

CHESTER COUNTY COURT OF COMMON PLEAS
CIVIL COVER SHEET

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OFFICE OF THE
PROTHONOTARY
CHESTER CO. PA.

1. CASE CAPTION: IA. CASE NO.:

NACHI v. PHIC

2. PLAINTIFF(s): (Name, address)

National Association of Certified Home Inspectors
1750 30th Street
Boulder, CO 80301

3. PLAINTIFF'S or (circle one)

DEFENDANT'S COUNSEL: (FILING ATTORNEY)

(Name, firm, address, telephone and attorney ID#)

Joseph A. Ferry, Esquire Atty I. D.: 46774
Two Penn Center Plaza
Suite 200
Philadelphia, PA 19102
215-854-6444

4. DEFENDANT(s): (Name, address)

PHIC
187 Marlboro Road
Yardley, PA 19607

5. ARE THERE, ANY RELATED CASES?

(see C.C.R.C.P. 200B)

Yes No

IF YES, SHOW CASE NOS. AND CAPTIONS:

(SEE PAGE 2)

6. IF THIS IS AN APPEAL FROM A DISTRICT JUSTICE JUDGMENT, WAS APPELLANT PLAINTIFF OR DEFENDANT IN THE ORIGINAL ACTION?

7. CASE CODE: 20 DESCRIPTION: (see reverse side) Dragonetti, Abuse of Process

8. IS THIS AN ARBITRATION CASE? Yes No JURY TRIAL DEMANDED

(Arbitration Limit is \$50,000. See C.C.R.C.P. 1301.1)

ARBITRATION CASES ONLY

An Arbitration hearing in this matter is scheduled for _____ at _____ in the Jury Lounge, Chester County Court House, West Chester, PA. The parties and their counsel are directed to report to the Juror's Lounge for an arbitration hearing in this matter on the date and time set forth above.

This matter will be heard by a Board of Arbitrators at the time, date and place specified but, if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial *de novo* on appeal from a decision entered by a judge.

NOTICE OF TRIAL LISTING DATE

Pursuant to C.C.R.C.P. 249.3, if this case is not subject to compulsory arbitration it will be presumed ready for trial twelve (12) months from the date of the initiation of the suit and will be placed on the trial list one (1) year from the date the suit was filed unless otherwise ordered by the Court.

To obtain relief from automatic trial listing a party must proceed pursuant to C.C.R.C.P. 249.3(b), request an administrative conference and obtain a court order deferring the placement of the case on the trial list until a later date.

FILE WITH: Prothonotary of Chester County, 2 North High Street, Suite 130, P.O. Box 2748, West Chester, PA 19380-0991

THIS COVER SHEET IS REQUIRED BY C.C.R.P. 1018.1 N AND MUST BE SERVED UPON ALL OTHER PARTIES TO THE ACTION IMMEDIATELY AFTER FILING. SUBMIT ENOUGH COPIES FOR SERVICE

SEE REVERSE SIDE FOR CASE CODES AND DESCRIPTIONS (DETACH PRIOR TO FILING OUT)

PROTHONOTARY FORM #148.2 REV. 9/2004



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Philadelphia, PA 19102
(215) 854-6444

Attorney for Plaintiff

NACHI
1750 Thirtieth Street
Boulder, CO 80301

COURT OF COMMON PLEAS
OF CHESTER COUNTY

v.

PHIC
187 Marlboro Road
Yardley, PA 19607

and

JOE KELLY
156 Chapel Drive
Virginville, PA 19564

and

PHILLIP D. BERGER, ESQUIRE
450 North Narberth Avenue
Narberth, PA 19072

and

LUNDY, FLITTER, BELDECOS &
BERGER, P. C.
450 North Narberth Avenue
Narberth, PA 19072

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CIVIL ACTION COMPLAINT

**CIVIL ACTION COMPLAINT
WRONGFUL USE CIVIL PROCEEDINGS-ABUSE OF PROCESS**

Plaintiff, National Association of Certified Home Inspectors ("NACHI"), by and through its undersigned attorney, Joseph A. Ferry, Esquire, brings this action seeking monetary damages against defendants and in support of its claims alleges as follows:

I. PARTIES

1. Plaintiff, NACHI is a non-profit corporation, organized under the laws of the State of Colorado, with a principal place of business at the captioned address.

2. Defendant, PHIC, is a non-entity that purports to be a 'coalition' that has a mailing address at the captioned address. At all times relevant and material hereto, defendant PHIC was acting both individually and on behalf of its listed directors and officers who expressly and implicitly approved of the actions that form the basis of this action. At all times relevant and material hereto, defendant PHIC was acting by and through both its individual legal counsel and his law firm.

3 Defendant, Joe Kelly, is an adult individual, a founder of PHIC and Secretary of PHIC, who resides at the above captioned address. At all times material hereto, defendant was an officer of PHIC and at all times material hereto was acting both individually and/or as agent for PHIC.

4. Defendant, Phillip D. Berger, Esquire, is an adult individual and attorney licensed to practice law in the Commonwealth of Pennsylvania who maintains a principle place of business at the above captioned address. At all times material hereto, defendant was an employee, or partner in Lundy, Flitter, Beldecos & Berger, P. C., and at all times material hereto was acting both individually and/or as agent for Lundy, Flitter, Beldecos & Berger, P. C.

5. Defendant, Lundy, Flitter, Beldecos & Berger, P. C. is a professional corporation offering legal services, organized and existing under the laws of the Commonwealth of Pennsylvania which maintains a principle place of business at the above captioned address. At all times material hereto, defendant, Lundy, Flitter, Beldecos & Berger, P. C. was acting individually and/or by or through its agent, employee and/or shareholder, Phillip D. Berger, Esquire, acting in the course or his agency or employment.

II. THE PHIC/KELLY LITIGATION

F/K/A

PHIC and KELLY v. NACHI, C. C. P., Chester County, No.: 03-7803

6. This civil action arises from damages sustained by plaintiff as a result of the "PHIC/Kelly Litigation" more fully described below herein which civil action was commenced against plaintiff on September 29, 2003 and which litigation was instituted and commenced by defendants, Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C., acting individually, jointly and/or severally in the representation of the PHIC/Kelly plaintiffs.

7. In this litigation, the PHIC/Kelly plaintiffs sought a declaratory judgment that NACHI was not 'compliant' with the Home Inspection Law, 68 Pa. C. S. §7501 *et seq.* At all times relevant and material hereto, defendants knew that neither PHIC nor Kelly had any standing to seek such a declaration.

8. After filing their frivolous declaratory judgment action, the PHIC/Kelly plaintiffs and their attorneys were unable to effect service upon NACHI and had to reissue the Complaint several times.

9. On March 15, 2004 , the PHIC/Kelly plaintiffs and their attorneys, Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. served James J. Munnis, Esquire, an attorney who had once represented NACHI, with the frivolous complaint, claimed that Mr. Munnis was authorized to accept service on behalf of NACHI over Mr. Munnis's assertions to the contrary and subsequently filed a false Certificate of Service with the Court of Common Pleas of Chester County.

10. On April 24, 2004, forty days after filing their false Certificate of Service, the PHIC/Kelly plaintiffs and their attorneys, Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. served a ten-day notice of their intention to take a default judgment to Mr. Munnis by mail.

11. Upon receiving the ten-day notice, Mr. Munnis wrote to Phillip D. Berger, Esquire and advised him that, since the service was improper, the ten-day notice was both inappropriate and ineffective.

12. Notwithstanding Mr. Munnis's advice that the service was improper, on May 4, 2004, the PHIC/Kelly plaintiffs and their attorneys, Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. filed a Praecipe to Enter a Default Judgment against NACHI.

13. Immediately upon being served with falsely obtained default judgment obtained by the PHIC/Kelly plaintiffs and their attorneys, Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C., Mr. Munnis filed a Petition to Strike the Judgment ("Petition To Strike").

14. The PHIC/Kelly plaintiffs and their attorneys, Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. subsequently filed a response to the Petition To Strike that continued to assert the false claim that NACHI had been properly served.

15. The Petition To Strike was granted on June 13, 2005 by Judge Gavin who ordered a trial date of July 25, 2005.

16. At that point the PHIC/Kelly plaintiffs and their attorneys, Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. knew that their scheme was foiled and they immediately dropped their lawsuit.

III. CAUSES OF ACTION AND DAMAGES

COUNT ONE

TITLE 42 Pa.C.S.A. § 8351-WRONGFUL USE OF CIVIL PROCEEDINGS

PLAINTIFF V. ALL DEFENDANTS

17. Plaintiff incorporates paragraphs 1-16 herein by reference, as though fully set forth at length herein.

18. Notwithstanding that all defendants knew that neither PHIC nor Kelly had any standing to assert the claims made in their lawsuit, that all defendants knew that there was never any proper service on NACHI, defendants nevertheless conspired to obtain a default judgment under false pretenses, steadfastly refused to remove the judgment and brazenly defended the false judgment that they knowingly obtained by filing a response to the Petition To Strike that contained false averments of fact.

19. The PHIC/Kelly defendants then published their falsely obtained judgment on the internet for the sole purpose of discrediting plaintiff NACHI and its members.

20. In addition to publishing the false judgment on the Internet, PHIC and Kelly notified Realtors throughout Pennsylvania to the effect that a court had declared that NACHI and its members were not compliant with the Pennsylvania Home Inspection law.

21. As a direct result of the defendants malicious conduct, NACHI members were systematically prevented from marketing their services to Realtors in Pennsylvania and their customers.

22. Defendants Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. knew or should have been that the underlying facts and allegations plead in their complaint on behalf of their clients, PHIC and Joe Kelly did not have standing to assert the claims presented by their complaint.

23. Defendants Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. knew or should have been that serving a complaint on an attorney does not constitute proper service and that, therefore, the default judgment that they assisted their clients PHIC and Joe Kelly in obtaining was fraudulent.

24. Defendants Phillip D. Berger, Esquire and Lundy, Flitter, Beldecos & Berger, P. C. knew or should have been that the PHIC/Kelly litigation had no merit and that, therefore, the default judgment that they assisted their clients PHIC and Joe Kelly in obtaining was fraudulent.

25. Defendants acting individually, jointly and/or severally, knew or should have known that when they commenced the civil action in the Court of Common Pleas of Chester County on or about September 29, 2003 that the claims asserted therein were not justiciable on behalf of the plaintiffs named therein.

26. Defendants acting individually, jointly and/or severally, knew or should have known that when they commenced the civil action in the Court of Common Pleas of Chester County on or about September 29, 2003 that the claims asserted therein against the named defendant were false.

27. Any negligent or intentional conduct, actions and/or omissions which give rise to liability of defendants Phillip D. Berger, Esquire and his law firm named herein, are imputed to their principals and defendants in this case, PHIC and Joe Kelly and therefore any liability for damages is vicariously imputed upon defendants PHIC and Joe Kelly.

28. Defendant attorney, his law firm and clients acting individually, jointly and/or severally, are liable to plaintiff for Wrongful Use of Civil Proceedings, also known as the Dragonetti Act having acted in a grossly negligent manner and/or without probable cause based upon the following elements:

- a. The defendants individually and/or jointly procured, initiated or continued the civil proceedings against plaintiff;
- b. The proceedings were terminated in favor of plaintiff;

- c. The defendants individually and/or jointly did not have probable cause for having included plaintiff as a party to the litigation;
- d. The primary purpose for which the proceedings were brought was not that of joinder of parties or adjudication of a claim on which the proceedings were based; and
- e. Plaintiff has suffered recoverable damages as set forth in § 8353.

29. Defendants acting individually and/or jointly, commenced litigation with malicious motive and lacking probable cause in an attempt to cause plaintiff NACHI and its members financial harm.

30. As a result of the aforesaid tortious conduct of defendants, plaintiff has suffered pecuniary losses to its great financial detriment as more elaborately set forth above herein.

WHEREFORE, plaintiff demands judgment against all defendants individually, jointly and/or severally in an amount in excess of Fifty Thousand (\$50,000.00) Dollars, plus cost of suit, interest, attorney's fees and any other relief available in law or equity and as Order by this Honorable Court may allow.

**COUNT TWO
COMMON LAW ABUSE OF PROCESS
PLAINTIFF V. ALL DEFENDANTS**

31. Plaintiff incorporates paragraphs 17 - 30 herein by reference, as though fully set forth at length herein.

32. The Restatement (Second) of Torts § 682 defines the tort of abuse of process as use of legal process against another "primarily to accomplish a purpose for which it is not designed". This cause of action is distinguished from wrongful use of civil proceedings in that the latter is a improper commencement of litigation while the common law abuse of civil process is concerned with a perversion of the litigation after it has been commenced.

33. At some time after commencement of the PHIC/Kelly litigation, defendant Phillip D. Berger, Esquire and his law firm Lundy, Flitter, Beldecos & Berger, P. C. knew or should have known that it was not proper to have attempted to effect service of process of the PHIC/Kelly lawsuit after being told repeatedly by Mr. Munnis that he was not authorized to accept service of process on behalf of NACHI.

34. Instead of heeding Mr. Munnis's instructions, defendant Phillip D. Berger, Esquire and his law firm Lundy, Flitter, Beldecos & Berger, P. C. filed a false Affidavit of Service.

35. After filing the false Affidavit of Service, defendant Phillip D. Berger, Esquire and his law firm Lundy, Flitter, Beldecos & Berger, P. C. issued a Ten Day Notice of their intention to take a default judgment.

36. Again Mr. Munnis advised defendant Phillip D. Berger, Esquire and his law firm Lundy, Flitter, Beldecos & Berger, P. C. that the service was improper and, therefore, the Ten Day Notice was void.

37. Despite knowing that the service was improper and that the Ten Day Notice was void, defendant Phillip D. Berger, Esquire and his law firm Lundy, Flitter, Beldecos & Berger, P. C. proceeded to file a Praecipe to Enter a Default Judgment which was granted by the Prothonotary of Chester County.

38. Mr. Munnis then filed a Motion To Strike The Judgment.

39. Despite knowing that the Default Judgment was improperly obtained, defendant Phillip D. Berger, Esquire and his law firm Lundy, Flitter, Beldecos & Berger, P. C. continued to perpetuate the fraud that they had committed by opposing the Motion To Strike The Judgment.

40. On June 13, 2005, Judge Gavin granted NACHI's Motion To Strike The Judgment.

41. As a result of the aforesaid tortious conduct of defendants, plaintiff has suffered pecuniary losses to its great financial detriment.

WHEREFORE, plaintiff demands judgment against all defendants individually, jointly and/or severally in an amount in excess of Fifty Thousand (\$50,000.00) Dollars, plus cost of suit, interest, attorney's fees and any other relief available in law or equity.

COUNT THREE

AWARD OF COUNSEL FEES PURSUANT TO 42 Pa. C.S.A. § 2503(7,9) PLAINTIFF V. ALL DEFENDANTS

42. Plaintiff incorporates paragraphs 31-41 herein by reference, as though fully set forth at length herein.

43. At some time after commencement of the PHIC/Kelly litigation, defendant Phillip D. Berger, Esquire and his law firm Lundy, Flitter, Beldecos & Berger, P. C. knew or should have known that it was not proper to have filed a fraudulent Affidavit of Service, not proper to have issued a Ten Day Notice of Default, not proper to have taken a Default Judgment to which the PHIC/Kelly plaintiffs were not entitled and not proper to have opposed NACHI's Motion To Strike The Judgment.

44. Pennsylvania law entitles a party to recovery of counsel fees incurred during pendency of litigation if the conduct of the adverse party in commencing the action was arbitrary, vexatious or in bad faith, or if the party's conduct during pendency of a matter is dilatory, obdurate or vexatious. As a result of the aforesaid tortious conduct of defendants PHIC and Joe Kelly, in instructing their legal counsel to file a false Affidavit of Service, to issue a Ten Day Notice of Default, to take a Default Judgment to which

they were not entitled and to oppose NACHI's Motion To Strike The Judgment, plaintiff has incurred attorney's fees for which he seeks recovery herein.

WHEREFORE, plaintiff demands judgment against all defendants individually, jointly and/or severally in an amount in excess of Fifty Thousand (\$50,000.00) Dollars, plus cost of suit, interest, attorney's fees and any other relief available in law or equity.

COUNT FOUR

DEFAMATION, LIBEL AND SLANDER PLAINTIFF V. ALL DEFENDANTS

45. Plaintiff incorporates paragraphs 42-44 herein by reference, as though fully set forth at length herein.

42. Plaintiff, NACHI is the largest professional association in the home inspection industry. Its members annually perform millions of home inspections on behalf of both buyers and sellers of homes.

43. NACHI members rely for business on the good will of the real estate agents in the states in which they reside.

44. NACHI, in turn, relies on its reputation as the premier association in the home inspection industry in order to attract new members.

45. The false allegations that NACHI was not compliant with the Pennsylvania Home Inspection Act and the obtaining of a false judgment allegedly declaring NACHI to be in non-compliance and the publication of these falsehoods on PHIC's website and by

mass communication to real estate agents across Pennsylvania is defamatory in that it relates to and is harmful to NACHI's business and professional reputation which has or will in the future affect NACHI's reputation in the community and result in reluctance of third persons retaining professional home inspection services or otherwise associating with NACHI members.

44. The false allegations of non-compliance with the Pennsylvania Home Inspection Act are sufficient to impune NACHI's integrity and professional reputation so as to be sufficient to support this cause of action as a matter of law, and, plaintiff is entitled to presumption of damage without proof of actual economic loss.

45. As a result of the aforesaid tortious conduct of defendants, plaintiff has suffered pecuniary losses to his great financial detriment in the past and will continue into the future for an undetermined sum.

WHEREFORE, plaintiff demands judgment against all defendants individually, jointly and/or severally in an amount in excess of Fifty Thousand (\$50,000.00) Dollars, plus cost of suit, interest, attorney's fees and any other relief available in law or equity.

Respectfully submitted,

BY: 
JOSEPH A. FERRY, ESQUIRE
Attorney for NACHI

VERIFICATION

I, NICK GROMICKO, am Chief Operating Officer of NACHI and am authorized to make this Verification on its behalf and I hereby verify that the statements made in this Complaint are true and correct to the best of my personal knowledge and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.


NICK GROMICKO