STATE OF MICHIGAN

COURT OF APPEALS

DWIGHT SMITH,

Plaintiff-Appellant,

V

ALLEN DOADES, DAVID HIGGINS, and MATT HIGGINS,

Defendants-Appellees,

and

FLORENCE HAKALA,

Defendant.

UNPUBLISHED
October 12, 2010

No. 291026
Washtenaw Circuit Court
LC No. 07-001177-CZ

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's November 13, 2008 order granting summary disposition to defendant Allan Doades on his claim for tortious interference with a contract and to Doades and defendants David Higgins and Matt Higgins on his claims for conversion, intentional infliction of emotional distress (IIED), negligence, and concert of action. Plaintiff also appeals the March 3, 2009 orders granting costs and attorney fees to Doades and the Higginses. We affirm.

I. BASIC FACTS

In 1979, plaintiff entered into a land contract with Florence Hakala to purchase a 27-acre parcel of land. The land contract granted plaintiff the "first opportunity to purchase" an adjacent 2.5-acre parcel, on which a house and a barn sat. The land contract also granted plaintiff the right to use the barn for storage of personal property. In 1985, plaintiff placed two wingless airplanes, a 1946 Ercoupe and a 1957 Piper Tripacer, in the barn. According to plaintiff, he only had two conversations with Hakala about the barn. The first occurred in 1984 when he asked for permission to store the planes in the barn. The second occurred in 1987 when Hakala asked him to remove various boxes and newspapers from the barn so that a window could be repaired. Plaintiff recalled that he asked Hakala if she wanted him to remove any of his other personal property, including the planes, from the barn, but Hakala replied that only the newspapers

needed to be removed. Plaintiff paid off the land contract in 1989, and the 27-acre parcel was transferred to him by warranty deed. Plaintiff's planes remained in the barn until October 2005, when, unbeknownst to him, the planes were removed by the Higginses at the request of Doades.

In 1987, Doades began renting from Hakala the house on the 2.5-acre parcel. According to Doades, in the mid-1990s, he contacted Hakala about the planes and the other property that was stored in the barn. He was concerned that the property, which was attracting mice, rats, and raccoons, was becoming a fire hazard. Doades testified that Hakala came to look at the barn, and that a day or two later, she informed him that plaintiff had been told to remove his property from the barn. Hakala distinctly recalled that in the mid-1990s she told plaintiff to remove his planes from the barn. According to Doades, soon thereafter, some papers and a motorcycle were removed from the barn. Then, in 2005, Doades received permission from Hakala to remove the planes from the barn, and he contacted David Higgins, who he knew was interested in planes, about removing the planes. Doades never saw plaintiff at the barn, nor did he ever see any evidence of any person working on the planes.

In October 2005, the Higginses came to the barn and discovered, according to David Higgins, that the planes were "rusted piles of crap." Nonetheless, the Higginses removed the planes from the barn as a favor to Doades; David Higgins had told Doades that he would haul the planes from the barn and he did not want to go back on his word. The Higginses took the planes to David Higgins's shop, and within a day or two, they removed the engines from the planes and brought the remaining parts to a landfill. The engines, which could not be dumped in the landfill because they contained oil, were stored at David Higgins's shop.

Plaintiff learned that the planes had been removed from the barn at a meeting of the Experimental Aircraft Association on November 10, 2005. At the meeting, the Higginses gave a presentation, and the presentation included photographs of the Ercoupe. Plaintiff stood up and informed everyone that the plane belonged to him. The Higgins responded by informing plaintiff that he should contact Doades, who had given them permission to remove the planes.

When his efforts to resolve the matter were unsuccessful, plaintiff filed suit.[1] He asserted claims of conversion, concert of action, IIED, and negligence against Hakala, Doades, and the Higginses, as well as claims of breach of contract, unjust enrichment, and fraud against Hakala, and a claim of tortious interference with a contract against Doades. The four defendants moved for summary disposition under MCR 2.116(C)(10). After hearing arguments, the trial court stated that plaintiff's only claim was for breach of contract against Hakala. It granted summary disposition to defendants on all of plaintiff's other claims.[2] The trial court later granted motions by Doades and the Higginses for attorney fees under MCR 2.405.

II. SUMMARY DISPOSITION

[1] After the Higginses were served with the complaint, they returned the two engines to plaintiff.

[2] Plaintiff subsequently settled with Hakala, and all claims against Hakala were dismissed with prejudice.

Plaintiff argues that the trial court erred in granting summary disposition to Doades on his claim for tortious interference with a contract and to Doades and the Higginses on his claims for conversion, IIED, negligence, and concert of action.

We review de novo a trial court's decision to grant a motion for summary disposition. *Chen v Wayne State Univ*, 284 Mich App 172, 200; 771 NW2d 820 (2009). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, when viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). A question of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A. TORTIOUS INTERFERENCE WITH A CONTRACT

Plaintiff claims that the trial court erred in granting summary disposition to Doades on his claim for tortious interference with a contract. According to plaintiff, when the facts are viewed in the light most favorable to him, there are questions of fact regarding whether Doades intentionally interfered with his right to store the planes in the barn. We disagree.

In order to sustain a claim for tortious interference with a contract, a plaintiff must demonstrate "(1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005). The third element requires a plaintiff to show "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights . . . of another." *CMI Int'l Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002) (quotation omitted).[3]

Based on plaintiff's statements about the conversations he had with Hakala about the barn and that those conversions never included Hakala telling him to remove his planes from the barn, we conclude that there is a factual issue as to whether in 2005 there was a contract between Hakala and plaintiff for plaintiff to use the barn for storage and whether the contract was breached when the planes were removed. However, plaintiff fails to establish a factual dispute that Doades intentionally instigated the breach. Plaintiff argues that "[t]here are facts that support the conclusion" that Doades "intentionally interfered" with the contract, but he does not identify those facts. We will not search the record for factual support of plaintiff's claim. *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Regardless, under the facts presented, no reasonable mind could conclude that Doades unjustifiably instigated the breach. In the 1990s, soon after Doades asked Hakala to look at the

[3] "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances." *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

personal property in the barn, Hakala informed him that plaintiff had been told to remove his property from the barn. In the following years, Doades never saw plaintiff at the barn, nor did he see any indication that plaintiff ever tended to the planes. In 2005, he received permission from Hakala to remove the planes, which, already in the 1990s, had become infested with animals. Under these circumstances, especially where Doades acted with permission from his landlord, no reasonable mind could conclude that Doades's action in requesting the Higginses to remove the planes was a per se wrongful act or an unjustified act done with malice. *CMI Int'l Inc*, 251 Mich App at 131. The trial court did not err in granting summary disposition to Doades on plaintiff's claim for tortious interference with a contract.

B. CONVERSION

Plaintiff argues that the trial court erred in granting summary disposition on his claims for statutory and common law conversion. We disagree.

In his complaint, plaintiff alleged that, "[c]ontrary to MCL 600.2919a, [d]efendants did at all relevant times steal, convert to their own use, aid in the conversion or aided in the concealment of stolen, embezzled, or converted airplanes . . . ." While plaintiff clearly stated a claim for statutory conversion, we conclude that plaintiff failed to plead a claim for common-law conversion, as the complaint contains no reference to common-law conversion. See MCR 2.111(B)(1) ("A complaint . . . must contain . . . the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]"). Thus, we only decide address statutory conversion.

MCL 600.2919a(1) provides:

> A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

The trial court determined that Doades and the Higginses were entitled to summary disposition on plaintiff's statutory conversion claim because there was no evidence that either Doades or the Higginses used the planes for their "own use." Plaintiff claims that the trial court erred in two respects. First, he claims that the trial court failed to view the evidence in the light most favorable to him in determining whether the Higginses used the planes for their own use. Second, he claims that the trial court failed to recognize that the requirement that a person's conversion of property be for the person's "own use" is limited to section (a) of MCL 600.2919a(1).

The trial court did not err in determining that plaintiff failed to establish a factual issue on whether the Higginses converted the planes for their own use. Plaintiff claims that the trial court failed to accept his claims that the Higginses retained the planes' "date-up plates" and that the engine mounts when returned to plaintiff showed evidence of fresh, noncorroded cut marks. However, plaintiff presents no evidence, apart from his own assertion, that the Higginses retained the "date-up plates." A party opposing a motion for summary disposition must provide evidentiary materials to support his position. *Coblentz v City of Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). In addition, while plaintiff relies heavily on his assertion that an expert had indicated that the engine mounts appeared to have been recently cut, he fails to present any evidence to support this claim, other than his own deposition testimony. The trial court correctly concluded that plaintiff's assertion was merely speculation and did not create a genuine issue of material fact.

Plaintiff correctly asserts that the requirement that a person's conversion of property be for the person's "own use" is limited to section (a) of MCL 600.2919a(1). However, MCL 600.2919a(1)(b) does not provide a remedy against the person who actually converted the property; it only provides a remedy against the person who aided the converter. See *Campbell v Sullins*, 257 Mich App 179, 191-192; 667 NW2d 887 (2003). In this case, the persons who aided the alleged conversion were the Higginses, when they agreed to haul the planes from the barn. For the Higginses to be liable under MCL 600.2919a(1)(b), they must have had actual knowledge that the planes were being converted. See *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005) ("The term 'know' does not encompass constructive knowledge, that one 'should have known.'"). Here, plaintiff presents no evidence that the Higginses, when they hauled away the planes at Doades's request, knew that the planes were allegedly being converted. Accordingly, the Higginses cannot be held liable under MCL 600.2919a(1)(b).

D. IIED

Plaintiff argues that the trial court erred in granting summary disposition on his claims for IIED, because Doades and the Higginses, in refusing to assist him in amicably resolving the matter, acted outside the scope of decency. We disagree.

To establish a claim for IIED, a plaintiff must demonstrate "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Graham v Ford*, 237 Mich App 670, 674; 604 NW2d 713 (1999). "Liability for [IIED] 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." *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.*

The uncooperation of Doades and the Higginses, as perceived by plaintiff, to amicably resolve the matter does not rise to the required level of extreme and outrageous behavior. While plaintiff may have found their actions annoying or even oppressive, their actions, such as Doades's initial refusal to inform plaintiff of the names of the persons who removed the planes from the barn, cannot be regarded as atrocious and utterly intolerable. *Doe*, 212 Mich App at 91. The trial court did not err in granting summary disposition on plaintiff's claim for IIED.

E. NEGLIGENCE

Plaintiff claims that the trial court erred in granting summary disposition on his claims for negligence. He asserts that Doades failed to exercise reasonable care when he did not contact plaintiff before requesting the Higginses to remove the planes from the barn. He asserts that the Higginses failed to exercise reasonable care when they did not determine if the planes were registered to an owner before removing the planes and when, after they learned that the planes belonged to plaintiff, they refused to return the planes and concealed their identities and the whereabouts of the planes.

To establish a negligence claim, a plaintiff must demonstrate that (1) the defendant owed him a duty, (2) the defendant breached that duty, (3) the plaintiff was injured, and (4) the defendant's breach caused the injuries. *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). The issue of "duty concerns whether a defendant is under *any* legal obligation to act for the benefit of the plaintiff." *Rakowski v Sarb*, 269 Mich App 619, 629; 713 NW2d 787 (2006) (quotation omitted, emphasis in original). In determining whether a duty exists, a court examines several factors, including the relationship of the parties. *Id.*; *Graves*, 253 Mich App at 492-493.

Plaintiff claims that Doades and the Higginses failed to exercise reasonable care after they learned that plaintiff was the owner of the airplanes. However, plaintiff fails to present any argument that Doades, whose only relationship with plaintiff was that they were both tenants of Hakala, or the Higginses, who were unaware of plaintiff's existence until the Experimental Aircraft Association in November 2005, were under any obligation to act for plaintiff's benefit. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Because plaintiff fails to establish that legal duties were owed him by Doades or the Higginses, his negligence claim cannot succeed. The trial court properly granted summary disposition to Doades and the Higginses on plaintiff's claim for negligence.

F. CONCERT OF ACTION

Plaintiff argues that the trial court erred in dismissing his claims for concert of action, because there were questions of fact whether defendants acted in concert. We disagree.

A concert of action claim requires proof that the defendants acted tortiously pursuant to a common design. *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985). Thus, a plaintiff must establish the existence of an underlying tort in order to successfully bring a concert of action claim. See *Jodway v Kennametal, Inc*, 207 Mich App 622, 632; 525 NW2d 883 (1994). As discussed above, the trial court did not err in dismissing plaintiff's numerous tort claims. When all of plaintiff's underlying claims were dismissed, plaintiff's concert of action claim could not succeed as a matter of law. The trial court did not err in dismissing the concert of action claim.

III. ATTORNEY FEES

Plaintiff argues that the trial court erred in awarding attorney fees to Doades and the Higginses pursuant to MCR 2.405, because the offers of judgment were made for gamesmanship purposes.[4] We disagree.

We review de novo a trial court's interpretation and application of the offer of judgment rule. *Castillo v Exclusive Builders, Inc*, 273 Mich App 489, 492; 733 NW2d 62 (2007). A trial court's decision to apply the "interest of justice" exception of MCR 2.405(D)(3) is reviewed for an abuse of discretion. *Derderian*, 263 Mich App at 374.

MCR 2.405(D) provides, in pertinent part, that "[i]f an offer [of judgment] is rejected, costs are payable as follows: (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action." "Actual costs" include "a reasonable attorney fee for services necessitated by the failure to stipulate to the entry of judgment." MCR 2.405(A)(6). "The purpose of MCR 2.405 is to encourage settlement and deter protracted litigation." *Hanley v Mazda Motor Corp*, 239 Mich App 596, 603; 609 NW2d 203 (2000) (internal quotations and citations omitted).

The award of attorney fees pursuant to MCR 2.405 should be enforced in most cases. *Miller v Meijer Inc*, 219 Mich App 476, 480; 556 NW2d 890 (1996). However, the court rule provides a trial court with discretion to decline to impose attorney fees under an exception for the "interest of justice." MCR 2.405(D)(3). This Court has noted that the interest of justice "appears to be directed at remedying the possibility that parties might make offers of judgment for gamesmanship purposes, rather than as a sincere effort at negotiation." *Luidens v 63rd Dist Court*, 219 Mich App 24, 35; 555 NW2d 709 (1996). For example, an offer of judgment is made for gamesmanship purposes when the offer is de minimus and made in the hopes of tacking attorney fees to costs if successful at trial. *Id.* Here, plaintiff received four offers of judgment, each in the amount of $500, for a total of $2,000. Plaintiff purchased both planes for less than $5,000, before allowing them to sit in a barn for 20 years and deteriorate. Under the circumstances, we cannot conclude that the offers of judgment were de minimus. The trial court did not abuse its discretion in granting the motions for attorney fees.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens

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[4] Plaintiff's argument that sanctions were improper because the trial court erred in dismissing plaintiff's claims against Doades and the Higginses is without merit. As discussed, the trial court did not err in granting summary disposition on any of plaintiff's claims.