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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000303-MR

THOMAS N. MCKINNEY, JR.

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MITCHELL PERRY, JUDGE
ACTION NO. 15-CI-001558

JERRY M. COLEMAN;
KENTUCKY NEIGHBORHOOD
BANK, INC.; AND MATT MARDIS

APPELLEES

OPINION
VACATING AND REMANDING

** ** * ** * ** *

BEFORE: DIXON, J. LAMBERT, AND STUMBO, JUDGES.

LAMBERT, J. JUDGE: Thomas N. McKinney, Jr., has appealed from the orders of the Jefferson Circuit Court dismissing his claims against the defendants and from the order denying his motion to alter, amend, or vacate those orders. Having

considered the record and the parties' arguments on appeal, we must vacate the circuit court's rulings.

The underlying action began with the filing of a verified complaint in which McKinney, who is a licensed real estate broker, sought damages against Kentucky Neighborhood Bank, Inc. (KNB), Matt Mardis, and Jerry M. Coleman. Coleman is a licensed and practicing attorney, and Mardis works for KNB. In his complaint, McKinney alleged that in July of 2012, he had been hired by the owners to manage property in Meade County. Two months earlier, KNB had filed a foreclosure action on the same property to enforce a mortgage. In September of that year, KNB obtained a judgment permitting the property to be sold at a judicial sale. KNB purchased the property at the Commissioner's sale. The Report of Sale was confirmed on September 20, 2012, and a deed was prepared and approved. The deed was recorded in the Meade County Clerk's Office on October 11, 2012.

McKinney went on to allege that on September 19, 2012, Coleman wrote a letter to him on behalf of KNB accusing him of stealing fixtures from the property and threatening legal action against him. That letter stated as follows:

I am the attorney representing Kentucky Neighborhood Bank who purchased the property at the Master Commissioner sale in the above-referenced lawsuit [KNB v. Collins, Meade Circuit Court, Civil Action No. 12-CI-00113], pursuant to a mortgage that the Bank had on these premises. It had been brought to my attention that you may [have] allowed or been aware of fixtures being removed from the premises, consisting of toilets, water heaters, dishwashers, stoves, microwaves, refrigerators, ceiling fans and perhaps even other fixtures. Certainly you had the keys to the premises and would

have been in a position to know of these fixtures being removed. Taking these fixtures from the premises is unlawful and the Bank will not stand for it. They have directed me to take legal action if all of these fixtures are not returned at a designated time and place to the premises for installation by the Bank. We do not want them reinstalled, we want them to be brought to the premises at an appointed time. In addition, we want the keys to the premises since my client purchased the property and the Bank has a right to those keys.

Please get in touch with me immediately about this matter to avoid legal proceedings.

Coleman wrote a second letter several days later making the same accusation and stating that witnesses saw him take fixtures from the property. That letter provided as follows:

Since I last talked with you on the phone we have done some investigating and found several witnesses who saw you taking certain ones of these items from the condo. We are also having a police report done on it and once that is completed it will be taken to the Hardin County Commonwealth Attorney's office for prosecution if these items are not returned by the end of the week. Please give me a call before then if you have any intention of keeping this matter out of the criminal courts.

McKinney contended that he had not stolen anything and that KNB did not have legal or equitable title of the property when the demand was made.

Mardis, as KNB's agent, initiated a criminal action against McKinney in Meade District Court, and McKinney was subsequently charged with felony theft. As a result, McKinney was arrested at his place of business, and while he was released, his liberty was restricted by the conditions of his release, including having to surrender his concealed carry weapon permit. McKinney alleged that

Mardis provided false or misleading information at the probable cause hearing, which led to a finding of probable cause and a referral to the grand jury. The grand jury returned an indictment charging McKinney with felony theft charges.¹

McKinney alleged that the criminal prosecution was brought about by the defendants in order to extort money from him and to gain an advantage in what he said should have been a civil matter. The criminal charges were dismissed on June 23, 2014, without a stipulation of probable cause.

As a result of these factual allegations, McKinney filed the above civil action seeking damages for malicious prosecution, negligence, defamation by libel and slander, outrageous conduct, and civil conspiracy. He demanded compensatory and punitive damages. Coleman filed an answer to the complaint and raised several affirmative defenses, including that McKinney's claim was barred by the applicable statute of limitations and that he was precluded from asserting his action because he paid restitution in the amount of \$3,000.00 to have the criminal action dismissed. Because the criminal proceeding was not terminated in McKinney's favor, he could not bring his claim.

In lieu of filing an answer, KNB and Mardis moved to dismiss McKinney's complaint pursuant to Kentucky Rules of Civil Procedure (CR) 8.01 and CR 12.02. They argued that McKinney could not prove a negligence claim because he could not establish that a duty existed between them or that there was a breach of any duty. In addition, the one-year statute of limitations for personal

¹ Criminal Action No. 13-CR-00021.

injuries as set forth in Kentucky Revised Statutes (KRS) 413.140(1)(a) had expired. The limitations period began to run on February 2, 2013, when he was indicted by the grand jury, and the complaint was filed more than two years later. As to McKinney's defamation claim, KNB and Mardis claimed that they were entitled to absolute immunity for any statements made in the course of a judicial proceeding. As with the negligence claim, KNB and Mardis contended that the limitations period for this claim had expired. McKinney's outrageous conduct claim also failed to include an allegation that they acted with the intent to cause emotional distress or that he suffered from severe emotional distress. His civil conspiracy claim failed to allege sufficient facts that any of the defendants conspired to commit malicious prosecution and, in any event, the limitations period had expired. Finally, McKinney's malicious prosecution claim failed because the criminal action was supported by probable cause.

McKinney filed a response in opposition to the motion to dismiss, arguing that in a light most favorable to him, KNB and Mardis failed to establish that he was not entitled to relief.

By separate motion, Coleman moved for a judgment on the pleadings pursuant to CR 12.03, and while the memorandum in support was not included in the record on appeal, it appears that Coleman raised arguments similar to those raised by KNB and Mardis in their motion to dismiss. Attached to McKinney's response was a copy of the Commonwealth's answer to the bill of particulars in the criminal action. In the answer, the Commonwealth included a list of items that had

allegedly been taken as well as the value of each item. The value of the items totaled \$7,465.00.

In an opinion and order entered November 16, 2015, the circuit court ruled on Coleman's motion for a judgment on the pleadings. The court granted the motion, holding as follows:

The thrust of Coleman's argument rests on the principle that, because McKinney issued a check of \$3,000 which resulted in the dismissal of his criminal case in Meade County, a claim of malicious prosecution cannot survive, because "having bought peace the accused may not thereafter assert that the proceedings have terminated in his favor." *Broaddus v. Campbell*, 911 S.W.2d 281, 285 (Ky. App. 1995). McKinney counters that, although he paid the \$3,000, this was not an admission of guilt which led to the dismissal of charges, but rather a preventative effort to end prosecution without a comment on the merits of the charges.

Malicious prosecution is a claim "not favored in the law." *Strohschein v. Crager*, 258 S.W.3d 25, 30 (Ky. App. 2007). In *Broaddus*, cited above, the plaintiff's malicious prosecution claim was dismissed because the plaintiff had admitted to probable cause for the criminal charges. Despite the fact that McKinney maintains he has not admitted to probable cause, the money paid to secure the dismissal of the charges means that the criminal case was not resolved in his favor, which renders any claim for malicious prosecution moot.

Regarding McKinney's surviving claims, his defamation [claim] must fail based on the expiration of the one year statute of limitations on defamation actions. His outrage claim must fail, because emotional distress damages are available through traditional torts. *Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. App. 1993). McKinney's negligence claim must fail because of negligence elements in other claimed torts, and his

civil conspiracy claim fails both as a matter of law and under the statute of limitations. Accordingly, Coleman's Motion for Judgment on the Pleadings is granted.

The court made the order final and appealable. In a separate order entered December 7, 2015, the court ruled that McKinney's claims against KNB and Mardis were dismissed for the same reasons as set forth in the November order, and thus both were considered under CR 12.03.²

McKinney moved the court to alter, amend, or vacate its November 16, 2015, order, arguing that the court had misapplied CR 12.03 in that it addressed matters outside of the pleadings and failed to address the motion as one for summary judgment. McKinney also disputed the merits of the ruling as it related to his malicious prosecution claim. In a separate motion, McKinney moved the court to alter, amend, or vacate its November 16, 2015, order as it related to KNB and Mardis. All three defendants objected to McKinney's motions, and the circuit court denied the motions on February 10, 2016. This appeal now follows.

On appeal, McKinney contends that the circuit court erred in dismissing his claims based upon CR 12.03. The appellees argue that the circuit court did not err in dismissing McKinney's claims and that he failed to preserve his right to seek review on all but his malicious prosecution claim.

CR 12.03 provides as follows:

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on

² The record does not contain a copy of the December 7, 2015, order, and none of the parties attached a copy of this order to their appellate briefs. The order was, however, attached to the supplemental prehearing statement.

the pleadings. If, on such motion, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

In *City of Pioneer Village v. Bullitt County ex rel. Bullitt Fiscal Court*, 104 S.W.3d 757, 759 (Ky. 2003), the Supreme Court of Kentucky addressed the application of CR 12.03:

[CR] 12.03 provides that any party to a lawsuit may move for a judgment on the pleadings. The purpose of the rule is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided. The procedure is not intended to delay the trial in any respect, but is to be determined before the trial begins. The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings. When a party moves for a judgment on the pleadings, he admits for the purposes of his motion not only the truth of all his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all his own allegations which have been denied by his adversary. *Archer v. Citizens Fidelity Bank & Trust Co.*, Ky., 365 S.W.2d 727 (1963). The judgment should be granted if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief. *Cf. Spencer v. Woods*, Ky., 282 S.W.2d 851 (1955).

Because the matter before this Court represents a question of law, our standard of review is *de novo*. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

In determining that McKinney's malicious prosecution claim had no merit, the circuit court relied upon the opinion of *Broadus v. Campbell*, 911 S.W.2d 281, 283 (Ky. App. 1995), in which this Court explained:

There are six elements which must be established to prevail on a claim of malicious prosecution including:

(1) [T]he institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Raine v. Drasin, Ky., 621 S.W.2d 895, 899 (1981). We believe it is axiomatic that where there is a specific finding of probable cause in the underlying criminal action, or where such a finding is made unnecessary by the defendant's agreement or acquiescence, a malicious prosecution action cannot be maintained. The appellant's admission that there was probable cause for the issuance of the indictment was as much a bar to bringing a malicious prosecution action as a plea of guilty to the charges would have been.

In dismissing McKinney's claim, the court relied entirely upon his payment of \$3,000.00, stating that "[d]espite the fact that McKinney maintains he has not admitted to probable cause, the money paid to secure the dismissal of the charges means that the criminal case was not resolved in his favor, which renders any claim for malicious prosecution moot."

McKinney contends that the circuit court improperly decided the motions on the basis of CR 12.03 rather than treating the motions as ones seeking summary judgment pursuant to CR 56. We must agree with this argument. McKinney did not raise any information about the \$3,000.00 payment in his complaint; Coleman raised the issue of the payment – and what it represented – in his answer to the complaint. But for purposes of deciding a CR 12.03 motion, the moving party must admit the truth of the opposing party’s allegations and admit that his own allegations are untrue. *See City of Pioneer Village, supra*. The court should not have relied upon McKinney’s \$3,000.00 payment as a basis to grant CR 12.03 relief. Rather, the circuit court should have treated the motions as ones seeking summary judgment and followed the procedure for such motions. Accordingly, we must hold that the circuit court erred as a matter of law in granting the defendants’ respective motions for a judgment on the pleadings and vacate its orders.

As to the remaining claims, in light of our ruling above, we shall out of an abundance of caution vacate the circuit court’s ruling related to those claims without addressing the merits and permit it to revisit these arguments on remand. In so holding, we reject Mardis and KNB’s argument that McKinney failed to preserve his right to seek review of the dismissal of these claims by failing to address them in his CR 59.05 motion. *See Kentucky Farm Bureau Mutual Ins. Co. v. Conley*, 456 S.W.3d 814, 819-20 (Ky. 2015) (overruling *Matthews v. Viking Energy Holdings, LLC*, 341 S.W.3d 594 (Ky. App. 2011), and holding that

“*Matthews* is irreconcilable with our policy of substantial compliance in the prosecution of appeals, and inconsistent with controlling precedent and our rules” and that “[u]nder our policy of substantial compliance, the remedy for an insufficiently particular CR 59.05 motion may be loss of that motion or sanctions, but it is not the loss of the right to an appeal.”).

For the foregoing reasons, the orders of the Jefferson Circuit Court are vacated, and this matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

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