

[Cite as *Pierce v. Woyma*, 2010-Ohio-5590.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94037

JENNIFER J. PIERCE

PLAINTIFF-APPELLANT

vs.

FRANK J. WOYMA, JR., ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART AND
REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-682983

BEFORE: Jones, J., Gallagher, A.J., and Boyle, J.

RELEASED AND JOURNALIZED: November 18, 2010

ATTORNEY FOR APPELLANT

Brent L. English
Law Offices of Brent L. English
M.K. Ferguson Plaza, Suite 470
1500 West Third Street
Cleveland, Ohio 44113-1422

ATTORNEYS FOR APPELLEES

Robert J. Triozzi
Director of Law

BY: Michael F. Cosgrove
Assistant Director of Law
City of Cleveland
601 Lakeside Avenue, Room 106
Cleveland, Ohio 44114-1077

LARRY A. JONES, J.:

{¶ 1} Plaintiff-appellant, Jennifer Pierce (“Pierce”), appeals the trial court’s granting of appellee’s motion to dismiss. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm in part, reverse in part, and remand to the trial court.

STATEMENT OF THE CASE

{¶ 2} Pierce filed her complaint in the prior litigation on October 30, 2006. The city of Cleveland (“Cleveland”) was not a party to the litigation at that time.

Pierce filed her first amended complaint on October 23, 2007, along with a motion to appoint a special process server. The special process server served the original complaint on Cleveland that named Officer Frank J. Woyma, Jr. (“Woyma”) only as a defendant. However, it was the first amended complaint that named Cleveland as a defendant.

{¶ 3} Cleveland answered the first amended complaint, and it asserted insufficiency of process and lack of jurisdiction over the person as affirmative defenses. Cleveland later amended its answer, but retained its affirmative defenses.¹ Although Cleveland maintained this objection, Pierce did not again attempt any subsequent service on Cleveland after initially serving the original complaint.

{¶ 4} Pierce voluntarily dismissed the prior litigation on January 25, 2008, and then filed the present complaint on January 26, 2009. Cleveland and Woyma moved to dismiss Pierce’s claims. Pierce did not oppose the motion. On September 3, 2009, the trial court granted the unopposed motion to dismiss, and on October 2, 2009, Pierce filed her appeal.

STATEMENT OF THE FACTS

{¶ 5} Pierce alleged that, on October 28, 2006, she was with her boyfriend and four other women at a nightclub on West Sixth Street in the Warehouse

¹In moving for leave to file its amended answer, Cleveland specifically stated that although the docket noted service, Cleveland did not waive service and did not agree that proper or sufficient service occurred.

District in Cleveland. The group left the nightclub and began walking down a public sidewalk. Pierce's boyfriend was holding a beer bottle as the group was leaving. Woyma, a Cleveland Police Officer, was working department-approved secondary employment in the Warehouse District that evening.

{¶ 6} Pierce alleges Woyma jumped on her boyfriend's back and began hitting her boyfriend with the beer bottle that had been in her boyfriend's hand. During the altercation, Pierce's boyfriend, after getting Woyma off his back, pushed Woyma, and the two fell to the ground.

{¶ 7} A number of people — only some of whom were police officers — then converged on Pierce's boyfriend and began striking him. Pierce began to cry and protested to what was happening to her boyfriend. A female officer then handcuffed Pierce for allegedly taking a swing at one of the officers, but she released Pierce after Pierce and her friends insisted she had not taken a swing at any of the officers.

{¶ 8} Woyma then approached Pierce on the opposite side of the street, complaining about what Pierce's boyfriend had done. Woyma asked if Pierce's boyfriend had any assets and threatened to sue Pierce's boyfriend. Pierce was not arrested, but was later indicted by the Cuyahoga County Grand Jury for obstructing official business and obstructing justice. Pierce's trial was held March 20-21, 2006. She was found not guilty of the charges.

ASSIGNMENTS OF ERROR

{¶ 9} Pierce assigns four assignments of error on appeal:

{¶ 10} “1. The trial court erred by granting Appellee Woyma’s Motion to Dismiss under R. Civ. Proc. 1(B)(6) on Appellant’s malicious prosecution claim.

{¶ 11} “2. The trial court erred by granting Appellee Woyma’s Motion to Dismiss under Ohio R. Civ. Proc. 12(B)(6) on Appellant’s intentional infliction of serious emotional distress claim.

{¶ 12} “3. The trial court erred by granting Appellee Woyma’s Motion to Dismiss under Ohio R. Civ. Proc. 12(B)(6) on Appellant’s abuse of process claim.

{¶ 13} “4. The trial court erred by granting Appellee City of Cleveland’s Motion to Dismiss under Ohio R. Civ. Proc. 12(B)(6) on statutory immunity grounds.”

LEGAL ANALYSIS

{¶ 14} Pierce argues in her first three assignments of error that the lower court erred in granting Woyma’s motion to dismiss for malicious prosecution, intentional infliction of emotional distress, and abuse of process.

{¶ 15} Pierce’s malicious prosecution claim against Woyma was dismissed under Civ.R. 12(B)(6). Whether a complaint should be dismissed pursuant to Civ.R. 12(B)(6) raises questions of law, and is reviewed de novo. *Stanfield v. Amvets Post No. 88*, 2nd Dist. No. 06CA35, 2007-Ohio-1896. The function of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of a claim. *Zeigler v. Bove* (Dec. 23, 1998), 5th Dist. No. 98CA65. In determining whether to grant a Civ.R. 12(B)(6)

motion, the court may not rely on evidence outside the complaint. *Costoff v. Akron Gen. Med. Ctr.*, 9th Dist. No. 21213, 2003-Ohio-962.

{¶ 16} A motion to dismiss for failure to state a claim is properly granted when it appears beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him or her to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. All factual allegations made in the complaint must be presumed true, and all reasonable inferences must be resolved in favor of the nonmoving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

{¶ 17} To survive a motion to dismiss for failure to state claim upon which relief can be granted, the pleader is ordinarily not required to allege in complaint every fact he or she intends to prove; such facts may not be available until after discovery. Civ.R. 8(A), 12(B)(6), *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 605 N.E.2d 378.

{¶ 18} Elements of the tort of malicious criminal prosecution are: 1.) malice in instituting or continuing prosecution, 2.) lack of probable cause, and 3.) termination of prosecution in favor of the accused. *Trussell v. General Motors Corp.*, (1990), 53 Ohio St.3d 142, 144, 559 N.E.2d 732.

{¶ 19} In an action for malicious prosecution, the lack of probable cause is the gist of the action. *Melonowski v. Judy* (1921), 102 Ohio St. 153, 131 N.E. 360. Probable cause does not depend on whether the claimant was guilty of the crime charged. *Waller v. Foxx* (Oct. 6, 1982), Hamilton App. No. 810568.

Rather, the question is whether the accuser had probable cause to believe that the claimant was guilty. *Id.* The person instituting the criminal proceeding is not bound to have evidence sufficient to insure a conviction but is required only to have evidence sufficient to justify an honest belief of the guilt of the accused. *Epling v. Pacific Intermountain Exp. Co.* (1977), 55 Ohio App.2d 59, 62, 379 N.E.2d 239.

{¶ 20} A review of the record demonstrates that Pierce’s complaint stated a valid claim for malicious prosecution against Woyma. The trial court stated in its September 4, 2009 journal entry that, “Plaintiff has failed to allege that defendants lacked probable cause. Therefore, plaintiff’s claim of malicious prosecution must be dismissed against the defendants.”² We find the legal rationale in the trial court’s entry to be misapplied.

{¶ 21} Notice pleading does not require a pleader to state all elements of the claim. *Fancher v. Fancher* (1982), 8 Ohio App.3d 79, 455 N.E.2d 1344.³ Moreover, even if it was required that a plaintiff must state each and every element of the claim, such was the case here. In paragraph 29 of the complaint, Pierce expressly alleged absence of probable cause as follows, “There was *no probable cause* to charge Jennifer J. Pierce of obstruction of official business or obstruction of justice.” (Emphasis added.)

²See trial court’s September 4, 2009 journal entry.

³However, this court notes that there must be enough stated in the pleading, so that the person sued, has adequate notice of the nature of the action. *Fancher*, 8 Ohio App.3d 79.

{¶ 22} As Pierce expressly alleged absence of probable cause in her complaint and otherwise pleaded properly, we find that the trial court erred in dismissing Pierce's complaint for malicious prosecution against Woyma.

{¶ 23} Accordingly, Pierce's first assignment of error is sustained.

{¶ 24} Pierce argues in her second assignment of error that the trial court erred by granting Woyma's motion to dismiss under Civ.R. 12(B)(6) on Pierce's intentional infliction of serious emotional distress claim.

{¶ 25} To establish a claim for intentional infliction of emotional distress, a plaintiff must show that: 1) the defendant intended to cause the plaintiff serious emotional distress; 2) the defendant's conduct was extreme and outrageous; and 3) the defendant's conduct was the proximate cause of plaintiff's serious emotional distress. *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410, 1994-Ohio-389, 644 N.E.2d 286.

{¶ 26} A review of the record in this case demonstrates that plaintiff Pierce alleged all elements of this tort in her complaint. Pierce alleged the following in her complaint:

32. "Jennifer J. Pierce incorporates each and every allegation contained in the Factual Allegations above and in the First Claim, above, as if fully reproduced herein."

33. "The Defendants, jointly and severally, intended to cause emotional distress to the [sic] Jennifer J. Pierce or should have known that their actions would result in serious emotional distress to him [sic]."

34. “The Defendants joint and several conduct was extreme and outrageous, and went beyond all possible bounds of decency and is intolerable in a civilized community.”

35. “The Defendants’ actions, jointly and severally, directly and proximately caused Jennifer J. Pierce’s emotional and psychic injuries set forth hereinabove.”

36. “The mental anguish suffered by Jennifer J. Pierce is serious and is of such a nature that no reasonable person could be expected to endure it.”⁴

{¶ 27} Although Pierce alleged all elements of the complaint, the trial court noted in its journal entry that Pierce failed to “allege facts that would support an intentional infliction of emotional distress claim.” The trial court went on to state that “the only action Woyma is alleged to have directed towards plaintiff was asking plaintiff if her boyfriend had money so he could sue.”

{¶ 28} However, review of the record demonstrates that Pierce’s complaint expressly contends that Woyma “maliciously instituted criminal charges against her” without probable cause when she did nothing at the scene. Specifically the complaint alleges that Woyma was instrumental in charging her with obstruction of official business and obstructing justice.

{¶ 29} In determining whether the trial court erred in dismissing the complaint, this court owes no deference to the trial court. See *Williams v. Ohio Edison*, Cuyahoga App. No. 92840, 2009-Ohio-5702. As previously stated, this

⁴See, plaintiff’s complaint, paragraphs 32-36.

court must accept as true all factual allegations in the complaint. This includes the allegations that Woyma initiated an altercation with Pierce's boyfriend by jumping on his back and later demanded to know whether or not her boyfriend had assets. This also includes the allegations that Woyma instituted criminal proceedings against Pierce that caused her great emotional distress, mental anguish, and money.

{¶ 30} Accordingly, we find that the trial court erred in granting Woyma's motion to dismiss Pierce's intentional infliction of serious emotional distress claim.

{¶ 31} Therefore, Pierce's second assignment of error is sustained.

{¶ 32} Pierce argues in her third assignment of error that the trial court erred in granting Woyma's motion to dismiss Pierce's abuse of process claim. Elements of abuse of process are (1) that legal proceeding has been set in motion in proper form and with probable cause; (2) that proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 626 N.E.2d 115.

{¶ 33} Here, the trial court dismissed Pierce's abuse of process claim because "there were no facts alleging that Defendants had an ulterior purpose for the proceeding against Plaintiff."⁵

⁵See trial court's September 4, 2009 journal entry, p.2.

{¶ 34} However, Pierce actually alleged the following in her complaint:

37. “Jennifer J. Pierce incorporates each and every allegation contained in the Factual Allegations above and in the First and Second Claim, above, as if fully reproduced herein.”

38. “*Assuming that the legal process was set in order in proper form and with probable cause, the Defendants perverted the process in an attempt to accomplish an ulterior purpose for which it was not designed.*”

39. “As a result, Jennifer J. Pierce sustained damages as a result of the wrongful use of process.”

(Emphasis added.)

{¶ 35} The record demonstrates that the complaint alleges, with the assumption, that the legal process in proper form and with probable cause, that Defendants perverted the process in an attempt to accomplish an ulterior purpose for which it was not designed.

{¶ 36} Accordingly, we find that the trial court erred in granting Woyma’s motion to dismiss Pierce’s abuse of process claim.

{¶ 37} Accordingly, Pierce’s third assignments of error is sustained.

{¶ 38} Pierce argues in her fourth assignment of error that the lower court erred when it granted Cleveland’s motion to dismiss on immunity grounds. Specifically, Pierce argues that Cleveland’s assertion of its immunity defense through a motion to dismiss, rather than an answer, was improper. An affirmative defense, such as statutory immunity, may be asserted through a motion to dismiss so long as the basis for the defense is apparent from the face of the complaint.

Affirmative defenses of immunity and the running of the statute of limitations can be raised in a motion to dismiss. *Altier v. Valentic*, Lake App. No. 2003-G-2521, 2004-Ohio-5641.

{¶ 39} Indeed, Pierce acknowledges as much when she cites several cases that allow immunity to be asserted through a motion to dismiss, i.e., *Estate of Ridley v. Hamilton Cty. Bd. Of MRDD*, 150 Ohio App.3d 383, 2002-Ohio-6344, 781 N.E.2d 1034.⁶ Pierce then argues that she believes that this entire body of case law is erroneous.

{¶ 40} Contrary to Pierce's claims, we find Cleveland properly asserted statutory immunity through a motion to dismiss and Pierce did not otherwise contest statutory immunity. Therefore the lower court properly dismissed Pierce's claims against Cleveland.

{¶ 41} Pierce's fourth assignment of error is overruled.

{¶ 42} Judgment is affirmed in part, reversed in part and remanded to the trial court.

The court finds there were reasonable grounds for this appeal.

Appellant and appellee to share costs herein taxed.

⁶*Myrick v. Cincinnati*, Hamilton App. No. 080119, 2008-Ohio-6830; *Rieger v. Montgomery Cty. Clerk of Courts*, Montgomery App. No. 22575, 2009-Ohio-426; *Pepper v. Bd. of Edn. Of Toledo Pub. Schools*, Lucas App. No. L-06-1199, 2007-Ohio-203; *Wright v. Mahoning Cty. Bd. of Commrs.*, Mahoning App. No. 08-MA-77, 2009-Ohio-561, *Lowrey v. Cleveland*, Cuyahoga App. No. 90246, 2008-Ohio-132; *Dubree v. Klide*, Cuyahoga App. No. 89673, 2008-Ohio-2178; *Hopper v. Elyria*, Lorain App. No. 08CA009421, 913 N.E.2d 997, 2009-Ohio-2517; *Slonsky v. J.W. Didado Elec. Inc.*, Summit App. No. 24228, 2008-Ohio-6791; *Watson v. Akron*, Summit App. No. 24077, 2008-Ohio-4995.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR