

[Cite as *Demsey v. Haberek*, 2017-Ohio-1453.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104894

KENNETH DEMSEY

PLAINTIFF-APPELLANT

vs.

SHARLENE HABEREK, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-865987

BEFORE: Blackmon, P.J., Celebrezze, J., and Jones, J.

RELEASED AND JOURNALIZED: April 20, 2017

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PATRICIA ANN BLACKMON, P.J.:

{¶1} Kenneth Demsey (“Kenneth”) appeals from the trial court’s dismissal of his complaint against his sisters, Sharlene Haberek (“Sharlene”) and Nancy Demsey Daniels (“Nancy”), and assigns the following errors for our review:

I. The court below erred to the prejudice of appellant by failing to have a full evidentiary hearing on the elements of intentional infliction of emotional distress, over and above elements of defamation.

II. The court below erred to the prejudice of appellant by failing to recognize the difference between the required elements of infliction of emotional distress and those elements of defamation.

{¶2} Additionally, Nancy filed a pro se motion to declare Kenneth a vexatious litigator and for sanctions. Having reviewed the record and pertinent law, we affirm the trial court’s judgment and deny Nancy’s motion to declare Kenneth a vexatious litigator and her request for sanctions. The apposite facts follow.

{¶3} On July 11, 2016, Kenneth filed a pro se complaint against Sharlene and Nancy. The handwritten complaint is largely indecipherable; therefore, it is reproduced verbatim below in its entirety:

**CLAIM, COUNT I
EMOTIONAL DISTRESS**

1 ALL DESCRIPTION OF THE FOLLOWING FACTS
ARE SUPPORTED BY EXHIBITS ATTACHED
2 SIX DAYS OF WRONGFUL ARREST. PLAINTIFF
KENNETH DEMSEY WAS DETAINED AT WADE PARK
VETERANS HOSPITAL FROM 7/14/12 TO 7/20/12
SEE ATTACHED EXHIBITS FROM WADE PARK
EX-A VETERANS HOSPITAL RECORD.
3 DEFENDANTS SHARLENE HABEREK,

NANCY DEMSEY DANIELS, AND THEIR
CONSPIRATORS ILLEGALLY AND DELIBERATELY
MADE TWO FALSE CALLS FOR SERVICE RERORTS
TO THE PARMA CITY POLICE ON 7/12/12 AND
7/13/12 2012 DEFENDANTS KNOWINGLY
AND WILLFULLY MADE SUCH FALSE REPORTS
BEING FULLY AWARE THEY WERE TOTALLY
FALSE. SEE EXIBITS ATTACHED. PARMA
EX-B POLICE CALL REPORTS
4 AFTER SIX DAYS OF WRONGFUL
INSTITUTIONAL CONFINMENT CAUSED
BY DEFENDANTS DIRECTLY AND MALICIOUSLY
BY DEFENDANTS INTENTIONAL BAD
CONDUCT THAT IS BEYOND THE NORMAL
EXCEPTABLE CONDUCT BETWEEN CITIZENS
WITH EXTREME INTENT BEYOND THE NORMAL
SEVER EMOTIONAL DAMAGES SE EXIBITS
EX C,D ATTACHED

II CAUSE OF ACTION

- 1 STATE THE INTENTIONAL AND OR EMOTIONAL
DISTRESS
- 2 BY THE ABOVE STATEMENT OF FACT
STATED IN PARAGRAPH 1-4
- 3 THE ABOVE ACTIONS CONSTITUTE THE
TORT AND INFLECTION OF EMOTIONAL
DISTRESS
- 4 PLAINTIFF KENNETH DEMSEY STATES THAT
DUE TO ACTIONS OF DEFENDANTS HE
HAS SUFFERED AND INDURED EMOTIONAL
DISTRESS WHICH IS FAR ABOVE THE
NORMAL. AS A RESULT OF THE ABOVE
INTENTIONAL AND OR EMOTIONAL DISTRESS
THE PLAINTIFF HAS SUFFERED ACTUAL
DAMAGE OF 1 MILLION DOLLARS FOR PAIN
AND SUFFERING, AND PUNITIVE DAMAGE
OF 7 MILLION DOLLARS

{¶4} On July 19, 2016, Sharlene filed a motion to dismiss pursuant to Civ.R.

12(B)(6), arguing that Kenneth failed to allege any viable claims against her and that the applicable statute of limitations had run. Kenneth did not oppose Sharlene's motion to

dismiss. On August 4, 2016, the court dismissed Kenneth’s complaint with prejudice, finding that the “claim hinges upon [Sharlene] communicating something and therefore sounds in defamation. [Kenneth’s] complaint is subject to the one-year statute of limitations for defamation and was filed three years after the tolling of the statute of limitations.”

{¶5} It is from this order that Kenneth appeals.

Failure to Conduct a Hearing

{¶6} Kenneth first argues that the court erred “by failing to have a full evidentiary hearing on the elements of intentional infliction of emotional distress, over and above elements of defamation.” Kenneth cites no law regarding a hearing and fails to argue in his appellate brief that a full hearing was required. In fact, Civ.R. 12(B)(6) does not require the court to hold an evidentiary hearing on a motion to dismiss. Additionally, Kenneth did not oppose Sharlene’s motion to dismiss in the trial court. It is incongruous for Kenneth to argue that the court erred by failing to hold a hearing on a motion that he failed to oppose. Accordingly, we disregard Kenneth’s first assigned error pursuant to App.R. 12(A)(2) and 16(A).

Motion to Dismiss

{¶7} In Kenneth’s second assigned error, he argues that the court erred by dismissing his complaint and failing to recognize the difference between intentional infliction of emotional distress (“IIED”) and defamation. However, as previously stated, Kenneth failed to oppose the dismissal in the trial court; therefore, the issue is waived on appeal. See *Abram v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No.

80127, 2002-Ohio-2622, ¶ 53 (“As the appellants made no attempt to respond to appellees’ supplemental motion for summary judgment, the issues raised in appellees’ motion were unopposed and appellants have waived those issues on appeal.”)

{¶8} However, in the interest of justice, we will review the second assigned error on its merits.

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. “All factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” In order for a court to grant a motion to dismiss for failure to state a claim, it must appear “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Since factual allegations in the complaint are presumed true and only the legal issues are presented, appellate review is de novo.

(Citations omitted.) *Tisdale v. Javitch, Block & Rathbone*, 8th Dist. Cuyahoga No. 83119, 2003-Ohio-6883, ¶ 5-7; Civ.R. 12(B)(6).

Defamation

{¶9} To succeed on a defamation claim, a plaintiff must show that: the defendant published a false statement of fact, which was defamatory in nature; “the defendant acted with the requisite degree of fault in publishing the statement”; and, as a result, the plaintiff suffered injury. *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist.1996).

Intentional Infliction of Emotional Distress

In order to recover on an action for intentional infliction of serious emotional stress four elements must be proved: 1) that the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; 2) that the actor’s conduct was so extreme and outrageous as to go “beyond all

possible bounds of decency” and was such that it can be considered as “utterly intolerable in a civilized community”; * * * 3) that the actor’s actions were the proximate cause of plaintiff’s psychic injury; and 4) that the mental anguish suffered by plaintiff is serious and of a nature that “no reasonable man could be expected to endure it * * *.”

(Citations omitted.) *Pyle v. Pyle*, 11 Ohio App.3d 31, 34, 463 N.E.2d 98 (8th Dist.1983).

Statute of Limitations

{¶10} The statute of limitations for defamation claims is one year from when the words were written or spoken. R.C. 2305.11(A). Generally, the statute of limitations for a claim of IIED is four years. R.C. 2305.09(D).

Analysis

{¶11} To the extent that Kenneth’s complaint sounds in defamation, we find that his claims are barred by the statute of limitations. The alleged defamatory statements were made to the police on July 12, 2012 and July 13, 2012, and Kenneth filed his complaint on July 11, 2016.

{¶12} To the extent that Kenneth’s complaint purports to allege IIED, we find that Kenneth has failed to state a claim upon which relief can be granted.

{¶13} Kenneth attached two police reports to his complaint, which state that on July 12, 2012 and July 13, 2012, Nancy called the police because Kenneth was “out of touch with reality, does not like police/family/attorneys, constantly files lawsuits,” is “easily [agitated], threatens to kill family members, and [has] increasing [e]rratic behavior.” The reports also state that a “probate warrant” had been issued for Kenneth.

{¶14} Kenneth also attached documents that appear to be portions of medical records including a “psychiatry nursing admission assessment” of him dated July 14,

2012. The assessment states that Kenneth was “in on a probate for hospitalization” because Sharlene and Nancy were “accusing * * * him of things, suing people (which he admits, and feels that is his right), and being crazy.” The assessment further states that Kenneth is “delusional * * * [and] [h]e believes that he is the President of an American Indian Organization. He intimidates people. He is easily agitated, verbally abusive, and aggressive. He stalks people and has threatened to kill family members.” The assessment lists Kenneth’s level of care as “Level II: Crisis situation.”

{¶15} Pursuant to Civ.R. 12(B)(6), we are required to construe the factual allegations in the complaint, including the attached documents, in favor of Kenneth. *See also* Civ.R. 10(C) (“A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.”)

{¶16} Upon review, we find that Kenneth can prove no set of facts in support of his claim for IIED. The allegations are that the probate court issued a warrant for Kenneth, Nancy called the police complaining of Kenneth’s erratic behavior, and Kenneth was subsequently hospitalized for a psychiatric “crisis situation.” We cannot say that it is outrageous or “beyond all possible bounds of decency” to call the police regarding a family member — or any other person for that matter — who is suffering from delusions, exhibiting threatening and erratic behavior, and is ultimately hospitalized for psychiatric issues.

{¶17} Accordingly, given the allegations in the complaint, Kenneth can prove no set of facts to support a claim for defamation or IIED. The court did not err by dismissing the complaint, and Kenneth’s second assigned error is overruled.

Vexatious Litigator

{¶18} Also at issue in this appeal is Nancy’s pro se unopposed motion to declare Kenneth a vexatious litigator and for sanctions under Loc.App.R. 23 for filing a frivolous appeal.

{¶19} Pursuant to Loc.App.R. 23(A), if this court determines, upon motion or sua sponte, that an appeal “is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose on the person who signed the appeal * * *, a represented party, or both, appropriate sanctions.” Frivolous is defined in this rule as “not reasonably well-grounded in fact, or warranted by existing law, or by a good faith argument for the extension, modification, or reversal of existing law.”

{¶20} Additionally, Loc.App.R. 23(B) states that this court may, upon motion or sua sponte, find a party to be a vexatious litigator, “[i]f a party habitually, persistently, and without reasonable cause engages in frivolous conduct under division (A) of this rule * * *.” If a party is found to be a vexatious litigator, “the Court may impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Eighth District Court of Appeals without first obtaining leave * * * or any other restriction the Eighth District Court of Appeals considers just.”

{¶21} Upon review, we find that Nancy’s motion is not supported by sufficient evidence under Loc.App.R. 23. In her motion, Nancy argues that Kenneth “has a long history of frivolous legal proceedings too voluminous to contain here without despoiling a forest of trees attempting to print out the copy.” While we respect Nancy’s mind toward

conservation, her unsupported conclusions are not sufficient to declare Kenneth a vexatious litigator. Although Nancy attached various documents to her motion, these documents were not sworn to, certified, or authenticated by affidavit; thus they lack evidentiary value.

{¶22} Accordingly, Nancy's motion to declare Kenneth a vexatious litigator and for sanctions is denied.

{¶23} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court 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.

PATRICIA ANN BLACKMON, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, SR., J., CONCUR