

STATE OF MICHIGAN
COURT OF APPEALS

SHERROD PIGEE and FIRST MORTGAGE
FUND, INC.,

UNPUBLISHED
September 21, 2004

Plaintiffs-Appellants,

v

No. 249235
Genesee Circuit Court
LC No. 01-071910-CZ

TONY DiPONIO,

Defendant-Third-Party-Appellee,

and

PETER DOERR,

Defendant.

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting summary disposition to defendant Tony DiPonio on their claims for abuse of process and constructive fraud. We affirm in part and reverse and remand in part.

This lawsuit stems from receivership proceedings in which defendant acted as attorney for the receiver, and also for a judgment creditor. Plaintiffs allege that as a result of defendant's intentional wrongful actions, they suffered financial damage to property they owned and which defendant prevented from being sold in a timely fashion. Specifically, they allege that defendant misrepresented to the receiver the need to obtain court approval for certain transactions, that he delayed the wind-up of a receivership involving a debt of only about \$11,000 by putting forward a spurious claim for \$95,000, and that he failed to properly file a substitution of counsel when he withdrew as attorney for the receiver, thus leaving the receiver technically unrepresented and placing the receivership in limbo. They also allege, as a special master appointed in the receivership found, that all this was done improperly to gain leverage for defendant's creditor

client in other litigation the creditor had with plaintiff Sherrod Pigeo.¹ They allege as well that it was defendant who largely instigated these actions by the creditor client. The special master said nothing on this point.

The trial court found that defendant's conduct as an attorney was "inappropriate," but that he owed no duty to plaintiffs as non-clients, and that he could not be sued for abuse of process because there was no showing that he acted for his personal benefit in committing the alleged abuse. The court therefore granted summary disposition to defendant.

Plaintiffs first argue that the trial court erred in finding that suit could not be brought because defendant owed them no duty. We agree. It is true that a lawyer ordinarily has no duty for professional negligence injuring a non-client. *Mieras v DeBona*, 452 Mich 278, 297; 550 NW2d 202 (1996). However, plaintiffs are not suing defendant for negligence or professional malpractice. They are suing him for deliberately wrongful conduct constituting an intentional tort. The fact that a lawyer owes no duty to avoid malpractice with respect to non-clients does not mean that the lawyer can commit intentional torts harming persons who are not his clients with impunity. In *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361; 354 NW2d 341 (1984), this Court ruled that an attorney who assisted a doctor in blocking a hospital from obtaining financing for an expansion by knowingly filing spurious statements casting doubt on the need for the facility could be sued by the hospital for the damage it suffered from this intentional misconduct. The facts alleged by plaintiffs in this case, if credited by the trier of fact, are remarkably similar to those in *Trepel*, and we see no reason the same rule should not apply.

Plaintiffs next argue that the trial court erred in ruling that they could not state a cause of action for constructive fraud or abuse of process. We agree with plaintiffs as to the abuse of process claim. There are two elements of a claim for abuse of process: (1) an ulterior purpose, and (2) "an act in the use of process which is improper in the regular prosecution of the proceeding." *Friedman v Dozor*, 412 Mich 1, 30; 312 NW2d 585 (1981).

Both elements are met by the facts alleged by plaintiffs. As explained by the *Friedman* Court, "abuse of process" does not mean abuse of "process" in the sense of abuse of the summons used to begin the case, but rather the subsequent misuse of the proceedings " 'for any purpose other than that which it was designed to accomplish.' " *Id.* at 30 n 18, quoting 3 Restatement Torts, 2d, comment a, p 474. Plaintiffs have clearly alleged that defendant used the receivership proceedings, not for purposes for which such proceedings are designed, but to obtain a tactical advantage for Midwest in other litigation, when there was no need for the proceedings. Plaintiffs have support for this position in both the special master's decision and the trial court's statements on the record regarding defendant's bad conduct. Moreover, defendant's position that any abuse was by Midwest, not by him, does not comport with the law. *Friedman* clearly recognizes that the attorney acting in the legal proceedings is an appropriate defendant in an abuse of process action. *Id.* at 30-31.

¹ Pigeo is the person whose property was in receivership, and plaintiff First Mortgage Fund, Inc., held mortgages on ten of his properties in receivership.

The other element of abuse of process is action for an ulterior motive. This appears to be the ground on which the trial court relied in ruling that the case could not go forward against defendant because there was no evidence “for his own benefit or detriment.” In *Young v Motor City Apts Ltd Dividend Housing Ass’n No 1 & No 2*, 133 Mich App 671, 681; 350 NW2d 790 (1984), it was noted that one who has “attempted to obtain a collateral advantage outside of the use of the process” has satisfied this requirement. This is exactly what plaintiffs have alleged—and the special master found to have taken place—in the present case. Plaintiffs alleged that defendant used the receivership to try to gain advantage in a situation external to that particular legal proceeding. See *Three Lakes Ass’n v Whiting*, 75 Mich App 564, 574; 255 NW2d 686 (1977) (the ulterior purpose was an attempt to “coerc[e] plaintiff to end all opposition to defendants’ condominium project”).

Neither *Young* nor *Three Lakes Ass’n* suggests, as the trial court apparently thought, that the “ulterior purpose” must be pecuniary advantage for the attorney himself. It is clear from *Friedman, supra*, that an attorney may be sued for abuse of process when the elements are met. There is no suggestion, in this or any other case cited to us, that the ulterior purpose cannot be one the attorney is pursuing on behalf of the client.

The elements of constructive fraud are set forth in *General Electric Credit Corp v Wolverine Ins Co*, 420 Mich 176; 362 NW2d 595 (1984). That decision explains that the distinction between “actual fraud” and “constructive fraud” is that actual fraud is an intentional misrepresentation which a party makes to induce detrimental reliance, while “constructive fraud” is a misrepresentation which causes the same effect, but without “a purposeful design to defraud.” *Id.* at 188-190. In either case, there has to be a misrepresentation. This is the missing element in plaintiffs’ claim. There is no allegation that defendant made any representation of any kind, false or otherwise, to plaintiffs. Thus we hold that defendant cannot be liable to plaintiffs for constructive fraud. The trial court did not err in granting summary disposition to defendant on plaintiffs’ claim for constructive fraud.

Finally, plaintiffs argue that they presented sufficient admissible evidence to withstand a motion for summary disposition.

This Court reviews orders granting summary disposition pursuant to MCR 2.116(C)(10) to determine whether, when the evidence is considered in the light most favorable to the non-moving party, there is a genuine issue of material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The nonmovant receives the benefit of all reasonable inferences. *Hall v McRea Corp*, 238 Mich App 361, 369-370; 605 NW2d 354 (1999). The benefit of the doubt is given to the existence of a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 320; 575 NW2d 324 (1998). If the record, when viewed in this way, leaves open an issue on which reasonable minds could differ, summary disposition is inappropriate. *Allstate Ins Co v Dep’t of Mgt & Budget*, 259 Mich App 705, 709; 675 NW2d 857 (2003).

Plaintiffs presented evidence which, if believed, would establish that defendant misrepresented the procedural requirements in the receivership proceedings to the receiver, filed a false claim of almost nine times the amount of the actual debt plaintiff Pigeo owed to keep the receivership going, and that he hamstrung the receivership by withdrawing as receiver without

properly allowing the substitution of replacement counsel in a timely fashion. Any one of these sets of facts, if credited, would be sufficient to support plaintiffs' claim for abuse of process. There is, therefore, a genuine issue as to questions of material fact, and so summary disposition was inappropriate on that claim. As previously noted, however, because there was no allegation that defendant made any false representations to plaintiffs, summary disposition was appropriate as to plaintiffs' claim for constructive fraud.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad