

STATE OF MICHIGAN
COURT OF APPEALS

TROYCE TRAVIS,

Plaintiff-Appellant,

v

MADDIN, HAUSER, WARTELL, ROTH, HELLER
& PESSES, P.C., and MARK H. FINK,

Defendants-Appellees.

UNPUBLISHED
February 4, 1997

No. 184683

Oakland Circuit Court
LC No. 94-473054

Before: White, P.J., and Griffin and D.C. Kolenda,* JJ.

PER CURIAM.

Plaintiff appeals from an Oakland Circuit Court order granting defendants summary disposition of his claims of abuse of process and fraud and deceit,¹ and from an order denying reconsideration of the grant of summary disposition. We affirm.

This action arises out of defendant Mark Fink's post-judgment collection representation of Frank Palazzolo in a partnership dissolution action against plaintiff in Macomb Circuit Court. The Macomb case was submitted to binding arbitration and the arbitration award was confirmed and adopted by the Macomb Circuit Court, entitling it to full force and effect. Apparently, the Macomb Circuit Court found that the arbitration award itself constituted the judgment, and accordingly, found that no additional order was necessary. Subsequently, defendant Fink obtained writs of garnishment and execution for Palazzolo against plaintiff. In obtaining these writs, Fink submitted an affidavit stating that Palazzolo had received a judgment against plaintiff in the amount of \$95,040.58. Pursuant to the writ of garnishment, \$7,342 was withheld from a bank account in plaintiff's name. Additionally, plaintiff paid \$6,300 when presented with the writ of execution. Subsequently, plaintiff was granted an ex-parte temporary restraining order (TRO) preventing Palazzolo from taking further steps to enforce the judgment. An order to pay to the court the \$7,342 garnished from plaintiff's bank account was thereafter entered. After hearing Palazzolo's motion to dissolve the TRO, the Macomb Circuit Court

* Circuit judge, sitting on the Court of Appeals by assignment.

dissolved the TRO, prevented further execution of the judgment pending appeal, and found that monies paid by plaintiff pursuant to the valid writ of execution should be retained by Palazzolo as partial satisfaction of the judgment provided in the arbitration award. An order for the release of the garnished funds from plaintiff's bank account was thereafter entered by a court clerk.

Meanwhile, plaintiff filed a complaint against defendants in Oakland Circuit Court alleging claims of abuse of process, fraud and deceit, and defamatory impairment of credit relating to the Macomb Circuit Court case. Plaintiff alleged that defendants improperly obtained the writs of garnishment and execution by using the order confirming the arbitration award as a valid judgment against plaintiff, and falsely claimed that Palazzolo had a judgment against plaintiff in the amount of \$98,000. Plaintiff further alleged that Fink fraudulently obtained the garnished funds despite a TRO and an order staying execution of the judgment pending appeal.

The Oakland Circuit Court summarily dismissed plaintiff's claims pursuant to MCR 2.116(C)(7), (8), and (10). The court found that plaintiff's claim for abuse of process was collaterally estopped by the Macomb Circuit Court case. Specifically, the court found that plaintiff had raised the same issues in Macomb Circuit Court and had received a full and fair opportunity to litigate the matter. With regard to plaintiff's claim for fraud and deceit, the court found that no genuine issue of material fact existed because the order to pay was submitted to the court prior to the issuance of the TRO. Accordingly, the court found that defendants were not responsible for causing the order releasing garnished funds.

First, plaintiff argues that the Oakland Circuit Court erred in applying collateral estoppel to bar his claim for abuse of process when it was never actually determined whether defendant Fink had fraudulently supported the issuance of the writs by claiming that a judgment had issued in the amount of \$95,040.58. We disagree.

In order to succeed on a claim of abuse of process a plaintiff must plead and prove an ulterior purpose and an act in the use of process that is improper in the regular prosecution of the proceeding. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). In other words, the plaintiff must show that the defendant used a proper legal procedure for a purpose that is collateral to the intended use of that procedure. *Id.* A bad motive by itself will not establish abuse of process. *Id.* Instead, there must be a corroborating act that demonstrated the ulterior purpose. *Id.*

Collateral estoppel acts to preclude re-litigation of an issue between the same parties in a subsequent, different cause of action when the prior proceeding resulted in a valid final judgment and the issue was actually and necessarily determined in that proceeding. *Bullock v Huster*, 209 Mich App 551, 556; 532 NW2d 202 (1995). The parties must have been given a full and fair opportunity to litigate the issue in the prior action. *Id.* Moreover, in the prior action the issue must have been essential to the resulting judgment, put into issue by the pleadings, and submitted to and determined by the trier of fact. *Id.*

The Macomb Circuit Court held that the “money paid by [Travis] on January 11, 1994 pursuant to the valid Writ of Execution issued December 15, 1993 and validly executed by officers of the Oakland County Sheriff Department be retained by Plaintiff as partial satisfaction of the Judgment as provided in the Arbitration Award.” Thus, the Macomb Circuit Court found that a valid judgment was issued against plaintiff and that the writ of execution was valid. The Macomb Circuit Court impliedly found that Fink had not fraudulently stated that Palazzolo had a money judgment against plaintiff.

Plaintiff also argues that a review of the transcript of the Macomb Circuit Court hearing on his motion to quash the writs demonstrates that the Macomb Circuit Court never determined whether the arbitration awarded Palazzolo a valid judgment. However, a court speaks through its orders. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 54; 436 NW2d 70 (1989). Thus, regardless of what the hearing transcript might reveal, the Oakland Circuit Court properly found that the Macomb Circuit Court order proved dispositive.

Next, plaintiff argues that defendants abandoned the defense of collateral estoppel in their supplemental brief in support of their motion for summary disposition. We do not read the supplemental brief in this fashion.

Plaintiff next argues that the court erred in dismissing his claim for fraud and deceit pursuant to MCR 2.116(C)(10) because genuine issues of material fact existed. Plaintiff failed to present any documentary evidence indicating that the order to pay had not been signed by Fink prior to the issuance of the TRO and failed to present documentary evidence indicating that defendants had any part in the release of the garnished funds. Thus, plaintiff did not meet his burden of proof in opposing the motion for summary disposition. *Quinto v Cross and Peters Co*, 451 Mich 358; 547 NW2d 314 (1996).

Affirmed.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

¹ Defendants were also granted summary disposition of plaintiff’s claim of defamatory impairment of credit. Plaintiff does not appeal the grant of summary disposition as to that claim.