

recorded telephone conversations between them and their mother in violation of 18 U.S.C.A. § 2511 (West 2000). They seek compensatory and punitive damages.¹

In response, Hurd filed a counterclaim in which he asserted that the plaintiffs had filed the present action and also sought criminal prosecutions of him by state and federal prosecutors in bad faith and with the ulterior motive of coercing him to deed certain land to them and paying them money.² The plaintiffs have moved to dismiss and for summary judgment in their favor as to this counterclaim. The motions have been argued and submitted for decision.

II

I agree with the plaintiffs that the counterclaim, as presently formulated, does not set forth a cause of action cognizable under Virginia law. As to the claim that the suit by the plaintiffs here was filed in bad faith and with an ulterior motive, it is settled in Virginia that to be actionable, the malicious prosecution of a civil action must involve the arrest of the person, seizure of his property, or other special injury. *See Ayyildiz*

¹ Subject matter jurisdiction is based on the presence of a federal question. *See* 28 U.S.C.A. § 1331 (West 1993).

² The court's subject matter jurisdiction over the counterclaim exists pursuant to its supplemental jurisdiction. *See* 28 U.S.C.A § 1367(a) (West 1993).

v. *Kidd*, 266 S.E.2d 108, 111 (Va. 1980). No such claim is made here by the counterclaimant.

A related but different cause of action is abuse of process. “The distinctive nature of malicious abuse of process lies in the perversion of regularly-issued process to accomplish some ulterior purpose for which the procedure was not intended.” *Donohoe Constr. Co. v. Mount Vernon Assocs.*, 369 S.E.2d 857, 862 (Va. 1988). The counterclaimant has not identified any process that has been abused in the present case. “A legitimate use of process to its authorized conclusion, even when carried out with bad intention, is not a malicious abuse of that process.” *Id.*

Finally, the defendant has referred in his counterclaim to attempted criminal prosecutions of him by the plaintiffs. A cause of action for malicious prosecution of a criminal action does not require the same proof of special injury as a claim involving a civil action, *see Ayyildiz*, 266 S.E.2d at 111, but does require a prosecution that terminates in a manner not unfavorable to the accused, *see id.* at 110. No such allegations are made in this case.

The defendant relies on *Boggs v. Duncan*, 121 S.E.2d 359 (Va. 1961), to support his cause of action. There the defendant in a contract action counterclaimed for breach of the contract and also asserted a claim for damages resulting from the “unlawful institution” of the initial suit against him. *See id.* at 360. A jury found in favor of the

defendant but the Virginia Supreme Court reversed on the ground that the defendant was awarded damages for injury to his reputation arising out of the institution of the suit. The court held that there could be no recovery for injury resulting from the issuance of civil process where the person procuring its issuance acted in good faith. *See id.* at 364. From this holding the defendant infers that all he need allege and prove is that the plaintiffs filed the present suit not in good faith. However, *Boggs* does not purport to be an authoritative delineation of the elements of the torts of malicious prosecution and abuse of process, as are the later Virginia cases cited above.

Because the defendant has not pleaded a valid cause of action, I will grant the motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The defendant has requested leave to file an amended counterclaim. Leave to amend normally ought to be granted at least once whenever a 12(b)(6) motion is sustained. *See Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991).

The plaintiffs have also moved for summary judgment as to the counterclaim pursuant to Federal Rule of Civil Procedure 56. Since I will grant leave to amend the counterclaim, and since it is represented that discovery depositions in the case have been taken but the transcripts of those depositions have not yet been transcribed, I will deny the motion for summary judgment without prejudice to it being resubmitted at a later date.

III

Accordingly, for the reasons stated, it is **ORDERED** as follows:

1. The motion to dismiss (Doc. No. 4) as to the counterclaim is granted;
2. The defendant is granted leave to file an amended counterclaim, provided that it is filed no later than ten (10) days following the date of entry of this order; and
3. The motion for summary judgment (Doc. No. 10) as to the counterclaim is denied without prejudice.

ENTER: August 10, 2001

United States District Judge