

STATE OF MICHIGAN
COURT OF APPEALS

CINDY N. ANDERSON and
KEN ANDERSON,

UNPUBLISHED
May 2, 1997

Plaintiffs-Appellants,

v

No. 193119
Oakland Circuit Court
LC No. 95-499902-CZ

RICHARD WARNICKE,
CAROL WARNICKE, and
THOMAS WARNICKE,

Defendants-Appellees.

Before: Markey, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition in favor of defendants, granting defendants' motion for protective order, and denying rehearing. We affirm.

Plaintiffs and defendants own adjoining lots in the Cass Lake Woods Subdivision in Orchard Lake, Michigan. Defendants built a tennis court on their property, part of which encroached on a lot that plaintiffs now own. In 1992, defendants filed suit in Oakland Circuit Court seeking to quiet title in the disputed area in their favor based on adverse possession and seeking monetary damages (the "quiet title action"). On June 30, 1995, plaintiffs brought this action alleging abuse of process in connection with the quiet title action. Plaintiffs' complaint alleged that defendants committed improper acts by operating with the ulterior purpose of "attempting to bludgeon Plaintiffs into submission by making the litigation as prolonged, complex, expensive, and detrimental to Plaintiffs as possible," and, thereby, causing plaintiffs to give up their legitimate rights in the property. The trial court granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10), and denied plaintiffs leave to amend their pleadings on the ground that amendment would be futile.

On appeal, plaintiffs argue that summary disposition under MCR 2.116(C)(10) was premature because the parties had not conducted their discovery. We disagree.

Generally, summary disposition under MCR 2.116(C)(10) is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996); *Bellows v Del McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Summary disposition is not premature, however, if discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *Id.* Furthermore, the party opposing the motion must demonstrate that there is a disputed issue before the court; in the absence of a disputed issue, incomplete discovery will not bar summary disposition. *Bellows, supra*; *Szkodzinski v Griffin*, 171 Mich App 711, 715; 431 NW2d 51 (1988); *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983).

To recover pursuant to a theory of abuse of process, a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process that is improper in the regular prosecution of the proceeding. *Friedman v Dorzorc*, 412 Mich 1, 30-31; 312 NW2d 585 (1981); *Bonner v Chicago Title Ins, Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). “A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure, e.g., where the defendant utilizes discovery in a manner consistent with the rules of procedure, but for the improper purpose of imposing an added burden and expense on the opposing party in an effort to conclude the litigation on favorable terms.” *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987). Procedural irregularities do not constitute a basis for the tort of abuse of process. *Id.* at 647. A plaintiff must allege a use of process for a purpose outside the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive. *Friedman, supra* at 31; *Young v Motor City Apartments Ltd Dividend Housing Ass’n No 1 & No 2*, 133 Mich App 671, 681; 350 NW2d 790 (1984). Process that properly issues and that prompts the case toward the resolution of the claims is not an abuse of process absent allegations of a specific act in the course of process that reveals a collateral, ulterior motive. *Id.* at 683.

In the present case, the only specific act alleged in plaintiffs’ complaint is defendants’ filing of an excessively lengthy witness list. Plaintiffs filed a motion in the quiet title action to strike defendants’ witness list. The trial court granted the motion, and defendants filed an amended witness list that contained the names of 14 witnesses. Plaintiffs’ proper recourse in this case was to seek to correct the allegedly improper procedure, which they have done. Therefore, plaintiffs’ complaint does not allege a specific act that corroborates defendants’ alleged ulterior motive. *Vallance, supra* at 646.

Plaintiffs also contend that they expected defendants to admit to several instances of misconduct and, therefore, these depositions and other discovery would have uncovered additional factual support for plaintiffs’ claim. We disagree. Plaintiffs have not presented any evidence beyond their speculation as to what defendants might state in their depositions to support any improper collateral motive or act on the part of defendants sufficient to state a claim for abuse of process. Therefore, plaintiffs have not presented evidence that there is a disputed issue before the court and that discovery would stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *Szkodzinski, supra*; *Pauley, supra*.

Plaintiffs next argue that the trial court's grant of summary disposition in favor of defendants was erroneous because defendants' motion was not supported by an affidavit. They argue that MCR 2.116(G)(3) provides that a motion for summary disposition based on MCR 2.116(C)(10) must be supported by an affidavit. This argument has no merit. MCR 2.116(G)(3) provides that affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required when judgment is sought based on subrule (C)(10). In the present case, defendants presented documentary evidence to support their motion. Therefore, because the plain language of the court rule provides that affidavits, depositions, admissions *or* other documentary evidence is required, defendants' failure to provide an affidavit does not require reversal of the trial court's order granting summary disposition.

Plaintiffs further argue that the trial court erred in denying them leave to amend their complaint. We disagree.

If summary disposition is granted under MCR 2.116(C)(8), (9) or (10), the court must give the parties an opportunity to amend their pleadings "unless the evidence then before the court shows that amendment would not be justified." MCR 2.116(I)(5). "An amendment is not justified or futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Early Detection Center, PC, v New York Life Ins Co*, 157 Mich App 618, 625; 403 NW2d 830 (1986). To add allegations that merely restate allegations already made is futile. *Dukesherer Farms v Director of the Dep't of Agriculture*, 172 Mich App 524, 530; 432 NW2d 721 (1988).

In their proposed first amended complaint, plaintiffs allege several specific acts on the part of defendants that they claim were intended to "extort some of plaintiffs' property at no cost or for substantially less than its value," to unnecessarily increase litigation expenses, to "harass, annoy, embarrass, humiliate and subject Plaintiffs to the ridicule of their neighbors in order to cause them to move from the neighborhood," and to invade plaintiffs' privacy. Among the specific acts plaintiffs allege that defendants committed are deliberately evading discovery, video taping plaintiffs on areas of their property that were not subject to dispute, serving plaintiffs with irrelevant and harassing interrogatories, and circulating defamatory materials among plaintiffs' neighbors.

We believe that plaintiffs' proposed amended complaint is still insufficient to state a claim for abuse of process. To support a claim of abuse of process, the ulterior purpose alleged must be more than harassment, defamation, exposure to excessive litigation costs, or coercion to discontinue business. *Early Detection Center, PC, supra* at 629-630. In the present case, the only motive plaintiffs alleged beyond harassment, embarrassment, and exposure to excessive litigation costs is to "extort some of plaintiffs' property at no cost or for substantially less than its value." Despite plaintiffs' choice of the word "extort," this motive is not collateral. The purpose of any quiet title action is to obtain clear title to a piece of disputed property. Therefore, plaintiffs have failed to state a claim of abuse of process.

Plaintiffs' proposed first amended complaint also alleges intentional infliction of emotional distress, stating that defendants' conduct is "outrageous and unacceptable in a civilized society." However, based on the facts of this case, we do not believe that defendants' conduct may be regarded

as so extreme and outrageous as to permit recovery. *Haverbush v Powelson*, 217 Mich App 228, 234-235; 551 NW2d 206 (1996). Furthermore, plaintiffs' first proposed amended complaint does not allege that plaintiffs suffered severe emotional distress. Therefore, the trial court did not abuse its discretion in finding that amendment of plaintiffs' complaint would be futile.

Affirmed.

Defendants being the prevailing party, they may tax costs pursuant to MCR 2.719.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra