STATE OF MICHIGAN

COURT OF APPEALS

NAJAT MACKIE and FREETOWN MINI MART, INC.,

Plaintiffs-Appellants,

v

BOLLORÉ S.A., NORTH ATLANTIC TRADING COMPANY, NORTH ATLANTIC OPERATING COMPANY, JENKENS & GILCHRIST and LISA MEYERHOFF,

Defendants,[1]

and

PROSKAUER ROSE, L.L.P., MARCELLA BALLARD, CHRISTOPHER A. RAIMONDI, KENNETH A. TARDIE & ASSOCIATES, PAUL H. STEINBERG and STEINBERG, SHAPIRO & CLARK,

Defendants-Appellees.

UNPUBLISHED
February 25, 2010

No. 286461
Wayne Circuit Court
LC No. 07-704897-CZ

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order of dismissal.[2] We affirm.

[1] Defendants Bolloré S.A., North Atlantic Trading Company, North Atlantic Operating Company, Jenkens & Gilchrist, and Lisa Meyerhoff were dismissed from this appeal by stipulation. *Mackie v Bolloré*, unpublished order of the Court of Appeals, entered May 15, 2009 (Docket No. 286461).

[2] To the extent that plaintiffs' claim of appeal was premature, it was treated as an application for
(continued…)

This case arises out of a dispute between Ali Mackie and the trademark holders of Zig-Zag cigarette papers—Bolloré, North Atlantic Trading Company (NATC), and North Atlantic Operating Company (NAOC). In March 1999, Bolloré, NATC, and NAOC, as the holders and exclusive licensees of the Zig-Zag trademarks, filed a lawsuit against various members of the Mackie family in the United States District Court for the Northern District of Texas, alleging that the Mackie defendants and their co-defendants had violated federal copyright and trademark laws. Ultimately, a contempt judgment was entered against the Mackie defendants, including Ali Mackie, for $11 million. Plaintiff, Najat Mackie, is Ali Mackie's mother and the owner of plaintiff, Freetown, a convenience store. She resides in Michigan and was not a defendant in the above-mentioned case.

Seeking to collect on the contempt judgment, Bolloré, NATC, and NAOC obtained orders from the Texas federal district court declaring plaintiffs in this case to be alter egos of Ali Mackie, adding plaintiffs as co-judgment debtors to the contempt judgment, piercing the corporate veil of Freetown, appointing a receiver, and ordering plaintiffs to turnover all non-exempt property to the receiver for satisfaction of the contempt judgment debt. Plaintiffs appealed the Texas orders to the United States Circuit Court of Appeals for the Fifth Circuit. While that appeal was pending, Bolloré, NATC, and NAOC obtained orders from the United States District Court for the Eastern District of Michigan for the United States Marshal to assist them in seizing and selling plaintiffs' property. In December 2004, and February 2005, defendants seized and sold plaintiffs' personal property.

On April 28, 2006, the Fifth Circuit Court of Appeals vacated the Texas federal district court orders on the ground that the Texas state statute authorizing turnover orders (Tex Civ Prac & Rem Code § 31.002) is limited to named judgment debtors and may not be used to determine the substantive property rights of third parties. *Bollore SA v Import Warehouse, Inc*, 448 F 3d 317, 322-326 (CA 5, 2006). The court reasoned that the federal district court's determination that Najat Mackie and Freetown were alter egos of Ali Mackie and, accordingly, adding them as co-judgment debtors to the contempt judgment, was a substantive determination of property rights not permitted by the authorizing statute. *Id*.

Plaintiffs filed a complaint in the Wayne County Circuit Court in 2007 against defendants alleging, among other things, malicious prosecution, abuse of process, intentional infliction of emotional distress, conversion, negligence, and unjust enrichment. Defendants moved for summary disposition, arguing that their conduct should not be rendered tortious in hindsight simply because the Fifth Circuit Court ultimately vacated the Texas federal district court orders. They argued that the turnover order was facially valid at the time defendants acted in reliance upon it and that plaintiffs' complaint must thus fail. The circuit court granted defendants' motion for summary disposition in all respects, with the exception of the unjust enrichment count pertaining only to Bolloré, NATC, and NAOC. Thereafter, the circuit court also dismissed the remaining defendants after they and plaintiffs accepted a case evaluation award in plaintiffs' favor on the remaining claim. This appeal followed.

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leave to appeal and granted. *Mackie v Bolloré*, unpublished order of the Court of Appeals, entered January 30, 2009 (Docket No. 286461).

Plaintiffs argue on appeal that the circuit court erred in granting partial summary disposition in favor of defendants on the ground that defendants were acting pursuant to valid court orders. On appeal, a decision to grant a motion for summary disposition is reviewed de novo. *Hines v Volkswagen of Am, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). When reviewing a motion for summary disposition under MCR 2.116(C)(10), this Court must consider all of the pleadings and the evidence in a light most favorable to the nonmoving party. *Id.* The motion tests whether there exists a genuine issue of material fact. *Id.* "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). Issues of law are also reviewed de novo on appeal. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 477; 760 NW2d 287 (2008).

Plaintiffs first argue that the circuit court erred in finding that defendants were acting pursuant to a valid court order. According to plaintiffs, there was no valid court order because defendants: (1) could not have registered the July 12, 2002 judgment as it applies to plaintiffs, because the case in Texas was not yet final by appeal; and, (2) defendants did not properly register the Texas federal court orders against plaintiffs in the United States District Court for the Eastern District of Michigan and,

The registration statute, 28 USC 1963 provides, in relevant part:

> A judgment in an action for the recovery of money or property entered in any court of appeals, district court, bankruptcy court, or in the Court of International Trade may be registered by filing a certified copy of the judgment in any other district or, with respect to the Court of International Trade, in any judicial district, *when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown.* [Emphasis added.]
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> A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

With respect to the July 12, 2002 judgment, the judgment was registered in Michigan on May 5, 2004. The Texas federal court's certification of judgment for registration in another district, dated April 14, 2004, explicitly states, "no notice of appeal from this judgment has been filed." Further, plaintiffs acknowledge that their federal claim of appeal was filed on December 7, 2004. Thus, there is no question that there was no appeal pending at the time the contempt judgment was registered in the United States District Court for the Eastern District of Michigan on May 5, 2004.

Plaintiffs also claim that the time for appeal had not yet expired, citing Sixth Circuit Court of Appeals case law in support of the contention that the language of 28 USC 1963 applies to a pending appeal *or* an unexpired time for appeal. We need not address whether 28 USC 1963 can be read this expansively because the time to appeal the contempt judgment had indeed expired by the time of plaintiffs' appeal, over two years after the judgment was entered. FRAP 4(a)(1) (30 days for filing of notice of appeal). Plaintiffs claim of appeal from December 7,

2004, was taken from several post-judgment orders, rather than from the contempt judgment. Plaintiffs' argument fails.

Addressing the registration of the turnover order, we note that the order added plaintiffs as judgment debtors to the original contempt judgment of July 12, 2002, and ordered plaintiffs to turnover any non-exempt property to a court-appointed receiver. The order was entered under the authority of a Texas turnover statute, Tex Civ Prac & Rem Code § 31.002. In general, such a turnover order is considered to be "purely procedural in nature; the statute does not provide for the determination of the substantive rights of the parties." *Resolution Trust Corp v Smith*, 53 F3d 72, 77 (CA 5, 1995) (internal quotation omitted). 28 USC 1963, however, only provides for the registration of "judgments." *Black's Law Dictionary*, 7th ed., defines "judgment" as, "A court's final determination of the rights and obligations of the parties in a case." An "order," on the other hand, is a "written direction or command delivered by a court or judge." *Black's Law Dictionary*, 7th ed. Generally speaking, then, a turnover order is not a judgment that may be registered according to 28 USC 1963.

In any event, the turnover order was eventually vacated by the Fifth Circuit Court of Appeals on the ground that the order was impermissibly *substantive* and not purely procedural, as required by Tex Civ Prac & Rem Code § 31.002. *Bollore SA v Import Warehouse*, *supra*, 448 F3d 317, 321-323. The Fifth Circuit Court found that the order did, in fact, serve to determine plaintiffs' substantive rights---much in the same way a judgment would. However, 28 USC 1963 only provides that a judgment "may" be registered. Thus, even if the turnover order was found to be a judgment, 28 USC 1963 does not require its registration.

Furthermore, while plaintiffs' tort claims against defendants arise out of the Fifth Circuit Court's opinion (plaintiffs argue that defendants acted tortiously when they seized and sold plaintiffs' property because the court orders that prompted their conduct were not valid[3]), questions of material fact must exist in order for plaintiffs' claims to survive summary disposition under MCR 2.116(C)(10). We therefore address plaintiffs' claims in turn.

Plaintiffs' first count is for malicious prosecution. To make out a prima facie case for malicious prosecution, a plaintiff must prove: "(1) Prior proceedings terminated in favor of the present plaintiff; (2) Absence of probable cause for those proceedings; (3) Malice, defined as a purpose other than that of securing the proper adjudication of the claim; and (4) A special injury that flows directly from the prior proceedings." *Payton v City of Detroit*, 211 Mich App 375, 394-395; 536 NW2d 233 (1995). Plaintiffs make only a conclusory and passing mention of defendants' alleged malice: "As a result of defendants' malice . . . plaintiffs' have suffered damage." We are unable to discern any evidence in the record of a nefarious purpose on the part of defendants—a receiver appointed by the court, and attorneys retained to recover an outstanding contempt judgment, acting directly pursuant to a series of court orders (valid or not). Plaintiffs have not provided any evidence to the contrary. Accordingly, we conclude that

[3] The only remaining defendants in this case are the court-appointed receiver and attorneys for the corporations who obtained the original contempt judgment.

summary disposition in favor of defendants was proper on this count because there was no genuine issue of material fact regarding defendants' malice. MCR 2.116(C)(10).

Plaintiffs' second count is for abuse of process. "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." *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992). As with the malicious prosecution count, an ulterior purpose is required. Likewise, plaintiffs have not alleged any actual ulterior purpose behind defendants' conduct. There is no evidence on the record demonstrating an ulterior purpose; thus, summary disposition in favor of defendants was proper on this count because there was no genuine issue of material fact regarding defendants' ulterior purpose.

Plaintiffs' next count is for intentional infliction of emotional distress. In order to establish a claim for intentional infliction of emotional distress, a plaintiff must establish: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003). The first element requires conduct that is "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." *Id*.

Plaintiffs allege that defendants' outrageous conduct is defined by the magnitude of the emotional distress it caused, rather than identifying any actual conduct of defendants that falls outside the bounds of decency. Plaintiffs' claim on this count again amounts to a conclusory statement with respect to at least this element of the tort. There is no evidence presented that defendants acted contrary to any of the court orders they possessed, let alone in a way considered "intolerable in a civilized community." *Id*. Summary disposition in favor of defendants was proper on this count because there was no genuine issue of material fact regarding whether defendants' conduct was outrageous. MCR 2.116(C)(10).

Plaintiffs' next count is for conversion.

> In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. In general, it is viewed as an intentional tort in the sense that the converter's actions are wilful, although the tort can be committed unwittingly if unaware of the plaintiff's outstanding property interest. [*Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).]

Similarly, plaintiffs also claim a trespass to chattels. A trespass to chattels is actionable if one dispossesses another of or intentionally and harmfully interferes with another's property. Restatement Torts, 2d, §§ 217-219; see also *Burns v Kirkpatrick*, 91 Mich 364, 365-366; 51 NW 893 (1892). A trespass to chattels or conversion is privileged when the trespasser acts pursuant to a facially valid court order. Restatement Torts, 2d, § 266. An order is facially valid if: "(1) it [is] regular in form, (2) it [is] issued by a court having authority to issue the particular [order] and having jurisdiction over the chattels described in it and (3) all proceedings required for the proper issuance of the [order] have duly taken place." *Id*., Comment b.

Plaintiffs also claim a trespass to land. "In Michigan, recovery for trespass to land is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. Moreover, the intrusion must be intentional." *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008) (internal quotation and citation omitted). Like trespass to chattels and conversion, there is ordinarily a privilege for an actor acting pursuant to a court order. Restatement Torts, 2d, § 210.

Plaintiffs have failed to proffer any evidence that the court orders in this case were not facially valid. Plaintiffs seek to rely on the fact that the orders were, ultimately, issued based on a legal error, but have not identified any procedural irregularities in the orders. Restatement Torts, 2d, § 266, Comment b. Accordingly, we conclude that summary disposition in favor of defendants was proper on these counts because there was no genuine issue of material fact regarding the facial validity of the court orders. MCR 2.116(C)(10).

Finally, plaintiffs claim that defendants' conduct amounted to negligence and the negligent infliction of emotional distress.

> In order to make out a prima facie case of negligence, the plaintiff must prove the four elements of duty, breach of that duty, causation, and damages. The threshold question in a negligence action is whether the defendant owed a duty to the plaintiff. Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. [*Brown, 478* Mich at 552.]

In this case, plaintiffs claim that "Defendants had a duty to refrain from maliciously prosecuting plaintiffs, converting plaintiffs' real and personal property, trespassing upon plaintiffs' land, and willfully inflicting emotional distress upon the plaintiffs", and had a duty to refrain from the malicious, reckless and unlawful prosecution of [plaintiffs] . . . including but not limited to when they unlawfully sought the turnover of [plaintiffs' property]." Assuming, *arguendo*, that plaintiffs' statement of duty is correct, the foregoing analysis demonstrates that plaintiffs have not proffered any evidence that defendants actually acted in contravention of this duty. There is no evidence that defendants ever took any extralegal action; rather, they made legal arguments to regularly constituted courts of law, and obtained and acted pursuant to facially valid orders from those courts. Plaintiffs have not provided any evidence that defendants' "prosecution" of this case was malicious, reckless, or unlawful. Accordingly, we conclude summary disposition in favor of defendants on these counts was proper because there was no genuine issue of material fact regarding defendants' breach of duty. MCR 2.116(C)(10).

Affirmed.

/s/ Alton T. Davis
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto