STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM R. YEE,

Plaintiff-Appellant,

v

GEORGE BRAIDWOOD JR., a/k/a GEORGE BRAIDWOOD II,

Defendant-Appellee.

UNPUBLISHED
May 22, 2001

No. 221945
Genesee Circuit Court
LC No. 98-063313-NO

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right[1] from the circuit court's order granting summary disposition to defendant, by dismissing plaintiff's claims for malicious prosecution, abuse of process and slander per se. We affirm.

While the circuit court granted the motion under MCR 2.116(C)(8) and (10), it is clear that the court looked beyond the pleadings, and therefore this Court will treat the motions as having been granted pursuant to MCR 2.116(C)(10), which tests whether there is factual support for a claim. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). In reviewing a motion under MCR 2.116(C)(10), the court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence to determine whether a genuine issue of material fact exists to warrant a trial. *Id.* On appeal, as below, all reasonable inferences are resolved in the nonmoving party's favor. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

[1] We disagree with defendant's assertion that this Court does not have jurisdiction over plaintiff's claim of appeal because it was not timely filed. Because plaintiff's motion for reconsideration was filed on January 26, 1999 (i.e., within twenty-one days of the January 11, 1999, order granting defendant summary disposition), the time limit for claiming an appeal was extended to twenty-one days from the date of the August 23, 1999, order denying reconsideration. MCR 7.204(A)(1)(b). Hence, plaintiff's August 27, 1999, claim of appeal was timely.

Our review indicates that plaintiff's claim for malicious prosecution fails for multiple reasons, but we will discuss only one. The uncontested facts fail to demonstrate that defendant initiated a prior criminal proceeding against plaintiff. An arrest warrant may not be issued without the prosecutor's written authorization unless security for costs is given. Thus, in Michigan, the prosecutor's exercise of his independent discretion in initiating and maintaining a prosecution is generally a complete defense to an action for malicious prosecution. *Mathews v Blue Cross and Blue Shield of Michigan*, 456 Mich 365, 384; 572 NW2d 603 (1998). Unless the information furnished was known by the giver to be false and was the information on which the prosecutor acted, the private person has not procured the prosecution. *Id.* at 385. If the prosecutor or police conduct an independent investigation, the warrant request may be said to be based on the independent investigation. *Id.* at 383-384.

Here, the defendant reported to the State Police information regarding plaintiff's continuing course of conduct, and characterized this behavior as stalking. During the ensuing investigation, plaintiff essentially corroborated the reported course of conduct, but characterized it as lawful and rightful evidence-gathering for an ongoing civil suit. On the basis of information from both defendant and plaintiff, as well as the investigation, the prosecutor secured the issuance of a misdemeanor arrest warrant, but withdrew the warrant before it was ever served on plaintiff. Under these circumstances, despite the fact that the warrant would not have issued without defendant's complaint, "the independent exercise of prosecutorial discretion establishes that the private defendant did not initiate the prosecution." *Id*. at 386.

For the same reason, plaintiff's claim for abuse of process fails. Defendant did not initiate the issuance of legal process, and there was no evidence that he made an irregular use of that legal process that corroborated plaintiff's speculation regarding defendant's ulterior motive. See *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992).

The trial court granted summary disposition on plaintiff's claim of slander per se pursuant to both MCR 2.116(C)(7) and (10), for the reasons that: (1) the statute of limitations, MCL 600.5805(8); MSA 27A.5805(8), barred recovery for any statements made before July 15, 1996; and (2) the statements that defendant made to the police after that date were subject to either an absolute privilege or a qualified privilege under circumstances where there was no evidence of malice. We find error in these rulings. However, plaintiff's complaint for slander per se was also predicated on allegations that, in the month before the arrest warrant issued, defendant had told his father and a neighbor that there was a stalking warrant out for plaintiff. Plaintiff supported these allegation with an affidavit from the neighbor. The gravamen of plaintiff's claim for slander is that these statements were untrue at the time they were made.

Among the elements that plaintiff would have to establish in order to successfully prosecute a claim for slander per se, would be the fact that defendant's statements were false in some material way. It is not enough to demonstrate that they were false with regard to some aspect that was not itself defamatory. It is the gist or sting of the defamatory statement that must be false. *Rouch v Enquirer & News (After Remand)*, 440 Mich 238, 258-271; 487 NW2d 205 (1992). The statements at issue in this case (assuming defendant uttered them and did so at the time alleged by plaintiff) may be considered to be comprised of two components: (1) a true assertion by implication that plaintiff had previously engaged in a course of conduct to which the

prosecutor would respond by securing the issuance of a stalking warrant; and (2) a false assertion that the prosecutor had already issued the warrant. The gist or sting of the statements (i.e., that portion of the statements that tends to defame plaintiff) flows from the true portion of the statements. Hence, although the statements might have been false with regard to the timing of the issuance of the warrant, they were not materially false for purposes of plaintiff's claim for slander per se. *Rouch, supra* at 271. Accordingly, even drawing all reasonable inferences in plaintiff's favor, summary disposition pursuant to MCR 2.116(C)(10) was appropriate.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot