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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-001575-MR

TONY GRAVES, JR.

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 95-CI-00188

R. FRED CAPPS

APPELLEES

AND NO. 1996-CA-001646-MR

TONY GRAVES, JR.

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT
HONORABLE PAUL BARRY JONES, JUDGE
ACTION NO. 95-CI-00188

DAVID KELLY CARTER AND
R. FRED CAPPS

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, EMBERTON, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Tony Graves, Jr. (Graves) appeals from a Monroe Circuit Court judgment entered on April 19, 1996, that dismissed his civil complaint against David Kelly Carter (Carter) and R. Fred Capps (Capps).¹ We affirm.

Graves was convicted on May 24, 1994, in the Monroe Circuit Court on four counts of trafficking in a controlled substance and he was sentenced to an aggregate prison term of twenty-four years. Attorney Carter represented Graves in that case and Capps was the Assistant Commonwealth's Attorney who prosecuted Graves.

On November 22, 1995, Graves filed a civil complaint against Carter and Capps which alleged "legal malpractice," "fraud," "breach of oral and/or implied contract," "injury to the rights of the plaintiff," "outrageous conduct," and "cruel and unusual punishment." In violation of Kentucky Rules of Civil Procedure (CR) 8.01(2), Graves asked for \$500,000 in compensatory damages and \$500,000 in punitive damages from each defendant.²

Graves made the very serious allegation that he, Capps,

¹On May 15, 1996, the trial court denied Graves' motion to alter, amend or vacate. On May 24, Graves filed a notice of appeal naming Carter and Capps as appellees and the case was assigned number 1996-CA-001646-MR. On May 28, for reasons unknown, Graves filed another notice of appeal which named only Capps as the appellee. That appeal was assigned case number 1996-CA-001575-MR. Both appeals will be disposed of by this Opinion.

²Graves also asked for "recissory [sic] damages," "consequential damages," "special damages," and "actual damages" "against each defendant in an amount to be determined."

and Carter had entered into an agreement to buy votes in a primary election in which Capps was running for Commonwealth's Attorney. Graves claimed that Capps assured him that if he would obtain votes for Capps by vote buying, Capps would take the appropriate steps so that Graves would not go to prison on his pending drug charges. Graves alleged that Capps told him that Capps would pay absentee voters \$50.00 each and regular voters \$20.00 each for their votes. Graves alleged that Carter stated that he would represent him in his criminal case free of charge if he would solicit votes for Capps. Graves claims that Capps had stated that he would appoint Carter Assistant Commonwealth's Attorney if Capps won the election. Graves claimed that he and his father procured 25 absentee voters, all of whom received payment at Carter's office, and that on election day he and his father procured 150-200 voters, many of whom were paid with half pints of whiskey from three cases of whiskey Carter had given to him to use as payment for them voting for Capps. Thus, Graves alleged that he, Capps and Carter were engaged in multiple violations of KRS 119.205, a Class D felony.

Graves contended that Capps reneged on his end of the bargain when he successfully prosecuted Graves for the drug offenses and later strongly opposed shock probation for Graves. Graves claimed that since Capps told him he would assist him in helping him avoid prison that he relied on his belief that Capps would recommend, and he would receive, shock probation. He

claims this reliance is why he did not file a direct appeal from his criminal convictions.

Carter and Capps answered and pleaded the defenses of statute of limitations, fraud, illegality, and the statute of frauds. Capps also pleaded immunity as a defense. Carter's and Capps' answers each included a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. CR 12.02(f).

On February 29, 1996, Graves filed a motion for enlargement of time to file a response to Capps' motion to dismiss. In his motion, Graves pointed out that he was incarcerated and that he needed additional time in preparing his case due to "the unavoidable hardship and burden it places upon him. . . ." On March 7, 1996, Graves filed a similar motion seeking an enlargement of time to prepare a response to Carter's motion to dismiss. By order entered on March 11, 1996, the trial court granted Graves an additional ten days in which to respond to Carter's motion. On March 22, 1996, Graves filed a motion for an additional extension of time of fourteen days to respond to Carter's motion arguing that even though the order granting the first extension was postmarked March 12, he did not receive it in his prison mail until March 18, which only gave him three days to respond. On March 26, 1996, the trial court granted Graves an additional ten days to respond to Carter's motion.³ On April 8,

³The trial court did not mention Graves' motion for an
(continued...)

1996, Graves filed his response to Carter's motion to dismiss and a motion for a "final extension of time in which to file his Response to Defendant Carter's motion to dismiss. . . ." Graves' pleadings were filed on April 8, 1996—thirteen days after the trial court's previous ten-day extension of time, or three days late.

By order entered on April 19, 1996, the trial court denied Graves a further extension of time and dismissed his complaint for failure to state a claim. The trial court stated as follows:

The Court has made every effort to generously accommodate Plaintiff. However, the Court's generosity has its limits. Plaintiff was on notice via the Court's order of March 22, 1996[,] that he would receive no further extensions of time. However, despite the Court's warning Plaintiff did not even mail his response until after the second extension of time had expired. Therefore, Plaintiff's motion for a final extension of time is hereby DENIED. Plaintiff's response, consequently, was not timely filed and will not be considered by the Court.

Although Plaintiff's complaint is riddled with unsubstantiated hearsay and uncorroborated innuendo, the essence of his assertion is that the Defendants orally promised him that they would procure a dismissal of the criminal charges against him if he would illegally induce (i.e. pay) people to vote for Defendant Capps in an upcoming election. Plaintiff further cites a laundry list of malpractice grievances against Defendant Carter, who represented Plaintiff in his criminal trial in 1994.

³(...continued)
extension of time to respond to Capps' dismissal motion.

It has long been held that a Court dealing with a motion to dismiss under CR 12.02(f) must construe the pleadings "in a light most favorable to the Plaintiff" and accept the allegations in the complaint as true. Gall v. Scroggy, Ky.App., 725 S.W.2d 867, 869. Therefore, for purposes of considering the motions to dismiss, the Court must accept the Plaintiff's loathsome allegation that the Defendants entered into an agreement with the Plaintiff to acquire a dismissal of the criminal charges against him in return for the Plaintiff's help in buying votes for Defendant Capps in an upcoming election. Vote buying activities are illegal in Kentucky under KRS 119.205. Therefore, any agreement or contract to perform vote buying activities is a contract based upon an illegality. Such a contract is invalid and unenforceable. Zeitz v. Foley, Ky., 264 S.W.2d 267 (1954). Consequently, even if Plaintiff and Defendants had some sort of oral contract concerning vote buying, that illegal contract could not and will not be enforced by the Court. Therefore, the motions of Defendant Carter and Defendant Capps to dismiss that portion of Defendant's complaint in which Plaintiff endeavors to receive damages based upon an alleged illegal contract is hereby SUSTAINED.

Plaintiff also alleges malpractice against Defendant Carter in his complaint. The actions (or inactions) cited by Plaintiff occurred in the first half of 1994. However, Plaintiff did not even file his complaint until November of 1995. KRS 413.245 clearly states that an action for professional service malpractice shall be brought within one year. Plaintiff's action was not filed within this time limit. Therefore, Defendant Carter's motion to dismiss the allegations of malpractice against him in Plaintiff's complaint is hereby SUSTAINED.

In summary, there appears to be no basis for Plaintiff to recover from either Defendant, even if all of the allegations in his complaint are true. Plaintiff's claim is barred because it is based on an illegal

contract and was filed after the expiration of the statute of limitations.

Graves then filed a motion to alter, amend or vacate. Graves argued that the trial court had erred in ruling that his response was filed untimely. Graves relied on Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), for the rule that federal pro se inmate notices of appeal are deemed to be filed at the time the inmate delivers the notice to the prison authorities for forwarding to the court clerk not when the court clerk receives the notice. (See also Higgenbottom v. McManus, 840 F.Supp. 454 (W.D. Ky.1994), which held that Houston applied to pro se federal inmates filing civil complaints.) Graves claimed that he had given his completed response to prison officials on April 2, to make copies for him and they did not return the original and copies until late on the evening of April 4, making it impossible for him to place the documents in the mail until April 5. Graves claimed that Houston and Higgenbottom recognize that prisoners do not have any control over when and how prison officials perform their official duties and that prisoners are not to be held accountable for circumstances beyond their control. He argued that in this case he is entitled to such consideration and that the trial court abused its discretion in ruling that his response was untimely. Graves also argued that the trial court failed to address and make findings on his allegations of fraud, outrageous conduct, "injury to the rights of the plaintiff" and "cruel and unusual punishment."

On May 15, 1996, the trial court denied Graves' motion to alter, amend or vacate, and stated that granting an extension of time is a matter of judicial discretion and its denial of such was not an abuse of discretion, citing Moffitt v. Asher, Ky., 302 S.W.2d 102 (1957). The trial court reiterated that it had made every reasonable effort to accommodate Graves when it granted the two previous extensions, and stated as follows:

Plaintiff also states that the Court's dismissal of his suit did not address his claims of fraud, injury to the rights of the plaintiff, outrageous conduct, and cruel and unusual punishment. The action filed by Plaintiff was properly dismissed because it was barred by the statute of limitations and was based upon an alleged illegal contract between Plaintiff and the Defendants. Therefore, there was no reason for the Court to consider any of Plaintiff's other causes of action. However, to avoid any future questions and to clarify the record, the remainder of Plaintiff's causes of action will be discussed.

To sustain an action for fraud, one must prove a misrepresentation of a present material fact, not "a mere promise for the future." Church v. Eastham, Ky., 331 S.W.2d 718, 719 (1960). Plaintiff's claim is based upon the assertion that the Defendants promised him future legal leniency in return for his help in an election. Thus, Plaintiff's claim is based upon a promise for the future and, therefore, clearly fails to meet the dictates of Church, supra.

Plaintiff's claim of injury to his rights states that he was denied, inter alia, due process of law, right to counsel, and right to a fair trial. However, Plaintiff was convicted by a jury of his peers following a trial in which he was represented by competent, retained counsel. This claim is, consequently, refuted by the record and is without merit. Even assuming that the

conduct of the Defendants occurred as alleged by Plaintiff, that conduct does not qualify as "harassment intended to cause extreme emotional distress" as required for outrageous conduct claims in Humana of Kentucky v. Seitz, Ky., 796 S.W.2d 1, 3 (1990). Accordingly, this aspect of Plaintiff[']s claim must also fail. Finally, Plaintiff's claim of cruel and unusual punishment must also fail as his confinement in prison following a lawfully obtained conviction is not such that it "shocks the general conscience and violates the principles of fundamental fairness" as required for claims of cruel and unusual punishment by Cutrer v. Commonwealth, Ky.App., 697 S.W.2d 156, 158 (1985).

In summary, Plaintiff's claim should be dismissed for the above-cited reasons, as well as those set forth in the Court's order of April 19. To avoid any further confusion, all of Plaintiff's claims and causes of action are hereby DISMISSED.

This appeal followed.

In our review, we must determine whether the allegations made in Graves' complaint adequately state the factual and legal bases of an enforceable claim. "A motion to dismiss for failure to state a claim does not test the merits of the action but is confined solely to the sufficiency of the pleading" (emphasis added). White v. Brock, Ky., 487 S.W.2d 908, 909 (1972). See also City of Louisville v. Stock Yards Bank & Trust, Ky., 843 S.W.2d 327, 328 (1992). We are mindful that "the central purpose of pleadings remains notice of claims and defenses", Hoke v. Cullinan, Ky., 914 S.W.2d 335, 339 (1995), and "the court should not dismiss unless it appears the plaintiff would not be entitled to relief under any state of facts which

could be proved in support of his claim." Ewell v. Central City, Ky., 340 S.W.2d 479, 480 (1960). Furthermore, the motion to dismiss for failure to state a claim is viewed with disfavor and rarely granted. Phillips, Kentucky Practice: Civil Procedure, Rule 12.02, § 9 (1995) citing Wright & Miller, Federal Practice and Procedure: Civil 2d, § 1357. A dismissal for failure to state a claim is determined as a matter of law; hence, we need not defer to the trial court. Matthews v. Holland, Ky.App., 912 S.W.2d 459, 460 (1995).

First, we address Graves' claim of legal malpractice against Carter. The trial court dismissed this claim on the basis that since it was filed after the statute of limitations had expired, the complaint failed to state a claim upon which relief can be granted. See Old Mason's Home of Kentucky, Inc. v. Mitchell, Ky.App., 892 S.W.2d 304 (1995). Graves correctly argues that in a legal malpractice action the statute of limitations does not begin to run "[u]ntil the legal harm became fixed and non-speculative." Alagia, Day, Trautwein & Smith v. Broadbent, Ky., 882 S.W.2d 121, 125-126 (1994).

Graves' complaint was filed on November 22, 1995, so we must determine whether the alleged "legal harm became fixed and non-speculative" prior to November 22, 1994. Graves was sentenced by the Monroe Circuit Court on May 25, 1994, and on July 29, 1994, he filed a pro se motion for shock probation. Graves alleged in his complaint that "[a]t the time of filing his motion for shock probation, the plaintiff was under the

reasonable impression and blief [sic] from statements made to him by the defendants that defendant Capps was still 'going to help' him in the criminal case and help secure his release on shock probation in eventual fulfillment of the agreement." The circuit court denied the motion for shock probation on October 5, 1994. Graves further alleged in his complaint that "[i]n mid December 1994, the plaintiff learned that in place of defendant Capps assisting in helping him to make shock probation, Capps objected and strongly opposed plaintiff['s] motion. . . ." Thus, Graves has raised a substantial question concerning the running of the statute of limitations. Nevertheless, his claim is barred as a matter of law as being founded upon an illegal act, and we affirm the trial court's dismissal, although for a different reason. Carrico v. City of Owensboro, Ky., 511 S.W.2d 677, 678 (1974).

The Court in Blankenship v. Green, 283 Ky. 700, 143 S.W.2d 294 (1940), stated this ancient rule of law as follows:

"The general principle was long ago stated by Lord Mansfield, with his usual completeness and felicity of expression: 'The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff. * * * No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act.'"

That opinion recognized the general doctrine that when such a contract is executed the law will not assist the party who has parted with his money or property and seeks recovery back

or that when executory it will not compel compliance.

Id. 283 Ky. at 705-706 quoting Bertram v. Morgan, 173 Ky. 655, 659, 191 S.W. 317, 318 (1917), citing Cranson v. Goss, 107 Mass. 439, 9 Am.Rep. 45.

In Miller v. Miller, Ky., 296 S.W.2d 684, 688 (1956), the Court declared as follows:

The rule deducible from many adjudications of this court is that any conduct or contract of any illegal, vicious or immoral nature cannot be the proper basis for a legal or equitable proceeding. Inevitably the parties are left in a dilemma which they themselves have devised. Robenson v. Yann, 224 Ky. 56, 5 S.W.2d 271.

More to the point, is the application of this rule to improper conduct arising out of legal representation. The Court in Jones v. Henderson, 189 Ky. 412, 225 S.W. 34 (1920), stated as follows:

"Agreements calculated to impede the regular administration of justice are void as against public policy, without reference to the question whether improper means are contemplated or employed in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country. Within the condemned category are agreements to compound a crime or a penal action; agreements involving champerty or maintenance; agreements to refer to arbitration; agreements to procure a witness to swear a particular thing or to procure evidence of any kind; agreements to induce a witness to testify, or to abstain from testifying or suppress evidence, or to influence the testimony of a witness in any way; agreements to stifle or prevent a criminal prosecution or to unduly influence its termination;

agreements involving the evasion of the service of judicial process; agreements to conceal the fact that a party is breaking the law; or agreements interfering with the proper discharge of the duties of a judicial officer or other person charged with the enforcement of the law. . . . All agreements, it is said in a recent case, relating to proceedings in court, civil or criminal, which may involve anything inconsistent with the impartial course of justice, are void, although not open to the charge of actual corruptness, and regardless of the good faith of the parties or of the fact that no evil resulted therefrom."

Id., 189 Ky. at 416-417 (emphases added) quoting 9 Cyc. 500.

Thus, the trial court is also affirmed on its dismissal of all of Graves' other claims as each claim arose out of the alleged illegal contract to buy votes.

As to Graves' claim that the trial court abused its discretion in not allowing him additional time to file a response, we merely state that the trial court clearly acted reasonably and there was no abuse of discretion. In light of the fact that all of Graves' claims are barred as arising out of alleged illegalities, it is impossible for Graves to demonstrate how the trial court's ruling denying the filing of his response was harmful to him. In other words, regardless of any response that Graves may have filed, all of his claims are barred as a matter of law.

For the foregoing reasons, the orders of the Monroe Circuit Court dismissing Graves' complaint are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Tony Graves, Jr., Pro Se
Saint Mary, KY

BRIEF FOR APPELLEE, CAPPS:

Hon. Reginald L. Ayers
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