

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000140-MR

ANDREI VOROBIEV

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 06-CI-04052

ALAN SAYLOR, IN HIS INDIVIDUAL
CAPACITY; CARL NATHE, IN HIS
INDIVIDUAL CAPACITY; LEE TODD, JR.,
IN HIS INDIVIDUAL CAPACITY; AND
THE UNIVERSITY OF KENTUCKY

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON AND KELLER, JUDGES.

KELLER, JUDGE: Andrei Vorobiev (Vorobiev) appeals from the Fayette Circuit Court's summary judgment in favor of the Appellees, Alan Saylor (Officer Saylor), Carl Nathe (Nathe), President Lee Todd, Jr. (President Todd), and the University of Kentucky (the University). For the following reasons, we affirm.

FACTUAL BACKGROUND

On September 20, 2005, Vorobiev attended the University's Board of Trustees meeting at the Patterson Office Tower located on the University's campus. President Todd, Officer Saylor, and Nathe were also present at this meeting. President Todd is the President of the University. Officer Saylor is part of and supervises the Executive Protection Team assigned to the protection of the University's public officials, including President Todd. Nathe is employed by the University of Kentucky Public Relations.

After being alerted that Vorobiev was acting suspiciously, Officer Saylor began observing Vorobiev during the meeting. At the conclusion of the meeting, Officer Saylor asked Nathe and other University personnel to watch Vorobiev for security reasons. Vorobiev was observed walking toward President Todd, and Nathe asked Vorobiev if he could be of any assistance. Vorobiev answered in the negative. Officer Saylor then approached Vorobiev and inquired about Vorobiev's business. According to Officer Saylor, Vorobiev told him that it was none of his business. Further, according to Officer Saylor, he asked Vorobiev to leave the Boardroom. Vorobiev denies that he was asked to leave the Boardroom.

Thereafter, Vorobiev went to the first floor lobby of the Patterson Office Tower. According to Vorobiev, the following events took place. While waiting in the lobby to speak with Steve Reed, a Board member, Nathe "shouldered" him. At the same time, Officer Saylor grabbed him by the arm and stated, "Come with me!" Officer Saylor then tried to drag Vorobiev to a dark corner of the lobby.

Vorobiev pulled his arm away and asked Officer Saylor and Nathe who they were and what they wanted. Officer Saylor then asked for Vorobiev's identification, which Vorobiev provided in the form of his driver's license. After about ten minutes of being "harassed" by Officer Saylor and Nathe, Vorobiev asked Officer Saylor to return his driver's license. Officer Saylor refused to give it to him. Vorobiev then attempted to leave the building to complain to Board member Reed who was located outside. Officer Saylor then grabbed Vorobiev and pushed him approximately forty to fifty feet onto the porch located outside of the building.

According to Officer Saylor and Nathe, whose version of this encounter differs from Vorobiev's, they went to the first floor and Officer Saylor asked Vorobiev for some identification. After Vorobiev asked Officer Saylor who he was, Officer Saylor identified himself officially as a University law enforcement officer with security responsibilities. Officer Saylor told Vorobiev that his actions during and after the meeting had caused alarm. Vorobiev then became very loud and disruptive, and Officer Saylor feared that Vorobiev would start a physical confrontation. Officer Saylor then asked Vorobiev to leave the building. Vorobiev repeatedly refused, and Officer Saylor escorted him out of the building using minimal force. Officer Saylor released Vorobiev once outside. The encounter inside the building in the first floor lobby lasted approximately two to three minutes.

Sometime in December of 2005, Vorobiev's wife, a University music professor, spoke with President Todd about the incident on September 20, 2005.

President Todd said he would look into the matter, but did not tell Vorobiev's wife that he would get back to her. President Todd did ask Officer Saylor about the incident and determined that Officer Saylor handled it appropriately. President Todd did not discuss the matter with Vorobiev's wife again.

On December 13, 2005, Vorobiev and his wife attended the University's Board of Trustees meeting. There was some sort of discussion between Vorobiev, his wife, Officer Saylor, and a second officer. No complaint or claim was filed against any University personnel or with the University police.

On September 20, 2006, Vorobiev filed a complaint in the Fayette Circuit Court against: the University; Officer Saylor, in his individual capacity; Nathe, in his individual capacity; and President Todd, in his individual capacity. One week later, he filed an amended complaint, and on May 11, 2009, he filed a second amended complaint. Vorobiev asserted multiple claims including assault, battery, negligence, conspiracy, as well as claims pursuant to 42 U.S.C. §§ 1983 and 1985.

On May 28, 2009, the Appellees filed a motion for summary judgment, and a hearing was set on June 19, 2009. On June 8, 2009, Vorobiev filed a motion for the trial judge to recuse himself. The motion to recuse was denied and the hearing on the Appellees' motion was rescheduled for June 25, 2009. In the late afternoon hours on the day before the pending motion was to be heard, Vorobiev filed an affidavit pursuant to Kentucky Revised Statute (KRS) 26A.020 with the Chief Justice of the Kentucky Supreme Court asking that the trial judge be disqualified from hearing the case. That request was denied in an order entered on July 10,

2009. The pending motion for summary judgment was again rescheduled for July 24, 2009. Vorobiev filed a notice of unavailability on July 16, 2009, indicating a conflict between July 22 and August 3. The trial court entered an order giving Vorobiev until August 14, 2009, to respond and rescheduled the hearing for August 28, 2009. Vorobiev then filed a motion for the court to transfer the case to another division of the Fayette Circuit Court, and the trial court denied that motion on August 7, 2009. Vorobiev filed a motion on August 21, 2009, requesting additional time to file a response to the Appellees' motion for summary judgment. The trial court granted that request giving Vorobiev until September 4, 2009, to file a response. Additionally, the court rescheduled the hearing on the motion for September 18, 2009.

Again, on the day before the scheduled hearing, and without having filed any response to the pending motion for summary judgment, Vorobiev filed a second affidavit with the Chief Justice of the Supreme Court seeking disqualification of the trial judge. This request was again denied in an order entered on September 30, 2009. The trial court gave Vorobiev until October 9, 2009, to file any response to the still pending motion for summary judgment, and set the hearing for October 16, 2009.

Again, on the day before the scheduled hearing, Vorobiev filed a third affidavit with the Chief Justice requesting that the trial judge be disqualified. Vorobiev then filed an "Addendum" to his third affidavit on October 17, 2009, and a "Second Addendum" on November 2, 2009. The Chief Justice again denied

Vorobiev's request in an order entered on November 6, 2009. On that same day, the trial court granted the Appellees' motion for summary judgment dismissing all of Vorobiev's claims against the Appellees. Specifically, the trial court concluded that the Appellees were immune from suit and that Vorobiev's claims made pursuant to 42 U.S.C. §§ 1983 and 1985 were barred by the applicable statute of limitations.

On November 16, 2009, Vorobiev filed a motion to vacate the judgment pursuant to Kentucky Rule of Civil Procedure (CR) 59.05, and the trial court denied that motion on December 21, 2009. This appeal followed.

STANDARD OF REVIEW

Summary judgment is only proper "when it would be impossible for the respondent to produce any evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 483 (Ky. 1991) (internal quotation omitted). In ruling on a motion for summary judgment, the Court is required to construe the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." *Id.* at 480. A party opposing a summary judgment motion "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Id.* at 481 (internal quotation omitted). Whether or not the Appellants are immune from suit is a question of law, which we review *de novo*. *Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006).

ANALYSIS

1. University of Kentucky

Vorobiev first contends that the trial court erred in granting summary judgment in favor of the University. We disagree.

As correctly noted by the trial court, the University is a state agency entitled to sovereign immunity. *Withers v. Univ. of Kentucky*, 939 S.W.2d 340, 343 (Ky. 1997). The University's immunity can be waived only with a specific and express waiver from the General Assembly. *University of Louisville v. Martin*, 574 S.W.2d 676, 678 (Ky. App. 1978). Vorobiev has failed to point to any specific waiver from the General Assembly, and in fact, concedes that the University of Kentucky is entitled to sovereign immunity.

However, Vorobiev argues that sovereign immunity does not apply to his claim for injunctive relief against the University. Specifically, Vorobiev contends that he is entitled to injunctive relief from the University's "policy of unconstitutional police harassment of citizens who simply attend the public University's open meetings." Having reviewed the record, it does not appear that Vorobiev requested injunctive relief in his second amended complaint as he alleges. Accordingly, the trial court was correct in granting summary judgment as to the claims against the University of Kentucky.

Even if Vorobiev did request injunctive relief, sovereign immunity "precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Yanero v. Davis*, 65 S.W.3d 510,

517 (Ky. 2001). However, we note that the Kentucky Supreme Court has recognized the *Ex parte Young* exception to the immunity defense. *See Board of Trs. of the Univ. of Kentucky v. Hayse*, 782 S.W.2d 609, 616 (Ky. 1989) (overruled on other grounds by *Yanero*, 65 S.W.3d 510). Under this exception, which was first expressed more than a century ago in the United States Supreme Court case of *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), a court may grant prospective injunctive relief against a state officer to compel compliance with federal law. “To trigger the *Ex parte Young* exception, a party must name a state officer and must seek prospective injunctive relief against said officer for compliance with federal law or a federal constitutional provision.” *Hamblen ex rel. Byars v. Kentucky Cabinet for Health & Family Servs.*, 322 S.W.3d 511, 516 (Ky. App. 2010). This “exception does not permit an action directly against the state or state agency but only against a state officer. And, [it] cannot be utilized to compel a state officer to comply with state law.” *Id.*

The *Ex parte Young* exception would not apply to the instant case because the University is not a state officer. Thus, even had Vorobiev properly sought injunctive relief against the University, he would not prevail.

2. Officer Saylor, Nathe, and President Todd

Vorobiev next contends that the trial court incorrectly granted summary judgment in favor of Officer Saylor, Nathe, and President Todd because they were not entitled to qualified official immunity. We disagree.

2007):

[W]hen . . . officers or employees are sued for negligent acts in their individual capacities, they have qualified official immunity.

Qualified official immunity applies to public officers or employees if their actions are discretionary (*i.e.*, involving personal deliberation, decisions and judgment) and are made in good faith and within the scope of their authority or employment. This is intended to protect governmental officers or employees from liability for good faith judgment calls in a legally uncertain environment. An act is not “discretionary” merely because some judgment is used in deciding on the means or method used. However, even if an act is discretionary, there is no immunity if it violates constitutional, statutory, or other clearly established rights, or if it is done willfully or maliciously with intent to harm, or if it is committed with a corrupt motive or in bad faith. The burden is on the plaintiff to show that the public official or employee was not acting in good faith. *Yanero*, 65 S.W.3d at 522-23.

If the negligent acts of public officers or employees are ministerial, there is no immunity. An act is ministerial if the duty is absolute, certain, and imperative, involving mere execution of a specific act based on fixed and designated facts. If ministerial acts are proper, then the public officer or employee has official immunity without qualification. *Id.* at 522. Any act done by a public officer or employee who knows or should have known that his actions, even though official in nature, would violate constitutional rights or who maliciously intends to cause injury, has no immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).

Vorobiev contends that Officer Saylor, Nathe, and President Todd are not entitled to qualified official immunity. However, Vorobiev does not state how any of the alleged actions were ministerial, made in bad faith, and not within the

scope of the Appellees' authority. Furthermore, Vorobiev failed to file a response to the summary judgment, an opposing affidavit, or any affirmative evidence to support his claim that Officer Saylor, Nathe, and President Todd are not entitled to qualified official immunity. CR 56.03 provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "[A] party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial." *Hubble v. Johnson*, 841 S.W.2d 169, 171 (Ky. 1992).

Vorobiev references his own affidavit and the affidavit of his wife to support his claim that Officer Saylor, Nathe, and President Todd are not entitled to qualified official immunity. However, these affidavits were filed in the record as exhibits to his motion to vacate judgment pursuant to CR 59.05 after summary judgment was granted. "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion v. Gullion*, 163 S.W.3d 888, 893 (Ky. 2005). Consequently, Vorobiev could not cure his failure to produce affirmative evidence regarding qualified official immunity prior to summary judgment by attaching the evidence to his CR 59.05 motion.

With the preceding in mind, we address the Appellees' argument that the trial court correctly determined that Officer Saylor, Nathe, and President Todd are all entitled to qualified official immunity.

a. Officer Saylor

As to Officer Saylor, the Appellees first argue that his actions, including escorting Vorobiev out the Patterson Office Tower, were discretionary, made in good faith, and within the scope of his authority. In support of their argument, the Appellees point to the following deposition testimony.

Peggy Way (Way), President Todd's secretary, testified that she asked President Todd if he knew the person at the back of the room who came in late and was pacing. President Todd indicated that he did not. Way also observed the same person, who was later identified as Vorobiev, digging in and out of his briefcase and he looked very suspicious. Way further testified that she suggested to Officer Saylor that he keep an eye on Vorobiev.

Officer Saylor testified that he is part of and supervises the Executive Protection Team assigned to the protection of the University's public officials, including President Todd. After Way informed him about Vorobiev and his suspicious behavior, Officer Saylor sat down behind Vorobiev to observe him in the public gallery. After the meeting, Officer Saylor observed Vorobiev pacing by the elevator. Because Officer Saylor wanted to stay close to President Todd as a security measure, he asked three other individuals, including Nathe, to keep an eye on Vorobiev for security reasons.

Nathe testified that, after the board meeting, Vorobiev was observed walking toward President Todd. Nathe asked Vorobiev if he could be of any assistance, and Vorobiev answered in the negative. Officer Saylor testified that he then approached Vorobiev and inquired about Vorobiev's business, to which Vorobiev replied that he had business with President Todd and that it was none of Officer Saylor's business. Officer Saylor further testified that he asked Vorobiev to leave the Boardroom. Vorobiev left and was observed on the first floor of the building in the lobby. Officer Saylor went to the first floor lobby and asked Vorobiev for identification. After being asked by Vorobiev who he was, Officer Saylor identified himself as a University law enforcement officer.

Officer Saylor testified that he told Vorobiev that his actions during and after the Trustees' meeting had caused alarm. During the explanation, Vorobiev responded in an angry, shouting tone. Nathe testified that Vorobiev was yelling and became "disorderly." Officer Saylor testified that he feared that Vorobiev was going to start a physical confrontation in the crowded lobby. Therefore, he asked Vorobiev to step outside to the porch area of the Patterson Office Tower. Officer Saylor and Nathe testified that after Vorobiev repeatedly refused to step outside, Officer Saylor escorted Vorobiev with minimal force and released him once they were outside.

Based on the preceding deposition testimony, the Appellees contend that Officer Saylor's actions were discretionary and not ministerial. Discretionary acts or functions are "those involving the exercise of discretion and judgment, or

personal deliberation, decision, and judgment” *Yanero*, 65 S.W.3d at 522. A ministerial act is “one that requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.” *Id.* In this case, Officer Saylor testified that he decided to escort Vorobiev out of the building once he believed that Vorobiev might start a physical confrontation with him in the crowded lobby. Thus, we agree with the Appellees that this decision was an exercise of his discretion.

Additionally, Officer Saylor’s actions were made in good faith. As stated in *Yanero*, “[o]nce the officer or employee has shown *prima facie* that the act was performed within the scope of his/her discretionary authority, the burden shifts to the plaintiff to establish by direct or circumstantial evidence that the discretionary act was not performed in good faith.” *Id.* at 523. Because Vorobiev failed to provide the requisite evidence that Officer Saylor’s actions were made in bad faith, as he was required to show once the burden of proof shifted to him, we must presume that his actions were made in good faith. *See Rowan County v. Sloas*, 201 S.W.3d 469, 475 (Ky. 2006) (stating that “‘good faith’ is just a presumption that exists absent evidence of ‘bad faith’”).

Finally, Officer Saylor was acting within the scope of his authority. Officer Saylor testified that he is a part of and supervises the Executive Protection Team assigned to the protection of the University’s public officials, including President Todd. Thus, the trial court did not err when it concluded that Officer Saylor’s

actions, including escorting Vorobiev out the building for security reasons, were within the scope of his authority. Accordingly, the trial court correctly determined that Officer Saylor was entitled to qualified official immunity.

b. Nathe and President Todd

We also believe that the trial court correctly concluded that Nathe and President Todd are entitled to qualified official immunity. The only “action” taken by Nathe was that he was present during Officer Saylor’s encounter with Vorobiev. With respect to President Todd, although it is unclear, it appears that Vorobiev is arguing that President Todd failed to investigate Officer Saylor’s and Nathe’s actions. However, Vorobiev failed to show that President Todd actually had a duty to investigate the actions of Officer Saylor and Nathe. As previously noted, “a party opposing a motion for summary judgment cannot rely merely on the unsupported allegations of his pleadings, but is required to present some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Godman v. City of Fort Wright*, 234 S.W.3d 362, 370 (Ky. App. 2007) (internal quotations omitted). Thus, as correctly noted by the trial court, “[b]ased on the evidence in this Record at this point . . . it is unclear what actions could be alleged against Defendants Nathe and Todd that would give rise to any claim.” Accordingly, the trial court did not err when it determined that Nathe and President Todd were also entitled to qualified official immunity.

3. 42 U.S.C. §§ 1983 and 1985 Actions

Vorobiev's final argument is that the trial court erred when it concluded that his claims made pursuant to 42 U.S.C. §§ 1983 and 1985 are barred by the applicable statute of limitations. Regardless of whether or not these claims were barred by the applicable statute of limitations, summary judgment was still appropriate. As discussed above, a party opposing a motion for summary judgment cannot rely upon unsupported allegations of his pleadings. Instead, he must present some affirmative evidence to show there is a genuine issue of material fact. *Hubble*, 841 S.W.2d at 171. Because Vorobiev failed to file a response to the Appellees' motion for summary judgment, and because he relies on the unsupported allegations of his pleadings, summary judgment was appropriate. *See Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 576 (Ky. 2009) (noting that "an appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result").

CONCLUSION

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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