STATE OF MICHIGAN

COURT OF APPEALS

STEVEN MARK FREUND,

Plaintiff-Appellant,

v

JEFFREY JOHN SILAGY and MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,[1]

Defendants-Appellees.

UNPUBLISHED
May 14, 2002

No. 228974
Iosco Circuit Court
LC No. 00-002359-CZ

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant Silagy's motion for summary disposition, and the trial court's denial of his motions for rehearing and amendment of his complaint. We affirm.

In 1997, defendant Silagy ("defendant"), acting as an employee of defendant DEQ, filed a "statement in support of complaint for warrant" with the local prosecutor and alleged that plaintiff had deposited "fill" in a wetland parcel without a permit, in violation of MCL 324.30304(a). Thereafter, the prosecutor filed a misdemeanor complaint against plaintiff. Ultimately, the prosecutor's motion for nolle prosequi was granted, and the criminal charge was dismissed. Plaintiff filed the instant lawsuit alleging various misconduct by defendant in pursuing the criminal charge against plaintiff.

The trial court granted defendant Silagy's motion for summary disposition as to each count in plaintiff's complaint pursuant to MCR 2.116(C)(8) and (10), and therefore dismissed plaintiff's complaint. Following the dismissal of his complaint, plaintiff moved for rehearing and to allow amendment of his complaint. The trial court denied both motions.

Plaintiff contends that the trial court erred by granting defendant's motion for summary disposition. Generally, we review de novo a trial court's ruling on a motion for summary

[1] During the early stages of the summary disposition hearing, plaintiff stipulated to the dismissal of defendant Michigan Department of Environmental Quality ("defendant DEQ").

disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). In regard to a motion for summary disposition pursuant to MCR 2.116(C)(8), the *Beaudrie* Court explained:

> A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Beaudrie, supra* at 129-130.]

"All well-pleaded facts are accepted as true and are construed in the light most favorable to the nonmoving party." *Madejski v Kotmar Ltd*, 246 Mich App 441, 444; 633 NW2d 429 (2001).

In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Haliw v Sterling Heights*, 464 Mich 297, 302; 627 NW2d 581 (2001). "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

As a preliminary matter, plaintiff contends that the trial court erred as a matter of law by deciding the summary disposition motion based "solely" on the fact that plaintiff did not file any affidavits to counter defendant's affidavit. Our review of the trial court's ruling, however, reveals that the trial court did not base its ruling on the "fact" that plaintiff did not file an affidavit to counter defendant's affidavit. Instead, the trial court properly based its ruling on either plaintiff's pleading deficiencies, MCR 2.116(C)(8), or plaintiff's failure to present sufficient facts to create a material factual dispute, MCR 2.116(C)(10).

In addition, MCR 2.116(G)(4) states that the adverse party in a motion for summary disposition pursuant to MCR 2.116(C)(10), "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." The court rule further provides: "If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." MCR 2.116(G)(4). Thus, to the extent that the trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), plaintiff's failure to counter defendant's motion for summary disposition and affidavit could properly lead to dismissal of plaintiff's causes of action, if "appropriate."

Therefore, we must consider whether the trial court, as a matter of law, properly dismissed each of plaintiff's ten counts: (i) injurious falsehood; (ii) false arrest; (iii) false imprisonment; (iv) malicious prosecution; (v) abuse of process; (vi) defamation; (vii) violation of plaintiff's right of due process of law under the Michigan Constitution; (viii) intentional infliction of emotional distress; (ix) fraud; and (x) discrimination.

During the hearing on defendant's motion for summary disposition, plaintiff conceded that counts (vii) and (x) were rendered moot by the dismissal of defendant DEQ. In addition, plaintiff conceded that the defamation count was untimely pursuant to the one-year statute of limitation, MCL 600.5805(8). Having conceded the lack of merit in these counts below, plaintiff

may not challenge the trial court's dismissal of these counts on appeal. See *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

In regard to false imprisonment, MCL 600.5805(2) provides for a two-year statute of limitation "for an action charging . . . false imprisonment." In *Meda v. City of Howell*, 110 Mich App 179, 186; 312 NW2d 202 (1981), we applied a two-year statute of limitation to a false imprisonment case based on a purported false arrest. Here, plaintiff's complaint alleged that he was incarcerated for several hours on May 14, 1997. Plaintiff did not, however, commence his lawsuit until January 18, 2000. Accordingly, the false arrest and false imprisonment counts were properly dismissed as time-barred pursuant to MCL 600.5805(2).[2]

In *Kollenberg v Ramirez*, 127 Mich App 345, 352; 339 NW2d 176 (1983), quoting 3 Restatement Torts, 2d § 623A, p 334, we recognized the tort of injurious falsehood:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if
>
> (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and
>
> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.

However, to avoid the one-year statute of limitation for defamation actions, MCL 600.5805(5), a plaintiff alleging injurious falsehood must also plead special damages. *Kollenberg, supra* at 355. "General personal damages for injury to plaintiff's professional reputation are not recoverable in the injurious falsehood action." *Id.* Here, plaintiff's complaint did not plead special damages, but instead sought to recover only general personal damages. Accordingly, plaintiff's complaint was insufficient to defeat the general one-year statute of limitation that applies to defamation actions, MCL 600.5805(8), and dismissal of this count was "appropriate" as a matter of law pursuant to either MCR 2.116(C)(7) or MCR 2.116(C)(8). See *Jory, supra* at 425.

In regard to malicious prosecution, our Supreme Court explained that a plaintiff has the deliberately "difficult" burden of proving:

> (1) that the defendant has initiated a criminal prosecution against him, (2) that the criminal proceedings terminated in his favor, (3) that the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) that the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 377-378; 572 NW2d 603

[2] Where a motion for summary disposition is based on an expired statute of limitation, the relevant court rule is MCR 2.116(C)(7). Nevertheless, we may affirm where the trial court reaches the right result, but for the wrong reason. *People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

(1998).]

Unless there is a disputed question of fact, the question of probable cause in a malicious prosecution action is a question of law for the court to determine. *Id.* at 380. "'To constitute probable cause . . ., there must be such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the person arrested is guilty of the offense charged.'" *Id.* at 387, quoting *Wilson v Bowen*, 64 Mich 133, 138; 31 NW 81 (1887).

Here, there is no dispute that defendant had a factual basis to believe that a wetland was filled by somebody—the only question being the identity of the perpetrator. Defendant's affidavit established that he mistakenly thought that plaintiff was the individual responsible for placing fill on the wetland area. Indeed, defendant noted that plaintiff had strongly asserted that he was the contact person for any issues regarding the wetland and diligently protested defendant's involvement. At most, plaintiff's complaint makes conclusory allegations regarding defendant's purported knowledge of the identity mistake. Moreover, although defendant may have negligently overlooked evidence to the contrary, we believe that there was sufficient evidence at the time plaintiff was charged to support a reasonable suspicion that plaintiff had ordered the fill—even though additional facts later determined this to be inaccurate. Indeed, it was only during the second interview of Greg Michalski that defendant learned, or perhaps realized, that plaintiff had not ordered the fill. Thus, we do not believe that there was a material factual dispute concerning the "malice" element; therefore, the trial court did not err as a matter of law by dismissing plaintiff's malicious prosecution cause of action.

In regard to plaintiff's fraud count, the trial court dismissed the count by noting that plaintiff failed to plead that he relied to his detriment on a false statement by defendant. Indeed, among the elements required for a prima facie case of fraud is that the plaintiff acted in reliance upon a misrepresentation. *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998). Here, plaintiff's complaint sets forth several conclusory allegations that defendant made false statements, but the complaint never alleged that he relied on the falsity of these statements. Accordingly, this count could have been dismissed based solely on MCR 2.116(C)(8) because the complaint failed to state a claim upon which relief could be granted. Alternatively, because the record below did not create any factual dispute regarding this missing element, dismissal of fraud count was "appropriate" pursuant to MCR 2.116(C)(10).

The trial court dismissed plaintiff's abuse of process claim because there were no allegations that defendant sought to personally extract any benefit from the criminal action against plaintiff. Instead, plaintiff alleged that defendant "had the ulterior motive of causing the plaintiff to have his source of livelihood destroyed or damaged." Plaintiff also alleged that defendant had an ulterior purpose of damaging plaintiff's personal and professional reputation, as well as harassing and intimidating plaintiff.

A successful cause of action for abuse of process requires a plaintiff to "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." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). The plaintiff must plead and prove "some corroborating act" demonstrating an ulterior purpose because a "bad motive alone will not establish an abuse of process." *Id.* Here, plaintiff did not plead any act that demonstrated that defendant had an ulterior purpose for

pursuing criminal charges against plaintiff. Instead, plaintiff simply pleaded conclusions that defendant had ulterior purposes. According to the *Bonner* decision, this is plainly insufficient. Therefore, as in *Bonner*, the trial court properly dismissed plaintiff's lawsuit based on either MCR 2.116(C)(8) or MCR 2.116(C)(10). See *Jory, supra* at 425.

Finally, the trial court dismissed plaintiff's intentional infliction of emotional distress count, stating that "a reasonable trier of fact could [not] find such extreme or outrageous conduct that would cause this complaint to set forth an intentional infliction of emotional distress . . . ." A successful claim of intentional infliction of emotional distress requires a plaintiff to plead and prove: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582; 603 NW2d 816 (1999). In *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999), we noted: "Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community."

Were there factual support for plaintiff's allegation that defendant pursued criminal charges against plaintiff though he knew that plaintiff was innocent, then perhaps the conduct was extreme and outrageous. However, the only evidence beyond the mere conclusory allegations in plaintiff's pleadings suggested that defendant was simply not careful in determining which "Mr. Freund" was responsible for filling the wetland area. While defendant's conduct, as alleged by plaintiff, could fairly be construed as "negligent," we are not persuaded that it rose to a level of extreme or outrageous. In the absence of a material question of fact concerning defendant's conduct, the trial court properly dismissed this count pursuant to MCR 2.116(C)(10). Consequently, we conclude that the trial court correctly dismissed each of plaintiff's ten counts as a matter of law.

Plaintiff also challenges the trial court's denial of his motion for rehearing. We review a trial court's decision on a motion for rehearing or reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Here, plaintiff essentially argued that the trial court had been misled by defendant's affidavit because of the outstanding felony warrant against defendant. However, plaintiff's motion did not reference any specific factual allegation by defendant that was untrue, nor did he indicate which material questions of fact the trial court improperly resolved. Further, plaintiff did not reference any legal error. Instead, plaintiff simply asked the trial court to reconsider its earlier ruling, perhaps by viewing defendant's affidavit with increased skepticism. MCR 2.119(F)(3) provides in pertinent part: "Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted." Accordingly, we do not believe that the trial court abused its discretion by denying plaintiff's motion for rehearing.

Defendant also contends that the trial court abused its discretion by denying his motion to amend his original complaint. MCR 2.118(A)(2) provides that "a party may amend a pleading only by leave of the court or by written consent of the adverse party." Nevertheless, the Court rule also provides that "[l]eave shall be freely given when justice so requires." MCR 2.118(A)(2). A motion to amend pleadings should ordinarily be granted absent such factors as "(1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure

to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment." *Lane v KinderCare*, 231 Mich App 689, 697; 588 NW2d 715 (1998). A futile amendment is one that "merely restates the allegations already made or adds allegations that still fail to state a claim." *Id*. A trial court's denial of a party's motion to amend his or her complaint is reviewed for an abuse of discretion. *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 405; 605 NW2d 690 (1999).

Here, plaintiff's proposed amended complaint added only two new factual allegations. However, although these allegations may have been relevant to defendant's credibility, they were not relevant to plaintiff's causes of action. Moreover, although plaintiff deleted five counts from his original complaint, the proposed amended complaint alleged substantively identical versions of the remaining five counts. Thus, having already dismissed these five retained counts, the trial court correctly concluded that plaintiff's motion was futile. *Lane*, *supra* at 697. Consequently, the trial court did not abuse its discretion by denying plaintiff's motion to amend his complaint.

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper