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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-001254-MR

LINDA S. PRATHER

APPELLANT

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR.
ACTION NOS. 02-CI-00391 & 04-CI-00995

PROVIDIAN NATIONAL BANK; PROVIDIAN FINANCIAL
SERVICES, A/K/A PROVIDIAN FINANCIAL CORP;
PROVIDIAN BANCORP; MICHAEL WARREN, ESQ.;
DRAYER BOTT, ESQ.; PAUL G. CROUSHORE, ESQ.;
GLENN ALGIE, ESQ.; AND WELTMAN, WEINBERG
& REIS CO., LPA

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * *

BEFORE: BARBER AND KNOPF,¹ JUDGES; EMBERTON, SENIOR JUDGE.

KNOPF, JUDGE: Linda S. Prather appeals from an order of the
Madison Circuit Court dismissing her claims for abuse of
process, wrongful use of civil proceedings, fraud, defamation

¹ This opinion was completed and concurred in prior to Judge William L. Knopf's retirement effective June 30, 2006. Release of the opinion was delayed by administrative handling.

and intentional infliction of emotional distress against Providian National Bank (Providian) and their prior attorneys, the law firm of Weltman, Weinberg & Reis Co., LPA (Weltman). We agree with Prather that she pleaded sufficient facts to support a cause of action against Providian for wrongful use of civil proceedings. However, we conclude that the trial court properly dismissed the other counts. Hence, we affirm in part, reverse in part and remand for further proceedings.

The facts of this action are rather complex and involve matters litigated in three related actions in three different courts. For purposes of this appeal, the following facts are relevant: On May 18, 1999, Providian filed a civil action in the Madison District Court, seeking to recover a credit-card debt which it alleged that Prather owed.² Prather disputed the debt alleging that the credit-card statements were withheld and, when they were provided, were fraudulently altered and did not reflect accurate information, and that the interest charges and fees were improperly calculated. In November 2001, Prather filed counterclaims against Providian and its attorneys, Weltman, alleging fraud and breach of contract. Following filing of Prather's counterclaims, the matter was transferred to Madison Circuit Court.³ During the course of the litigation, a

² Action No. 99-C-00323.

³ Action No. 02-CI-00391.

discovery dispute arose between the parties concerning proof of Providian's ownership of the credit-card account. Providian failed to provide such proof as ordered by the court, and on August 25, 2003, the trial court entered an order dismissing with prejudice Providian's claim against Prather.

Around the same time, Prather attempted to file an amended counterclaim against Providian and Weltman, asserting additional claims for fraud, wrongful use of civil proceedings, defamation, and unlawful debt collection practices. The trial court denied the motion to amend, taking the position that the additional claims were more appropriately addressed in a separate action. Thereafter, in August of 2004, Prather filed a new complaint⁴ against Providian and Weltman and the several individually named attorneys in the Weltman firm, reasserting her prior causes of action and adding additional counts alleging violation of the Kentucky Consumer Protection Act,⁵ malicious prosecution, abuse of process, wrongful use of civil proceedings, defamation, and intentional infliction of emotional distress. Later in 2004, Providian and Weltman had the 2004 action removed to the United States District Court for the

⁴ Action No. 04-CI-00995.

⁵ KRS 367.110 *et seq.*

Eastern District of Kentucky.⁶ However, the federal court determined that removal of Prather's state-law claims was not warranted, and the court ordered those claims remanded back to the Madison Circuit Court. Upon remand, the trial court ordered the 2004 action consolidated with Prather's 2002 counterclaims.

Providian and Weltman filed separate motions to dismiss. In an order entered on April 14, 2005, the trial court dismissed the individually named attorneys, and noting the agreement of the parties, also dismissed Prather's Consumer Protection Act claim. On May 18, 2005, the trial court dismissed all of Prather's claims against Providian and Weltman except the breach of contract claim. The trial court designated its order dismissing as final and appealable on June 6, 2005, and Prather now appeals. Prather's breach-of-contract claims remain pending before the trial court.⁷

In the various orders, the trial court did not set out its reasons for dismissing Prather's claims. Consequently, we shall presume that the trial court based its decisions on the grounds asserted in Providian's and Weltman's motions. While this matter was removed to the Federal District Court, Providian and Weltman filed motions to dismiss Prather's claims pursuant to F.R.Civ.Pro 12(b)(6). The federal court did not rule on

⁶ Civil Action No. 04-432-JBC.

⁷ See CR 54.02.

these motions, and Providian and Weltman renewed their motions following remand to the Madison Circuit Court pursuant to CR 12.02(f). Prather contends that the motions should have been treated as motions for summary judgment pursuant to CR 56. However, there is no indication in the record that the trial court considered matters outside of the pleadings. Consequently, the trial court properly treated the matter as a motion to dismiss for failure to state a claim.

A motion to dismiss should only be granted if "it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim".⁸ When ruling on the motion, the allegations in "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true."⁹ In making this decision, the trial court is not required to make any factual findings.¹⁰ Therefore, the question is purely a matter of law,¹¹ and the trial court's decision will be reviewed *de novo*.¹²

⁸ Pari-Mutuel Clerks' Union v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977).

⁹ Gall v. Scroggy, 725 S.W.2d 867, 868 (Ky.App. 1987).

¹⁰ James v. Wilson, 95 S.W.3d 875, 884 (Ky.App. 2002).

¹¹ Id.

¹² Revenue Cabinet v. Hubbard, 37 S.W.3d 717, 719 (Ky. 2000).

Prather first argues that the trial court erred by dismissing her claims alleging malicious prosecution, wrongful use of civil proceedings or abuse of process. As to the first two claims, where the underlying action is civil, the tort properly is called "wrongful use of civil proceedings."¹³ The term "malicious prosecution" is reserved for the wrongful prosecution of criminal cases.

Abuse of process is the irregular or wrongful use of a judicial proceeding. The essential elements of the tort include: (1) an ulterior purpose; and (2) a willful act in the use of process not proper in the regular conduct of the proceeding.¹⁴ The six (6) elements necessary to establish a claim for wrongful use of civil proceedings are: (1) the institution or continuation of original judicial proceedings; (2) by, or at the instance of the plaintiff; (3) the termination of such proceedings in the defendant's favor; (4) malice in the institution of the proceedings; (5) lack of probable cause for the proceeding; and (6) the suffering of damage as a result.¹⁵

The distinction between abuse of process and wrongful use of civil proceedings is not always clear. Both torts

¹³ Prewitt v. Sexton, 777 S.W.2d 891, 893-894 (Ky. 1989). See also, Mapother and Mapother, P.S.C. v. Douglas, 750 S.W.2d 430, 431 (Ky. 1988).

¹⁴ Simpson v. Laytart, 962 S.W.2d 392, 394 (Ky. 1998), and Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765, 766 (Ky.App. 1980).

¹⁵ Raine v. Draisin, 621 S.W.2d 895, 899 (Ky. 1981).

protect individuals against the misuse of civil actions to cause harm.¹⁶ However, the gist of the first tort is the abuse of otherwise proper judicial process as a means to secure a collateral advantage over another party.¹⁷ Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion even though with bad intentions.¹⁸

In contrast, malice and the absence of probable cause are essential elements of wrongful use of civil proceedings. In Mapother & Mapother, P.S.C. v. Douglas,¹⁹ the Supreme Court of Kentucky included improper purpose as an element of the tort of wrongful use of civil proceedings. This would seem to conflate the elements of wrongful use of civil proceedings and abuse of process. But in Prewitt v. Sexton,²⁰ the Supreme Court explained that the term "improper purpose", as used in wrongful use of civil proceedings, substitutes for the "malice" element used in

¹⁶ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 119, at 870 (5th ed. 1984) (using the term "malicious prosecution" to describe actions based on the misuse of criminal or civil actions).

¹⁷ Flynn v. Songer, 399 S.W.2d 491, 495 (Ky. 1966).

¹⁸ Bourbon County Joint Planning Commission v. Simpson, 799 S.W.2d 42, 45 (Ky. App. 1990). Simpson v. Laytart, *supra* at 394-95.

¹⁹ *Supra* at 431.

²⁰ *Supra* at 893-94.

older cases describing malicious prosecution. In the context of wrongful use of civil proceedings, an improper purpose (or malice) may be found where the defendant acted primarily for a purpose other than that of securing the proper adjudication of the claim on which the proceeding was based.²¹ But unlike with abuse of process, the defendant's improper purpose need not be manifested by an attempt to secure a collateral advantage over another party. The bad motive itself suffices to establish the element of malice.²²

With regard to Prather's abuse of process claim, we agree with Providian and Weltman that Prather failed to plead any facts indicating that they sought to obtain a collateral advantage over her through their filing of the collection action. Indeed, Prather does not separately address this claim in her briefs.²³ Consequently, the trial court properly dismissed her claim for abuse of process.

With respect to Prather's claims of wrongful use of civil proceedings, Providian and Weltman first argue that the

²¹ Id. at 895.

²² See Restatement (Second) of Torts, §676, comment c.

²³ During the proceedings before the trial court, Prather asserted that Providian and Weltman brought the collection action to foreclose her administrative and other avenues for challenging the disputed credit card balance. However, Prather has never alleged that Providian or Weltman attempted to use the filing of the action as a lever to compel her to abandon those avenues. As previously noted, allegations regarding the latter conduct would distinguish Prather's claim of abuse of process from that of wrongful use of civil proceedings.

dismissal of Providian's claim in 2003 was not a termination on the merits and therefore cannot serve as a basis for a claim of wrongful use of civil proceedings. We disagree. While the trial court dismissed Providian's claim against Prather due to its violation of the trial court's discovery orders, the court specifically designated its order dismissing Providian's claims as "with prejudice". A "dismissal with prejudice" constitutes "an adjudication on the merits and final disposition, barring the right to bring or maintain an action on the same claim or cause".²⁴ Furthermore, the trial court dismissed Providian's claim because it failed to present evidence showing that it had a right to bring an action to collect on the credit-card account. We find that the dismissal reflects on the substantive merits of the claim.²⁵ Consequently, Prather has met this element of her claim.

Providian and Weltman also argue that Prather failed to allege facts showing that they lacked probable cause to institute the collection action or that they acted with malice in so doing. The law protects any person commencing a civil action in good faith and upon reasonable grounds because public policy requires that all persons have free access to the courts

²⁴ Shaffer v. Morgan, 815 S.W.2d 402, 404 (Ky. 1991), *quoting* Black's Law Dictionary, 469 (6th ed. 1991).

²⁵ Alcorn v. Gordon, 762 S.W.2d 809 (Ky.App. 1988).

to seek redress of wrongs.²⁶ Strict compliance with the prerequisites for maintaining an action for wrongful use of civil proceedings is required.²⁷

In determining probable cause for initiation of civil proceedings, all that is necessary is that the claimant reasonably believe that there is a sound chance that his claim may be held legally valid upon adjudication."²⁸ Moreover, where the legal validity of the claim is uncertain, the fact that the court ultimately does not sustain this claim is not dispositive of whether the plaintiff lacked probable cause in a case for wrongful use of civil proceedings.²⁹

Prather's allegations that Providian withheld statements and that Providian imposed improper interest charges and fees would seem to more properly state a cause of action as an unfair debt collections practice.³⁰ Likewise, Providian's failure to properly validate the debt would be a defense to a collection action,³¹ but would not necessarily indicate a lack of

²⁶ Raine v. Drasin, supra at 899.

²⁷ Prewitt, supra at 895 (describing this rule as "important baggage for this relatively new tort [wrongful use of civil proceedings] . . . brought along from its origins" in the tort of malicious prosecution.

²⁸ RESTATEMENT (SECOND) OF TORTS § 675 cmt. e.

²⁹ Id. at § 675 cmt. f. See also, KEETON ET AL § 120 at 893.

³⁰ 15 U.S.C. §§ 1692(e), 1692(f)(1).

³¹ 15 U.S.C. § 1692(g).

probable cause in bringing the action. However, Prather further alleges that Providian materially altered her account statements. If this allegation were proven, it would indicate a lack of probable cause to bring the action, at least on the part of Providian. Likewise, such conduct would also tend to support a finding of malice or improper motive in bringing the action. Therefore, the trial court erred by dismissing Prather's claim against Providian for wrongful use of civil proceedings.

Our analysis of this claim with respect to Weltman is somewhat more complicated. In a suit for wrongful use of civil proceedings, the standard for determining whether an attorney lacked probable cause for filing the underlying civil suit is set forth in the Restatement (Second) of Torts § 675,³² which states as follows:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and . . .

(a) correctly and reasonably believes that under those facts the claim may be valid under the applicable law . . .

An attorney has a duty to investigate the factual basis for a client's claim prior to filing suit, and failure to conduct a reasonable investigation may support a finding of lack

³² See Mapother, *supra* at 431.

of probable cause.³³ However, the question of probable cause underlying the tort of wrongful use of civil proceedings does not turn on whether the attorney was subsequently unable to prove his client's claims regarding the facts, so long as the attorney's views were tenable at the outset.³⁴

To support a claim for wrongful use of civil proceedings against Weltman, Prather would have to allege that Weltman knew (or reasonably should have known) of Providian's alteration of her records at the time the action was filed. A close reading of Prather's 2004 complaint reveals that she has not made that particular allegation against Weltman. Rather, she asserts only that Weltman lacked proof of the claim and that they had knowledge that the balance was disputed at the time the 1999 action was filed. Furthermore, she does not assert that Weltman participated or knew of Providian's alleged alteration of her records. While the facts as developed before the trial court did not ultimately support Providian's claim, we conclude that Prather has failed to allege facts showing that Weltman lacked a reasonable or tenable basis for bringing the action.³⁵ Therefore, the trial court properly dismissed the claim against Weltman.

³³ Prewitt v. Sexton, *supra* at 896.

³⁴ Id.

³⁵ Id.

We also agree with the trial court that Prather has not stated a cause of action for fraud against Providian or Weltman. A party claiming harm from fraud 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.³⁶ Providian correctly notes that Kentucky does not recognize a cause of action for spoliation of evidence.³⁷ Therefore, Prather cannot bring a claim for Providian's alleged alteration of her records after institution of the action.

As previously discussed, Prather does allege that Providian materially altered her credit-card records and statements prior to the institution of the action. To that extent, she pleaded sufficient facts showing that Providian made an actionable and material misrepresentation. But she has not alleged any similar conduct by Weltman.

Furthermore, Prather has failed to plead facts showing that she relied on the alleged misrepresentations. "The very essence of actionable fraud or deceit is the belief in and reliance upon the statements of the party who seeks to perpetrate the fraud. Where the plaintiff does not believe the

³⁶ United Parcel Service Co. v. Rickert, 996 S.W.2d 464, 468 (Ky. 1999), citing Wahba v. Don Corlett Motors, Inc., 573 S.W.2d 357, 359 (Ky.App. 1978).

³⁷ Monsanto v. Reed, 950 S.W.2d 811, 814 (Ky. 1997).

statements . . . or where he has knowledge to the contrary . . . recovery is denied".³⁸ Therefore, the trial court properly dismissed Prather's fraud claims against Providian and Weltman.

Prather next argues that she sufficiently stated a cause of action for defamation against Providian and Weltman. However, Providian and Weltman correctly note that statements in pleadings filed in judicial proceedings are absolutely privileged when material, pertinent, and relevant to the subject under inquiry, though it is claimed that they are false and alleged with malice.³⁹ Consequently, any matters asserted by Providian or Weltman during the course of the litigation cannot serve as a basis for a defamation action.

Furthermore, the Fair Credit Reporting Act (FCRA)⁴⁰ preempts state law claims for defamation to the extent that a bank furnishes any inaccurate information after receiving notice of the dispute.⁴¹ Since Prather does not allege that Providian or Weltman furnished inaccurate information to any credit

³⁸ Wilson v. Henry, 340 S.W.2d 449, 451 (Ky. 1960) (*citations omitted*). See also Compressed Gas Corp., Inc. v. U.S. Steel Corp., 857 F.2d 346, 352 (6th Cir. 1988).

³⁹ Schmitt v. Mann, 291 Ky. 80, 163 S.W.2d 281, 283 (1942). See also Hayes v. Rodgers, 447 S.W.2d 597, 599 (Ky. 1969).

⁴⁰ 15 U.S.C. § 1681 et seq.

⁴¹ Stafford v. Cross Country Bank, 262 F.Supp.2d 776, 787-88 (W.D.Ky. 2003), citing 15 U.S.C. §§ 1681s-2 and 1681t(b)(1)(F). In its order remanding, the Federal District Court noted that the FCRA may serve as a defense to the defamation count, but was not sufficient to justify removal of the defamation claim to federal court.

reporting service before they received notice of her dispute of the balance, Prather's defamation claims are preempted by the FCRA.

Finally, Prather argues that the trial court erred by dismissing her claims for intentional infliction of emotional distress. We disagree. A party asserting a claim for intentional infliction must allege conduct that is "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."⁴² Prather does not allege that Providian or Weltman engaged in any conduct specifically intended to cause her mental anguish.⁴³ Providian's action in pursuing a collections suit against Prather, even if done in bad faith, does not rise to the level of outrageous conduct.⁴⁴

Accordingly, the order of the Madison Circuit Court dismissing Prather's claim against Providian for wrongful use of civil proceedings is reversed and this matter is remanded for additional proceedings on the merits of that claim. The circuit

⁴² Humana of Kentucky, Inc. v. Seitz, 796 S.W.2d 1, 3(Ky. 1990), quoting RESTATEMENT (SECOND) OF TORTS, § 46 Cmt. d.

⁴³ Id. See also Kroger Co. v. Willgruber, 920 S.W.2d 61 (Ky. 1996), Craft v. Rice, 671 S.W.2d 247 (Ky. 1984), and Brewer v. Hillard, 15 S.W.3d 1, 6-7 (Ky.App. 1999).

⁴⁴ Kentucky Farm Bureau Mutual Ins. Co. v. Burton, 922 S.W.2d 385 (Ky.App. 1996).

court's order dismissing the other claims against Providian and Weltman is affirmed.

ALL CONCUR.

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