STATE OF MICHIGAN

COURT OF APPEALS

J. EDWARD KLOIAN,

Plaintiff-Appellant,

v

JESSE O'JACK,

Defendant-Appelle.

UNPUBLISHED
January 24, 2012

No. 301544
Washtenaw Circuit Court
LC No. 10-794 CZ

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

In this summary disposition case, plaintiff J. Edward Kloian appeals the trial court's grant of defendant Jesse O'Jack's motion for summary disposition. We affirm.

Plaintiff filed this action against defendant, an attorney, who was opposing counsel in an underlying quiet title action filed against plaintiff. In this case, plaintiff alleged six different causes of action: malicious prosecution of a civil proceeding; statutory malicious prosecution; abuse of process; intentional infliction of emotional distress; fraud; and punitive damages Plaintiff claimed that defendant filed the underlying quiet title action against him without probable cause and solely for the purpose of delaying defendant's clients' eviction. Plaintiff also claimed that defendant made numerous false statements in the quiet title complaint. Defendant filed a motion for summary disposition on all of plaintiff's claims and requested that the trial court order plaintiff to pay costs associated with defending a frivolous lawsuit. The trial court granted defendant's motion for summary disposition and found that the lawsuit was frivolous.

I. SUMMARY DISPOSITION

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition on all six counts and in refusing to allow him to amend his complaint. We disagree

This Court reviews de novo the grant or denial of summary disposition. *Ligon v Detroit,* 276 Mich App 120, 124; 739 NW2d 900 (2007). A trial court's decision on a motion to amend is reviewed for an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997).

A. MALICIOUS PROSECUTION OF A CIVIL PROCEEDING

In order to prove a claim of malicious prosecution, plaintiff must show "that prior proceedings terminated in favor of the present plaintiff, that there was an absence of probable cause for the proceedings, that malice, defined as a purpose other than that of securing the proper adjudication of the claim, existed and that a special injury flowed directly from the prior proceeding." *Young v Barker,* 158 Mich App 709, 721; 405 NW2d 397 (1987), citing *Young v Motor City Apartments,* 133 Mich App 671, 675; 350 NW2d 790 (1984).

Plaintiff argues that he should have been considered a prevailing party in the underlying proceeding under MCR 2.625(B)(3), which is a court rule governing the taxation of costs. MCR 2.625(B)(3) states:

> [I]f there are several defendants in one action, and judgment for or dismissal of one or more of them is entered, those defendants are deemed prevailing parties, even though the plaintiff ultimately prevails over the remaining defendants.

While the relevance of this court rule is questionable as it specifically addresses an award of costs rather than claims of malicious prosecution, the rule applies only to those defendants who are dismissed from an action or for whom judgment is entered. In the underlying lawsuit, plaintiff did not file a motion for summary disposition that ultimately led to his dismissal from the lawsuit or resulted in judgment for him. Rather, *defendant* filed the motion on behalf of his clients, arguing that there was no issue of fact because plaintiff disavowed any personal interest in the underlying property. The ruling, which plaintiff appealed, was not in plaintiff's favor. Indeed it stated that defendant's clients' title was "valid against J. Edward Kloian and all persons claiming under him" and that "[t]he title of J. Edward Kloian, and those persons claiming through or under J. Edward Kloian is cut off." Therefore, since plaintiff's common law claim for malicious prosecution failed to satisfy the requirement that plaintiff have prevailed in the underlying suit, the trial court properly granted summary disposition of this claim.

B. STATUTORY MALICIOUS PROSECUTION UNDER MCL 600.2907

The malicious prosecution statute, MCL 600.2907, is a general statute that gives broad authority for many persons and entities to be sued. *Payton v Detroit,* 211 Mich App 375, 393; 536 NW2d 233 (1995). MCL 600.2907 states:

> Every person who shall, for vexation and trouble or maliciously, cause or procure any other to be arrested, attached, or in any way proceeded against, by any process or civil or criminal action, or in any other manner prescribed by law, to answer to the suit or prosecution of any person, without the consent of such person, or where there is no such person known, shall be liable to the person so arrested, attached or proceeded against, in treble the amount of the damages and expenses which, by any verdict, shall be found to have been sustained and incurred by him; and shall be liable to the person in whose name such arrest or proceeding was had in the sum of $200.00 damages, and shall be deemed guilty of

a misdemeanor, punishable on conviction by imprisonment in the county jail for a term not exceeding 6 months.

Malicious prosecution is a tort that "runs counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged." Prosser & Keeton, Torts (5th ed.), § 119 at 876. However, the interests of persons wrongfully prosecuted must also be protected. Balancing the interests involved, actions for malicious prosecution have historically been limited by restrictions that make them difficult to maintain. *Id.* *Renda v Int'l Union, UAW,* 366 Mich 58, 75, 114 NW2d 343 (1962); *Matthews v Blue Cross Blue Shield of Michigan,* 456 Mich 365, 377; 572 NW2d 603 (1998). An action for malicious prosecution of a civil action may not be brought absent a special injury.

Here, plaintiff has not demonstrated any special injury to himself that flowed directly from the conduct of defendant. Defendant merely performed his job as an attorney in bringing a successful action to quiet title. That plaintiff did not get the result he sought, and that the result ended up costing him money are not injuries caused by defendant. They are injuries that resulted from the trial court's decision in the underlying case.

C. ABUSE OF PROCESS

To recover upon 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 which is improper in the regular prosecution of the proceeding." *Friedman v Dozorc,* 412 Mich 1, 30; 312 NW2d 585 (1981), citing *Spear v Pendill,* 164 Mich 620, 623; 130 NW 343 (1911). To present a meritorious claim of abuse of process, a plaintiff must show that the defendant had used a proper legal procedure for a purpose collateral to the intended use of that procedure. *Bonner v Chicago Title Ins. Co.,* 194 Mich App 462, 472; 487 NW2d 807 (1992). There must be some corroborating act that demonstrates the ulterior purpose, and a bad motive alone will not establish an abuse of process. *Id.* The gravamen of the misconduct upon which liability is imposed is not the wrongful procurement of legal process or the wrongful initiation of civil proceedings; it is the misuse of process, no matter whether properly obtained, for any purpose other than that which it was designed to accomplish. *Friedman,* 412 Mich at 30 n 18, quoting 3 Restatement Torts, 2d, § 682, comment *a,* at 474. An action for abuse of process lies for the improper use of process following its issuance, not for maliciously causing it to issue. *Friedman,* 412 Mich at 31.

Here, plaintiff has presented no evidence of an improper purpose on the part of defendant or his clients in filing this lawsuit. In fact, defendant's conduct and purpose in filing the underlying lawsuit was merely that of any attorney or litigant in our adversarial system. In order to sustain a claim for abuse of process, a plaintiff "must allege a use of process for a purpose outside of the intended purpose and must allege with specificity an act which itself corroborates the ulterior motive." *Young,* 133 Mich App at 681. There are no remaining questions of fact and plaintiff has failed to provide any evidence regarding an improper use of process. Furthermore, there has been no evidence in the record that defendant had an ulterior purpose in bringing the underlying lawsuit on behalf of his clients.

D. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Dalley v Dykema Gossett PLLC,* 287 Mich App 296, 321; 788 NW2d 679 (2010) (internal quotation omitted). "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." *Doe v Mills,* 212 Mich App 73, 91; 536 NW2d 824 (1995). Accordingly, "[l]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.*

The record does not indicate that defendant engaged in any conduct that would support a claim of intentional infliction of emotional distress. Defendant's decision to file the underlying claim to quiet title on behalf of his clients was based on a valid title opinion from a title company. This was a reasonable piece of information upon which to rely, and it was neither extreme nor outrageous to file a suit to quiet title.

E. FRAUD

As a general rule, actionable fraud consists of the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc v McConkey,* 231 Mich App 22, 27; 585 NW2d 33 (1998). Additionally, fraud must be pled with particularity. MCR 2.112(B)(1). Plaintiff represented himself in these proceedings, and although some leniency is afforded such litigants, they are not excused from application of the court rules. *Bachor v Detroit,* 49 Mich App 507, 512; 212 NW2d 302 (1973). Plaintiff did not make anything other than broad and muddled allegations in any pleading he filed regarding defendant committing a fraudulent act. Particularly, plaintiff has never indicated that defendant made any sort of representation to plaintiff. Nor has plaintiff presented any facts or arguments that would show that he relied to his detriment on anything defendant said. Therefore, the trial court properly granted defendant's motion for summary disposition.

F. PUNITIVE DAMAGES

Finally, plaintiff argues that the trial court should have allowed him to amend his complaint to correct his failure to cite a relevant statute in his claim for punitive damages.

In *Casey v Auto-Owners Ins Co,* 273 Mich App 388, 400; 729 NW2d 277 (2006), this Court stated that "[p]unitive damages, which are designed to punish a party for misconduct, are generally not recoverable in Michigan." There is an exception where punitive damages are authorized by statute. *Id.* Here, however, plaintiff did not cite any statute as the basis for his punitive damages argument in his complaint or at any other time in the trial court. Furthermore, plaintiff has not cited a statute that would allow punitive damages in this case in his brief on

appeal, but instead relies on his argument that he should have been allowed to amend his complaint to include such a statute.

The trial court never addressed plaintiff's requests to amend the pleadings. A trial court's failure to specifically state its reasons for denial of a plaintiff's motion to amend his complaint requires reversal unless the amendment would be futile. *Dowerk v Oxford Charter Twp,* 233 MichApp 62, 75; 592 NW2d 724 (1998). An amendment would be futile if it is legally insufficient on its face. *PT Today, Inc v Comm'r of Financial & Ins Serv*, 270 Mich App 110, 143; 715 NW2d 398 (2006). The addition of allegations that merely restate those already made is futile, as are the addition of allegations that still fail to state a claim, and the addition of a claim over which the court lacks jurisdiction. *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

Here plaintiff has not indicated how he would amend his complaint, or which statute he might use as grounds for punitive damages. The record indicates that plaintiff's causes of action are without merit and are not grounded in law. Thus, any amendment to the complaint would have been futile. "*Allegheny Ludlum Corp v Dep't of Treasury,* 207 Mich App 604, 605; 525 NW2d 512 (1994).

II. FRIVOLOUS CLAIMS

Next, plaintiff contends that the trial court erred in finding that his claims were frivolous. We disagree.

"This Court reviews a trial court's finding on whether an action is frivolous for clear legal error." *Jerico Constr, Inc v Quadrants, Inc,* 257 Mich App 22, 35 (2003), citing *Kitchen v Kitchen,* 465 Mich 654, 661; 641 NW2d 245 (2002). "A decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *Id.*

The trial court found plaintiff's complaint to be frivolous under both MCR 2.114(D) and MCL 600.2591. The frivolous claims provisions impose an affirmative duty on each attorney [or, in this case, one acting as his own attorney] to conduct a reasonable inquiry into the factual and legal viability of a pleading before it is signed. *AG v Harkins*, 257 Mich App 564, 576; 669 NW2d 296 (2003). The reasonableness of the inquiry is determined by an objective standard. *Id*. The focus is upon the efforts taken to investigate a claim before filing suit, and a determination of reasonable inquiry depends on the particular facts and circumstances of the case.

Here, defendant filed a lawsuit to quiet title on behalf of his clients in a situation where title to the property was unclear. Defendant relied on information obtained from his clients, from the bankruptcy trustee, and from an independent title company in arriving at the conclusion that such a suit was necessary. Given that he obtained a successful outcome in the underlying case on behalf of his clients, it is clear that defendant filed a meritorious action. There is nothing in the record that would support any of plaintiff's six claims in this case. Plaintiff's complaint has no factual basis, is not warranted by existing law, and his brief contains no good-faith arguments for the extension, modification, or reversal of existing law under MCR 2.114(D). Plaintiff is

unhappy with the result of the underlying suit, but his unhappiness is not grounds to file suit against defendant. Because plaintiff's lawsuit is totally devoid of legal merit, we conclude that the trial court did not clearly err in concluding that this lawsuit was frivolous and in awarding costs and fees to defendant.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro