STATE OF MICHIGAN

COURT OF APPEALS

GEORGE V. PETERSEN,

Plaintiff-Appellant,

v

THOMAS R. EVERETT and CHARLES H. NOVELLI,

Defendants,

and

DANIEL LESS,

Defendant-Appellee.

UNPUBLISHED
November 30, 2001

No. 219987
Wayne Circuit Court
LC No. 97-716956-NM

Before: Owens, P.J., and Holbrook, Jr., and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order dismissing his claims against defendants Everett and Novelli for failure to proceed. Plaintiff also raises issues related to the trial court's grant of summary disposition in favor of defendant Less. We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition to defendant Less. We disagree. Because the trial court granted the motion based on the pleadings alone, we review this issue under the standard of review applicable to (C)(8) motions. "MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).

Initially, we note that it is questionable whether plaintiff properly filed any claims against Less. No amended complaint, summons, or proof of service of a complaint regarding Less are found in the lower court file. MCR 2.101, 2.102, and 2.111. Nonetheless, the trial court granted plaintiff's motion to add Less as a party to its complaint filed against defendants Everett and Novelli, and Less proceeded to defend plaintiff 's claims against him.

At the hearing on Less' motion for summary disposition, the trial court clarified the claims plaintiff was raising against Less. The court asked plaintiff if he was claiming abuse of process, conspiracy to commit malpractice, malicious prosecution, and fraud. Plaintiff responded in the affirmative. The trial court properly dismissed each of these claims. "A public prosecutor is not liable for malicious prosecution." *Mathews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998).[1] Plaintiff cannot collaterally attack his conviction through the vehicle of a civil suit. Further, plaintiff's abuse of process claim was properly dismissed as being untimely. MCL 600.5805(9).[2] We also conclude that plaintiff has not raised sufficient allegations to sustain either his conspiracy or fraud claims.

Plaintiff also argues that the trial court erred in dismissing plaintiff's claims against Less because discovery was not complete. Again, we disagree. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence.

We also reject plaintiff's argument that the trial court erred in denying his motion for reconsideration. Plaintiff argues that he should have been allowed to turn his malicious prosecution claim against defendant into a habeas corpus proceeding, thereby granting him the opportunity to challenge the fact of his conviction by establishing that the underlying criminal case would have terminated in his favor if not for the prosecutor's misconduct.[3] To the extent that the court treated plaintiff's allegations as raising, in part, a claim for malicious prosecution, we find no abuse of discretion. *American Transmission, Inc v Channel 7 of Detroit*, 239 Mich App 695, 709; 609 NW2d 607 (2000). Plaintiff has not shown that the court made a palpable error or that a different disposition of the motion would result from correcting the alleged error. MCR 2.119(F)(3).

Plaintiff also challenges the trial court's dismissal of his claims against Everett and Novelli. The trial court dismissed plaintiff's claims against defendants Everett and Novelli due to plaintiff's failure to appear at trial and failure to proceed. The trial court, in its discretion, may dismiss a case with prejudice or enter default judgment when a party fails to appear at a duly scheduled trial. *Zerillo v Dyksterhouse*, 191 Mich App 228, 230; 477 NW2d 117 (1991).

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[1] Plaintiff argues that the trial court committed reversible error because it did not address plaintiff's claim that defendant Less fabricated evidence. However, plaintiff's complaint does not allege such a claim or even facts to support such a claim. Further, we find plaintiff's allegation that Less conspired with the medical examiner to falsify the manner in which the victim was killed to be fanciful. Certainly the requirement that this Court accept as true all "well-plead" factual allegations does not mean that we cannot "pierce the veil of the complainant's factual allegations and dismiss those claims whose factual contentions are clearly baseless." *Neitzke v Williams*, 490 US 319, 327; 109 S Ct 1827; 104 L Ed 2d 338 (1989).

[2] Plaintiff argues that either the six year statute of limitations, MCL 600.5813, should apply or that the statute should be tolled based on discovery or continuing wrong. However, plaintiff neither cites case law, nor cites evidence to support either of these theories.

[3] Plaintiff's criticism of *Heck v Humphrey*, 512 US 477; 114 S Ct 2364; 129 L Ed 2d 383 (1994) is irrelevant, in that *Heck* involved an apparent conflict between 42 USC § 1983, and the federal habeas corpus statute, 28 USC § 2254.

It is undisputed that plaintiff did not appear at trial on May 18, 1999. The record shows that plaintiff was aware early on in the proceedings about delays and problems associated with processing his mail. Nonetheless, plaintiff did not take action to obtain an adjournment or file a request for a writ of habeas corpus until May 1, 1999, when his attempt to mail his request failed for lack of postage. Additionally, the trial court found that plaintiff made no attempt to prepare for trial, having filed his witness list six months after the witness list deadline, and having failed to subpoena his witnesses. Given these facts, we conclude that the court did not abuse its discretion in dismissing plaintiff's claims for failure to appear at trial and failure to proceed. See *People v Ullah,* 216 Mich App 669, 673; 550 NW2d 568 (1996).

We also reject plaintiff's argument that the trial court erred in denying plaintiff's motion for a default judgment and summary disposition against defendant Everett. Assuming arguendo that plaintiff did properly attempt to file the motion with the court on May 1, 1999,[4] plaintiff attempted to argue the motion on May 18, 1999, only seventeen days later, and six days after the motion was sent to Everett. Because the motion was not filed in accordance with the court rules, MCR 2.116(G)(1) and 2.063(B), the trial court correctly denied the motion. Accordingly, we find no abuse of discretion. *Frankenmuth Mutual Ins Co v ACO, Inc*, 193 Mich App 389, 396-398; 484 NW2d 718 (1992).

Finally, plaintiff argues that judicial misconduct denied him his Fourteenth Amendment right of access to the court to litigate his claims against defendants Everett and Novelli. Specifically, plaintiff claims that the court misled him by raising the illusory prospect that plaintiff could obtain a writ of habeas corpus and have the state pay for his transportation to trial. In so doing, plaintiff alleges the court diverted his attention away from pursuing other viable means of appearing at trial. The court's actions, plaintiff asserts, evidence "a preconceived plan to hastenly [sic] dismiss the case," as well as the court's involvement in "internalized conspiracies" against him. After reviewing the record, we conclude that plaintiff's bizarre allegations are baseless. It is clear from the record that plaintiff simply misunderstood the court's attempt to keep him informed of the procedures that needed to be followed.

In any event, regardless of what the trial court told plaintiff, the record shows that plaintiff has no one to blame but himself for the dismissal of his claims against Everett and Novelli. Plaintiff failed to timely pursue a writ of habeas corpus and failed to prepare for trial. We find no judicial misconduct and no abuse of discretion on the part of the trial court.

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[4] On or about May 1, 1999, plaintiff attempted to file a motion for a default judgment and summary disposition against defendant Everett. The lower court record contains a copy of the motion, however, the motion is not listed on the lower court's docket. In a motion to this Court to amend the lower court record, which was denied, plaintiff attached a docket sheet, amended by himself, which lists, on May 12, 1999, "Motion for Miscellaneous Motion (Writ of Habeas Corpus, Default and Summary Judgment, Reconsideration, Ex Parte Stay/Package Envelope Returned due to Insufficient Funds)." On the Tuesday May 18, 1999, trial date, defendant Everett stated that he received the default/summary disposition motion the Thursday before, i.e., May 13, 1999.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot