

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001350-MR

and

NO. 2009-CA-001509-MR

JAMES GREGORY HAMILTON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM JOHNSON CIRCUIT COURT
v. HONORABLE DANIEL SPARKS, SPECIAL JUDGE
ACTION NO. 05-CI-00057

MARSHA LYNN MCKENZIE

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant/Cross-Appellee, James Gregory Hamilton, appeals from an order of the Johnson Circuit Court granting summary judgment in favor of Appellee/Cross-Appellant, Marsha Lynn McKenzie.

In March 1996, Hamilton purchased a tract of land in Johnson County, Kentucky, that was adjacent to land owned by McKenzie. Shortly thereafter a dispute between the parties arose over the location of the boundary line dividing the properties. The dispute culminated in an October 1996 incident wherein Hamilton allegedly threatened McKenzie's mother, Helen McKenzie, with a weed eater. The McKenzies sought the advice of the Johnson County Attorney, and Hamilton was charged with menacing (Helen McKenzie being the complaining witness¹), as well as third-degree criminal trespass and second-degree criminal mischief (Marsha McKenzie being the complaining witness).

Subsequently, in December 1996, Hamilton filed a civil action in the Johnson Circuit Court alleging that McKenzie had trespassed on his property, prevented him from developing the land, and had caused him to lose revenue. On January 16, 1997, the trespassing and criminal mischief charges were dismissed "on condition Defendant is to have no contact with complaining witness and is to resolve the property dispute between the parties in a peaceful manner in accordance with the terms of any circuit court order."

The civil litigation took some time to resolve. Initially, a judgment was entered on behalf of McKenzie. However, a panel of this Court on appeal reversed and remanded the matter without consideration of the merits after determining that an appearance of impropriety existed because the trial commissioner shared office space with McKenzie's attorney. On remand, a special

¹ The menacing charge was subsequently dismissed upon the motion of the prosecutor and those facts are not at issue herein.

trial commissioner entered findings of fact and conclusions of law in favor of Hamilton. On May 13, 2004, the trial court adopted the trial commissioner's recommendations and entered judgment accordingly. No appeal was taken from that decision.

On February 8, 2005, Hamilton filed a second civil action against McKenzie in the Johnson Circuit Court asserting claims for trespass, wrongful civil proceeding, abuse of process, malicious prosecution, libel and slander. In November 2006, the trial court denied McKenzie's motion for summary judgment based upon a statute of limitations defense. However, several days before the scheduled trial in the matter, the trial court granted McKenzie's substantive motion for summary judgment on all issues. Hamilton thereafter appealed to this Court as a matter of law. McKenzie has also cross-appealed the trial court's November 2006 denial of her first motion for summary judgment.

On appeal from the granting of a motion for summary judgment, the appellate court must determine "whether the trial court correctly found that there were no genuine issues of any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); CR 56.03. In considering a motion for summary judgment, the trial court must consider the evidence in a light most favorable to the non-moving party. *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment is proper where the movant shows that the adverse party could not prevail under any circumstances. *Id.* Because summary judgment involves no

fact finding, this Court will review the trial court's decision de novo. 3D

Enterprises Contracting Corp. v. Louisville and Jefferson County Metro. Sewer Dist., 174 S.W.3d 440, 445 (Ky. 2005).

Hamilton first argues on appeal that summary judgment was improper on his claims of malicious prosecution and abuse of process. Hamilton contends that there exist genuine issues of material fact with regard to whether McKenzie acted with malice and in bad faith by filing the 1996 criminal charges against him. We disagree.

Malicious prosecution addresses the wrongful use of criminal proceedings without probable cause. The elements of the tort are as follows:

- (a) The institution or continuation of a prior judicial proceeding;
- (b) By, or at the instance of, the person sought to be charged;
- (c) The termination of the prior criminal proceeding in the Plaintiff's favor;
- (d) Malice in the institution of such proceedings;
- (e) Want or lack of probable cause for the proceeding;
- (f) The suffering of damage as a result of the proceeding.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981). Hamilton contends that McKenzie had no well-founded belief that the disputed property was hers and the fact that she filed criminal charges against him solely to seize the property for her own use was evidence that she acted with malice.

In finding that Hamilton could not prevail as a matter of law on his malicious prosecution claim, the trial court first noted that Hamilton failed to demonstrate that the prior criminal proceeding was terminated in his favor. Rather, the dismissal of the criminal charges was conditioned upon Hamilton's agreement to have no contact with McKenzie and to resolve the dispute in the civil action. Thus, we agree with the trial court that because Hamilton had "to give up something," the criminal matter was not terminated in his favor. *See Broaddus v. Campbell*, 911 S.W.2d 281 (Ky. App. 1995).

Further, Hamilton fails to set forth any specific evidence that McKenzie acted with malice other than his broad assertion that she was trying to take his property from him without any basis to do so. However, the record clearly belies such an assertion. The first judgment herein established the boundary in favor of McKenzie. Although that judgment was subsequently reversed, it was not in any manner related to the merits of the action. Moreover, upon remand, the special trial commissioner noted in his report, "After having reviewed the files, drawings and testimony of the surveyors, I do believe that this group can create different interpretations from the same set of data that would rival any group of attorneys." Clearly, there was a legitimate dispute as to the boundary between the parties' properties, and McKenzie reasonably believed that Hamilton had encroached on her property. The subsequent judgment in favor of Hamilton does not somehow render McKenzie's actions malicious. Accordingly, the trial court

properly found that Hamilton could not, as a matter of law, prevail on his malicious prosecution claim.

There is likewise no evidence in the record herein to establish a cause of action for abuse of process, which consists of “[t]he employment of a legal process for some other purpose than that which it was intended by the law to effect.” *Raine*, 621 S.W.2d at 902. To prevail on such a claim a plaintiff must show (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Bonnie Brass Farms, Inc. v. Robinson*, 598 S.W.2d 765 (1980).

Hamilton maintains that McKenzie’s ulterior purpose in pursuing the criminal charges was simply to gain control of the disputed property. However, as observed by the trial court,

[T]he record contains no evidence that Ms. McKenzie attempted to use the criminal proceeding against Mr. Hamilton outside the criminal proceeding. In other words, Ms. McKenzie made no offers, threats, or inducements to Mr. Hamilton to drop the criminal proceeding in exchange for Mr. Hamilton’s surrender of the property at issue. To the contrary, the parties were in agreement that the criminal case would be dismissed, and the parties permitted to resolve their differences in the civil action.

Apparently, Hamilton believes that because the disputed property was ultimately found to have not belonged to McKenzie, her act of bringing the criminal charges was abuse of process. Such is simply not the standard and the trial court properly found that Hamilton could not prevail on this claim as a matter of law.

Hamilton next argues that the trial court erred in finding that he failed to produce sufficient evidence to maintain a cause of action for defamation. He argues that a stigma attached when McKenzie wrongfully charged him with criminal trespass in 1996, and that his reputation was damaged because of such. Again, we must disagree.

To establish defamation, a plaintiff must show (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation. *Columbia Sussex Corp., Inc. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981). The words complained of must be of such a nature that courts can presume as a matter of law that they do tend to denigrate or disgrace the plaintiff, or hold him up to public hatred, contempt or scorn. *See Digest Pub. Co. v. Perry Pub. Co.*, 284 S.W.2d 832 (Ky. 1955).

In granting summary judgment on this claim, the trial court concluded:

The language complained of by Plaintiff is that contained in the summons which was issued when the Defendant sought the advice of the county attorney. The statements in their entirety are “and intentionally entered upon the premises of Marsha McKenzie and destroyed property worth more than \$500.00 by destroying a wire fence and cutting down trees.”

Plaintiff has admitted in his discovery deposition that in fact, he cut down a wire fence and brushed the property in question. The alleged defamatory language consists of the allegation that the Plaintiff “intentionally entered upon the premises of Marsha McKenzie.”

The complexity of the underlying civil action which determined the boundary establishes beyond any reasonable question that there existed a legitimate issue as to the location of the boundary. Therefore, the Court finds, as a matter of law, that the defendant, Marsha McKenzie, had a good faith, but mistaken belief as to the boundary in question, and as such, is entitled to the protections which give rise to that good faith but mistaken belief, as they are stated in the summons issued by the Johnson County Attorney.

Additionally, the Plaintiff was thoroughly questioned during the course of his discovery deposition as to any injury to his reputation, and the Plaintiff was unable to point out any instance by which he could establish that his reputation had been injured. Words which do not bear any defamatory meaning are not actionable. [*Taxpayers' League of Bell County v. Sun Pub. Co.*, 256 Ky. 37, 75 S.W.2d 564 (1934)].

Hamilton has likewise failed in this Court to produce any evidence of injury to his reputation. Accordingly, we are of the opinion that the trial court properly found that Hamilton did not establish the elements of defamation and could not prevail on that claim as a matter of law. Summary judgment was proper.

Finally, we find no merit in Hamilton's argument that there was a genuine issue of material fact to preclude summary judgment on his claims for trespass and wrongful taking, and we adopt the reasoning of the trial court herein:

[T]here is ample evidence establishing a bona fide dispute as to the location of the boundary between the parties, which was resolved by way of civil litigation. The Plaintiff complained of trespass in that prior civil action, which became final thirty (30) days after the Court's affirmation of the recommendations. The Court finds, as a matter of law, when there exists a good faith but mistaken belief as to the location of a boundary line,

such circumstances do not give rise to a subsequent cause of action for trespass.

There is no allegation that the Defendant, Marsha McKenzie, attempted to occupy or go upon the property in question once the Judgment of the Court in the prior civil litigation became final. Any alleged trespass prior thereto was previously adjudicated. Therefore, the Court finds, as a matter of law, that a cause of action for trespass may not lie under these circumstances.

We would further note that Hamilton asserts that his property was wrongfully taken since he was denied use thereof during the pendency of the boundary dispute. Although Hamilton contends that the conditional dismissal of the criminal charges barred him from access or use of the disputed property, we find no evidence of such in the record. Therefore, the trial court properly granted summary judgment on his claims.

Because we have determined that the trial court properly granted summary judgment in favor of McKenzie on all claims, we need not address the merits of her cross-appeal.

The judgment of the Johnson Circuit Court is affirmed.

ALL CONCUR.

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