

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002880-MR

STEPHEN D. PRICE

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 94-CI-02525

WILL MCGINNIS, ARTHUR SALOMON,
DAVID R. O'BRYAN, AND DICK TINGLE

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: This is an appeal by Stephen D. Price, pro se, from an order of the Fayette Circuit Court dismissing his lawsuit on the grounds that the complaint failed to state a claim upon which relief can be granted. We affirm.

The facts as set forth by Price are as follows.¹ In 1980, Price rented a garage at 318 Park Avenue, Lexington, Kentucky, from Henry Nadig. Price used the garage for storage of his business equipment and as a workshop and office. On the surrounding plot, Price raised seedling trees in a small nursery and installed a small, experimental root-cellar in conjunction with his horticulture study at the University of Kentucky.

In August 1989, Dick Tingle, a real estate agent, advised Price that the garage, along with the apartment house in front of it and the grounds around the garage, had been sold. Tingle told Price that the new owner desired use of the garage, and that Price should move out as soon as possible. The property had been for sale for several years, and Price assumed a buyer had been found and began preparing to move.

A short time later, Will McGinnis moved into the apartment house on the property. McGinnis advised Price that he was the new owner of the property, that he wanted use of the garage as soon as possible, and that Price should vacate the premises within thirty days. Price thereupon commenced vacating the garage and spent the month of September 1989 moving his effects to a barn located in Sadieville, Kentucky.

¹The trial court record does not include an averment of the facts of the case, and the material included in Price's statement of the case does not appear in the trial record. Such extraneous material should not be included in a brief. Rankin v. Blue Grass Boys Ranch, Inc., Ky., 469 S.W.2d 767, 769 (1971). However, in consideration that Price is a pro se litigant, and in order to present a rendition of the facts of the case, we have refrained from striking Price's statement of the case. See Beecham v. Commonwealth, Ky., 657 S.W.2d 234, 236 (1983) (pro se pleadings are not required to meet the standard of those applied to legal counsel.)

One morning in September 1989, while Price was engaged in moving, Arthur Salomon and David R. O'Bryan came to the Park Avenue address. Salomon and O'Bryan are trustees for funds inherited by McGinnis. Salomon and O'Bryan appeared to be inspecting the premises, and when they attempted to enter the garage, Price refused them entry and told them to leave.

On the evening of September 30, 1989, as Price was loading the last of his personal effects onto a truck, McGinnis came to Price and advised him that he had never held title to the property; that his intention to buy the property had been foiled by the refusal of Salomon and O'Bryan to authorize funds for the purchase of the property; that he was not, in fact, the landlord of the property; and that Price was not required to move after all.

Thereafter, after working for several weeks out of the Sadieville barn, Price moved his effects back to the Park Avenue garage. Price continued to rent the garage until June 1993, whereupon he shifted his business and horticulture work to Scott County.

On August 19, 1994, Price filed a lawsuit, stating the legal grounds for his complaint as follows: (1) "[t]hat Defendants, on or about 21 August, 1989, through deception and/or negligence caused ejection of Plaintiff from his rented premises, at 312 Park Avenue, Lexington, Kentucky, thereby depriving Plaintiff of use and enjoyment of said premises established over some nine years of occupancy;" and (2) "[t]hat Defendants had no

lawful authority to thus eject and deprive Plaintiff." Price's complaint sought \$4,472.00 in damages.

On November 1, 1999, the trial court entered an order dismissing Price's complaint for failure to state a claim upon which relief can be granted, and because the action was barred by the statute of limitations. The order, in relevant part, is as follows:

The Court finds from reviewing the record that the complaint fails to state a claim upon which relief can be granted. There is no alleged wrong doing on the part of any of the Defendants, except for McGinnis. However, the allegations against McGinnis are without merit, because McGinnis was not the owner of said property. The Plaintiff left on his own choosing, because he could have asked for some proof that McGinnis was the true owner of said property.

Furthermore, the Court finds that this action is barred by the applicable statute of limitations.

A motion to dismiss for failure to state a claim upon which relief can be granted under Kentucky Rules of Civil Procedure (CR) 12.02(f) should only be granted when it appears to a certainty that the claimant is entitled to no relief under any set of facts which could be proved in support of the claim. Spencer v. Woods, Ky., 282 S.W.2d 851 (1955); Kevin Tucker & Associates, Inc. v. Scott & Ritter, Inc., Ky. App. 842 S.W.2d 873, 874 (1992). In reviewing such a dismissal, this Court must presume that all the factual allegations in the complaint are true and must draw any reasonable inference in favor of the non-movant. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer

evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96 (1974); Feathers v. State Farm Fire & Cas. Co., Ky. App., 667 S.W.2d 693 (1983), overruled on other grounds, Federal Kemper Ins. Co. v. Hornback, Ky., 711 S.W.2d 844 (1986); Com. ex rel. Chandler v. Anthem Ins. Companies, Inc., Ky. App. 8 S.W.3d 48, 51 (1999); United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464, 468 (1999).

Price's August 19, 1994, complaint failed to include any factual assertions directly related to the causes of action, but instead contained only conclusory allegations of wrongdoing. The complaint, in sum, stated that the defendants through deception and/or negligence caused ejection of plaintiff from his rented premises, thereby depriving him of the use and enjoyment of said premises, and further defendants having no lawful authority to thus eject and deprive him. We construe these pro se pleadings to claim causes of action for negligent misrepresentation² and fraud.³

We conclude that the trial court correctly dismissed the complaint insofar as it alleged negligent misrepresentation. The elements of a claim of negligent misrepresentation are a misrepresentation, which concerns a material fact, justifiably relied on by the plaintiff, and where loss or damages are proximately caused by such misrepresentation. 37 C.J.S. Fraud §

²Based upon the pleading "through . . . negligence caused ejection of Plaintiff from his rented premises[.]"

³Based upon the pleading "through deception . . . caused ejection of Plaintiff from his rented premises[.]"

59 (1997); See also Restatement (Second) of Torts, § 552 (1977). An action for negligent misrepresentation is an action for fraud. 37 C.J.S. Fraud § 59 (1997).

Price, in his complaint, did not set forth any facts supporting a claim of negligent misrepresentation. Further, the facts as stated in his brief, even if true, are insufficient to support a claim of negligent misrepresentation as a matter of law. As a long-term lessee of the garage property, Price unjustifiably relied upon statements of the appellees, in that the truth and veracity of their statements could easily have been checked by Price merely by consulting his long-term landlord regarding the situation. Furthermore, because the losses or damages incurred by Price could easily have been avoided simply by checking with his landlord, the losses were not proximately caused by any misrepresentations made by the appellees, but, rather by Price's failure to confirm the appellees' statements with his landlord.

The trial court likewise properly dismissed Price's fraud allegation for failure to state a claim. In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: a) material representation, b) which is false, c) known to be false or made recklessly, d) made with inducement to be acted upon, e) acted in reliance thereon, and, f) causing injury. United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464, 468 (1999); Wahba v. Don Corlett Motors, Inc., Ky. App., 573 S.W.2d 357, 359 (1978). In the same manner as the negligent

misrepresentation claim, any fraudulent misrepresentations made to Price by the appellees did not cause his injuries and losses. In view of the simplicity with which any false or reckless statements made by the appellees could have been verified, Price's failure to check with his landlord, and not the misrepresentations, was the cause of his losses.

In addition to the foregoing, as we construe Price's complaint, both causes of action are based in fraud.⁴ In all averments for fraud, the circumstances constituting fraud must be stated with particularity in the pleadings. CR 9.02. General, nonspecific allegations of fraud, sham, and the like, are inadequate to plead a cause of action. Pendelton Bros. Vending v. Commonwealth Fin. & Admin. Cabinet, Ky. 758 S.W.2d 24 (1988). Price's complaint lacked the requisite statements of particularity regarding the allegations of fraud and negligent misrepresentation, and his complaint was accordingly deficient under this rule; hence the trial court's dismissal for failure to state a claim upon which relief could be granted was likewise proper pursuant to CR 9.02.

For the foregoing reasons the order of the Fayette Circuit Court dismissing the appellant's complaint for failure to state a claim upon which relief could be granted is affirmed.

ALL CONCUR.

⁴For this reason we disagree with the trial court that Price's action was barred by the statute of limitations. See KRS 413.120(12) (formerly KRS 413.120(11)).

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