot meet his burden as to these two requirements. Once Perkin meets that initial burden, the burden shifts to Lujan to point out to

the Court some genuine issue of material fact that exists as to each of the two requirements, to show that Lujan could feasibly meet his burden of proof were the case to proceed to trial.

In actions for Wrongful Civil Proceedings, the ultimate determination of whether the Defendant lacked probable cause for pursuing the litigation rests with the judge, rather than the jury. See Restatement (Second) of Torts, § 681B(1)(c). "[S]ubject to the control of the court," the jury may also determine "the circumstances under which the proceedings were initiated in so far as may be necessary to enable the court to determine whether the defendant had probable cause for initiating them." *Id.* at (2)(a) (emphasis added). At trial, it is the function of the jury to decide whether the Defendant was acting primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based. *Id*, at 2(b). If, however, the Court finds that no reasonable juror could determine by a preponderance of the evidence that the Defendant acted primarily for such an improper purpose, summary judgment may be awarded on this basis. See *Anderson* **v.** Liberty Lobby, *Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986) (the Supreme Court held that, in ruling upon a motion for summary judgment or for a directed verdict, "[t]he judge's inquiry . . . unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict – 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed'") (quoting *Improvement* Co. v. *Munson*, 81 U.S. 442, 448 20 L.Ed. 867, 872 (1871)).

B. <u>Evidence shows Perkin had probable cause in pursuing the Federal Action on behalf of F'arber.</u>

In the absence of existing written or customary local law to the contrary, the American Law Institute's Restatements of the Law have binding effect in the CNMI by virtue of 7 CMC § 3401. There being no existing written or customary law on the tort of

Wrongful Civil Proceedings, the Court turns to the Restatements. In a claim for Wrongful Use of Civil Proceedings, Section 674 of the Restatements provides when defendant is subject to liability. In general. Section 674 provides as follows:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if
>
> (a) he acts without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and
>
> (b) except when they are ex **parte**, the proceedings have terminated in favor of the person against whom they are brought.

Restatement (Second) of Torts at § 674 *et seq.* (hereinafter "Restatement"). The Restatement defines when probable cause exists. Section 675 of the Restatement reads:

> One who takes an active part in the initiation, continuation or procurement of civil proceedings against another ***has probable cause*** for doing so *if* he reasonably believes in the existence of the facts upon which the claim is based, and either
>
> (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or
> (b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

(Emphasis added). As Perkin has noted, comment "d" to § 674 of the Restatement also provides that:

> *An attorney* who initiates a civil proceeding on behalf of his client or one who takes any steps in the proceeding is not liable if he has probable cause for his action (see § 675); and even if he has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding. his client in obtaining a proper adiudication of his **claim**. (See § 676). An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of the chances.

(Emphasis added). The Court interprets comment "d" to mean that a plaintiff must succeed as to *all three* elements of Section 674 in order to prevail in his cause of action, and this applies equally to actions for "wrongful civil proceedings" actions brought against *attorneys,* Perkin has also referenced the case of *Wong v. Tabor,* 422 NE2d 1279 (1981), apparently to support the suggestion that a heightened standard of "probable cause" should apply in cases where an attorney is sued for Wrongful Civil Proceedings for his role in representing a client. *Wong* is an appellate decision from Indiana that principally supports the ideas that "mere negligence in asserting a claim is not sufficient to subject an attorney to liability for the bringing of suit," and that "while the Restatement defines probable cause, it is not dispositive with regard to an attorney's liability for wrongful use of civil proceedings." *Id.* at 1286, 1287. Here again, the *Wong* decision merely restates what Section 674 already provides. Wong does not specifically state that a heightened standard of "probable cause" should apply to lawyers, but emphasizes instead the "improper purpose" portion of Section 674

Having resolved that Sections 674 and 675 of the Restatement apply to this Court's determination of probable cause, the Court finds that no genuine issue of material fact remains to support Lujan's contention (1) that Perkin did not reasonably believe in the existence sf the facts upon which Farber's claim was based, and (2) that Perkin did not reasonably believe that under those facts the claim was valid under the applicable law. Accordingly, the Court finds that no genuine issue of material fact remains to support Lujan's claim that Perkin lacked probable cause in pursuing Farber's case in the Federal District Court, and the Court finds that Perkin is entitled to judgment as a matter of law. This decision is supported by overwhelming evidence in Perkin's favor, and is reinforced by a general lack of factual support for Lujan's claim of an absence of probable cause and unreasonable belief. Among all of the facts submitted by the parties, the Court finds the following most compelling:

(1) At the start of the action in Federal Court, Chief Judge Alex R. Munson *granted* Farber's motion for a *temporary restraining order,* which required the **Hillblom Estate** to retain $600,000.00 (i.e., required that the Estate *not distribute* that money to Junior Larry Hillbroom's Trust) pending the resolution of Farber's action against Lujan;

(2) The Federal Court later ordered that $400,000.00 of the requested $600,000.00 *be paid to Farber* on the date of final distribution in the Hillblom case:

(3) When Lujan moved for summary judgment as to Farber's claims regarding the remaining $200,000. the Federal Court granted the motion as to Lujan's claims for anticipatory repudiation. because Farber had abandoned this argument. *However, the Federal Court denied the motion us to the remaining "actual" breach of contract claim,* stating that the parties presented *"two plausible interpretations of the contract."* (Emphasis added). The Federal Court also stated that Plaintiff provided testimony and a "reasonable interpretation" that the earlier payment of $200,000 was paid for labor and expenses not covered by the contract. The Federal Court described Farber's interpretation of the parties' contract as "a literal reading of the contract, which required Lujan to pay Farber $600,000 at the time of the 'final distribution' from Hillblom's Estate."

(4) When Perkin's claim as to the remaining $200,000.00 was finally dismissed, it was by Farber's own motion, rather than a judgment in Lujan's favor.

In order for Perkin to succeed in obtaining a temporary restraining order in the Federal Action, the Federal Court first had to determine that "it *clearly appear[ed]* from specific facts shown by affidavit or by the verified coinplaint that *immediate and irreparable injury,* loss, or damage [would] result to the applicant before the adverse party or that party's attorney [could] be heard in opposition." Fed. R. Civ. P. 65(b) (emphasis added). The Court based its decision on the Complaint, the two motions before it, and the attached exhibits, finding that it appeared that arrangements had been made on behalf of Junior Larry Hillbroom whereby his share of the final distribution of the Hillblom Estate would be paid to a trust in the Cook Islands to shield it from creditors. Although Lujan has alleged in his counterclaim that Farber's allegation that the distribution to Hillblom was to be paid into a Cook Islands' trust *was wholly false,* the judge in the Federal Action believed it to be likely enough to warrant the issuance of a TRO. Lujan's argument on this point, among others, demonstrates only that genuine issues remained in dispute

in the underlying action. Those facts alone are insufficient to demonstrate a lack of probable cause on Perltin's part, which involves the more fundamental question of whether Perkin reasonably believed in the facts underlying the claims he pursued on Farber's behalf, and whether he reasonably believed that those claims were valid under the applicable laws.

The substance of the litigation in the Federal Action was that Farber believed he was owed $600.000.00, of which Lujan ultimately paid $400,000.00. In denying Lujan's Motion for Partial Summary Judgment as to the $200.000.00 remaining at issue, the Federal Court also had to determine that *genuine issues of material fact* remained in dispute as to *this amount.* See *generally* Fed. *R. Civ.* P. 56. Here again, Perkin was successful in the litigation.

Although Perkin's success in pursuing Farber's claims is not *dispositive* as to the question of probable cause, it is extremely persuasive.[2] If the claims in Federal Court were reasonable enough for that court (1) to grant the TRO, (2) to require Lujan to pay $400,000.00 to Farber, *and* (3) to deny Lujan's motion for summary judgment as to the remaining $200,000.00, it was certainly reasonable for *Perkin* to believe in the facts underlying those claims and the legal validity of those claims. Moreover, this Court concurs with the Federal Court's assessment of the facts presented to it: there was a contract between Lujan and Farber and based on a literal reading of its terms, Farber was owed $600,000.00 "*at the time of the 'final distribution.'*" At the same time, Lujan did present evidence to show that Farber may have already received a

[2] The Court notes, however. that in California and other jurisdictions, Perkin's success *would* be considered dispositive on the issue of probable cause. Just as a prior "guilty" verdict against a Malicious Prosecution-Plaintiff bars a Defendant's liability for having pursued that criminal prosecution (under the Restatement (Second) of Torts, § 657), the California courts and others have extended this concept to actions for *wrongful civil proceedings.* In particular. California appellate courts have adopted the standard that "a recovery by [a] plaintiff in the original action is regarded as conclusive evidence of the existence of probable cause . . . ." *Cowles v. Carter.* 115 Cal. App. 3d 350. 356 (Cal. App.. 1981). *citing* Prosser, Torts (4th ed. 1971), § 120, Wrongful Civil Proceedings, p.855. fn. 51: 1 Harper & James, Law of Torts (1956) p.330. This standard has been rxtended to include a plaintiff's success in seeking the denial of a defendant's summary judgment motion in the prior action (such as the denial of Lujan's Motion in the Federal Action), since a denial of summary judgment "provides similarly persuasive evidence that a suit does not totally lack merit." *Roberts v Sentry Life Insurance.* 76 Cal. App. 4th 375. 383 (Cal. App., 1999). Although this Court stops short of adopting such a broad standard. it *does* consider Perkin's prior successes as one factor in determining whether Perkin lacked probable cause.

partial payment. On the other hand, Farber declared that he regarded the prior $200,000.00 payment as an "additional periodic payment based in part on Lujan's receipt of the second half of the 'leveler,'" and he also maintains that Lujan said nothing about the $200,000.00 payment constituting an advance on Farber's final bonus.

In this case. no facts have been submitted that would tend to demonstrate that Farber did not believe the $200.000 payment was an advance of Farber's final bonus, much less that *Perkin* did not. In support of his argument that Farber and Perkin did believe the $200,000 payment was an advance, Lujan submitted a copy of an April 3, 2000, letter Perkin sent to Lujan, prior to filing the action, referenced "Counteroffer of Settlement and Compromise". Perkin's April 3rd letter, which was approved and signed by Farber, asks that Lujan agree and guarantee that he individually pay Farber the difference between any amount approved for payment by the Guam Guardianship Court and/or actually paid by the JLH Trust up to $385,000. After the Federal Action was concluded, $385,000 is the net amount Farber obtained from Lujan.[3] However, Perkin's April 3rd Counteroffer letter to Lujan predicated his compromise offer with an express statement denying any admissions to the terms Lujan proffered in Lujan's April 3rd letter to Perkin. In Lujan's April 3rd letter to Perkin, Lujan asserted that Farber had already received a $200,000 advance and presented new conditions as to how Farber would receive his payment that were not a part of the parties' September 29, 1998, written agreement. This Court does not find that Perkin's April 3rd letter evidences Perkin's knowledge that Farber did not have a valid claim to the disputed $200.000. It merely evidences a proposed compromise. Because the claims sought by Perkin on behalf of Farber were made pursuant to a reasonable contractual

[3] Farber paid $15,000 to Lujan as per a separate loan agreement not relevant to Farber's Federal Action.

interpretation which even a federal court found reasonable, this Court finds that Perkin had probable cause for pursuing those claims.

With regard to Farber's claim for anticipatory breach of contract, Lujan has argued that Lujan did not state anywhere in his April 3, 2000 letter to Perkin that Farber would *not* be paid. OPP'N at 6. As the Federal Court recognized, however, contractual "repudiation" need not consist of an outright refusal to perform. The Restatement (Second) of Contracts § 251 provides that, where "reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance . . . ." Section 251 goes on to say that, if the obligor fails to provide (within a reasonable time) such assurance of due performance "as is adequate in the circumstances of the particular case," the obligee may treat such failure as a repudiation of the contract. Perkin requested an assurance of performance within a stated period of time, but in reply, Lujan did not provide any particular assurance, but actually suggested that the payment to Farber would be conditioned on "Guardian Court approval" and other "steps to be taken to honor the agreement to pay Mr. Farber's bonus." These conditions were not contained in the original agreement itself. Additionally, Lujan characterized the $200,000.00 payment as an "*advance*" on Farber's bonus, which was contrary to Perkin's legitimate interpretation of the payment under the terms of the contract. Furthermore, the final distribution of the Hillblom Estate was scheduled for April 6,2000 Saipan time. In short, Farber was within his rights to sue for anticipatory breach.

Lujan has also contended that "[w]hether Mr. Perkin honestly and reasonably believed that there were any grounds to initiate a lawsuit is a question of fact that is material in nature and the dispute in this regard is genuine." OPP'N at 5. Lujan's basis for this statement is that, although Perkin in his declaration stated that he decided to proceed with the lawsuit on the basis

of an affidavit he received from Myron Farber, it is *possible* that Perkin did not receive the information contained in Farber's affidavit prior to the initiation of the lawsuit in Federal Court. Lujan's suspicion is founded on the fact that the date designated above the notary public's signature at the end of the affidavit is incomplete (no year is stated), and the affidavit attached to the Motion contains the caption of the Federal Action with a case number, something that Farber's affidavit would not have contained at the time Perkin allegedly received it. The Court finds that this argument does not suffice to demonstrate the existence of a *genuine issue* for *trial,* and the inferences Lujan asks the Court to draw are unreasonable. *See* Com. R. Civ. P. 56(e) ("the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial"); *see also Cabrera v. Heirs of DeCastro, supra.* While it *is* a fact that the date ascribed to Farber's affidavit is incomplete, and that the Affidavit submitted contains the caption of the Federal action, in order to draw the conclusion that Lujan suggests, the Court would also have to draw certain absurd inferences. In order to file Farber's Affidavit at the same time that the Complaint was filed on April 5,2000, Perkin *must* have had that affidavit prior to filing the complaint. Furthermore, if Perkin had no knowledge of the facts underlying the lawsuit, the Complaint itself would not have contained the detail factual allegations at all. However, this was not the case. For the foregoing reasons, the Court finds that Perkin did not lack probable cause in pursuing Farber's claims in the Federal District Court, and the Court finds that summary judgment is warranted on this ground.

C. Luian cannot prove that Perkin acted primarily for a purpose other than to secure the proper adjudication of Farber's claims.

"To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." Restatement (Second) of Torts, § 676. In

his Opposition to Perkin's motion, Lujan cites to Section 676 of the Restatement (Second) of Torts, and particularly comment "c" thereto, to support his argument that a jury could find that Perkin was acting (1) either with hostility or ill will (malice); and/or (2) to deprive Lujan of the beneficial use of his property; and/or (3) to force a settlement that had no relation to his claim.

The example given in comment "c" to Section 676 of the Restatement regarding "malice" involves a situation where the purpose of the civil proceeding is solely to harass a Defendant. That example is clearly not applicable to the facts of this case. As stated above, Farber's claims in the Federal Action were meritorious. Thus, the Court finds that Perkin was not acting primarily out of hostility or ill will in pursuing Farber's claims.

As to the example of "deprivation of the beneficial use of property" described in comment "c" to Section 676, it concerns proceedings in which a plaintiff attacks a defendant's title to *land*, where the litigation is pursued *not* for the purpose of adjudicating the title, but to prevent the owner from selling his land. Again, this example is not analogous to the facts of this case. Lujan argues that the facts are analogous, because he was deprived of $400,000.00 of his *own money*, when he was ordered to pay that amount into the Federal Court. It is Lujan's contention that he was not personally liable for that amount, because the September 29, 1998 Agreement he signed did not bind him individually, but rather, in a representative capacity, on behalf of Junior Larry Hillbroom. Even assuming for the sake of argument that Lujan was not personally liable, and that this litigation did serve to personally deprive him of his property, none of the facts submitted to the Court support the contention that this was *Perkin's primary* purpose in pursuing Farber's claims. First, the TRO which Perkin sought and obtained from the Federal Court was directed at the Estate of Larry Lee Hillblom, not Lujan's personal assets or his law office's assets. Second, at the motion for preliminary injunction hearing in the Federal Action. Lujan agreed to pay $400,000 to the Federal Court. which would then release the funds to Farber

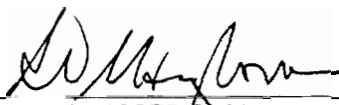
when the final distribution of the Hilblom Estate took place. In exchange, Farber agreed that the TRO could be extinguished, and that the preliminary injunction be denied. The only remaining issue in the case was the $200,000 difference. As to this amount, Farber prevailed against Lujan's motion for summary judgment. Thereafter, Farber voluntarily dismissed the case. Although Lujan ultimately paid the $400.000 from his personal funds, the foregoing facts support a finding that Perkin did not act primarily to deprive Lujan of the beneficial use of his personal property.

Finally, the fact that the proceedings in the Federal Court resulted in an award of $400,000 in Farber's favor demonstrates that those proceedings were not entered into merely to force a settlement that had no relation to the merits of his claims. It is apparent that no settlement was made, and Lujan has not alleged any facts from which a reasonable juror could determine that Perkin *intended* to obtain a settlement that was unrelated to Farber's claims, much less that this was his primary purpose. In summary, Lujan has failed to point out to the Court any facts by which a reasonable juror could find by a preponderance of the evidence that Perkin acted primarily for a purpose other than securing the proper adjudication of Farber's claims, and summary judgment is also warranted on this individual basis.

IV. CONCLUSION

For the foregoing reasons, Counterclaim Defendant John Francis Perkin's MOTION FOR SUMMARY JUDGMENT is hereby GRANTED. Consequently, the pending Motions in Limine have been rendered moot. The scheduled depositions, hearings, and trial date, are hereby vacated. Each party shall bear their own attorney's fees and costs.

SO ORDERED this 15th day of April. 2004.



RAMONA V. MANGLONA, Associate Judge