

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001558-MR

GEOFFREY M. YOUNG

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 14-CI-03154

ANNE HOPKINS, EVELYN KNIGHT,
ALICIA HULLINGER, ANDREW DAUGHERTY,
JAMIE JOHNSON, AND JUSTIN BURNETT

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: JONES, STUMBO, AND TAYLOR, JUDGES.

JONES, JUDGE: Appellant, Geoffrey Young, brings this appeal *pro se* challenging numerous orders of the Fayette Circuit Court, which collectively dismissed all his claims against Appellees. Following review of the record, we affirm.

I. BACKGROUND

Geoffrey Young (“Geoff”) had been a part owner of Good Foods Co-Op, Inc. (“Good Foods”) for approximately two decades leading up to the events that give rise to this litigation. In June of 2012, Geoff sent an email to Good Foods’ board of directors expressing his concerns with provisions of Good Foods’ bylaws dealing with the amount of money an owner in Good Foods would receive upon terminating his or her ownership in the company. Geoff’s email indicated that he believed Good Foods’ practice was unlawful. Good Foods’ board of directors consulted with an attorney in Vermont – the state in which Good Foods is incorporated – who apprised the board that nothing about Good Foods’ bylaws or the manner in which it dispensed of owners’ capital accounts was illegal.

In December of 2013, Geoff developed a petition to call a special owners’ meeting to vote on a proposed bylaw that would require Good Foods to give a departing owner all money in that owner’s capital account, which would include the \$200 initial investment that owner made in the company as well as any patronage rebates that might have been credited to the owner’s account during his or her time with Good Foods. Geoff began collecting signatures for his petition by going to the Good Foods store in Lexington, Kentucky, asking patrons of the store whether they were owners and, if so, if they would be interested in signing his petition. Anne Hopkins, general manager of Good Foods at all times relevant to this litigation and an appellee in this action, noticed Geoff approaching store patrons and inquired into his actions. When she discovered the contents of the

petition for which Geoff was collecting signatures, she asked him to leave and eventually told him that she would call the police if he did not stop harassing the customers. Following this event, Good Foods developed a policy that owners of Good Foods must follow if they wished to petition on store grounds, which included a form petition provided by Good Foods.

Geoff returned with a new petition on January 14, 2014. He was directed to the new policy for petitioning, and asked to use the new form that had been developed in conjunction with that policy. Geoff declined to follow the policy or use the provided form and was again asked to cease petitioning and to leave the store. He did not do so. Eventually, Anne called the police to come remove Geoff from the store grounds. Officer Justin Burnett, also an appellee, arrived at the scene and eventually arrested Geoff and charged him with criminal trespass in the third degree and disorderly conduct in the second degree. Despite this incident, Geoff returned to Good Foods three days later and resumed collecting signatures for his petition. He was again arrested and charged with criminal trespass in the third degree. Geoff represented himself in his defense of the criminal charges brought against him. Following a jury trial, he was convicted on all charges. Geoff eventually appealed those charges to the Fayette County Circuit Court, which affirmed. This Court denied discretionary review of Geoff's criminal convictions.¹

¹ Order Denying Discretionary Review, No. 2014-CA-001707 (Ky. App. Jan. 16, 2015).

In the meantime, Geoff filed a *pro se* civil complaint against the Lexington Division of Police, Anne, and seven other Good Foods board members. That suit was dismissed for procedural defects on March 8, 2014. On April 21, 2014, the Good Foods' board of directors expelled Geoff from ownership in the company. Five days later, Geoff received an email from an employee of Good Foods, which stated that Geoff was banned from entering the Good Foods store in Lexington and from attending any events – including board meetings – associated with Good Foods. Geoff concluded that this ban was legally ineffective and attempted to attend the annual Good Foods owners' meeting the following day, April 27, 2014. Upon Geoff's arrival at the meeting, an off-duty policeman, who had been hired as security by Good Foods, stopped Geoff from entering the building and informed him that if he refused to leave he would be taken to jail. Geoff voluntarily left the meeting.

On August 19, 2014, Geoff filed a second *pro se* complaint in Fayette Circuit Court against Anne, Evelyn Knight, and Alicia Hullinger (collectively, the "Good Foods Defendants"). Also named as defendants were Sergeant Andrew Daugherty, Officer Jamie Johnson, and Officer Justin Burnett (collectively, the "Police Defendants"), each of whom had been present at one of Geoff's arrests on the Good Foods property. Geoff's complaint sought monetary, declaratory, injunctive, and other appropriate relief for "securities and tax fraud over a 12-year period, perjury on May 6 and 7, 2014, defamation, and false arrest and imprisonment on two occasions in January 2014." Geoff additionally alleged that

the Police Defendants had used excessive force on him by placing him in handcuffs for no legitimate reason.

On September 9, 2014, the Police Defendants filed an answer and a motion to dismiss Geoff's perjury claims against them. In support of their motion to dismiss the perjury claims, the Police Defendants denied that they had committed perjury, and asserted that Geoff had no cause of action against them as the testimony of a witness at a judicial proceeding is absolutely privileged. Following Geoff's response and a hearing on the motion, the circuit court dismissed Geoff's perjury and defamation claims against the Police Defendants with prejudice on October 2, 2014. The circuit court's order found that all of Geoff's perjury and defamation claims against the Police Defendants arose out of their testimony against Geoff during his criminal trial. As those statements are immune from lawsuit, the circuit court found that Geoff had no cause of action on the claims as no relief could be granted. The order further stated that if Geoff attempted to question the Police Defendants on the dismissed perjury/defamation claims during discovery, the circuit court would find that any objection made by the Police Defendants' attorney related to those statements was valid and appropriately made. Geoff moved to amend the circuit court's October 2, 2014, order, arguing that it was vague and unconstitutional. The motion to amend was denied on October 14, 2014.

On October 3, 2014, the Good Foods Defendants filed a motion, with accompanying memorandum, to dismiss Geoff's complaint against them in its

entirety. The Good Foods Defendants argued that Geoff's claims for securities and tax frauds were, in substance, a derivative action, which he did not have standing to pursue because: 1) he is no longer an owner in the corporation; 2) he does not fairly and adequately represent the interests of the shareholders in enforcing the rights of the corporation; and 3) he failed to plead the requisite demand for legal action to the corporation with particularity. As to the remainder of Geoff's claims against the Good Foods Defendants – for perjury, defamation, false arrest, and false imprisonment – the Good Foods Defendants argued that Geoff's complaint failed to assert sufficient allegations to make a *prima facie* case against them. Geoff's response to the motion to dismiss argued that none of his claims against the Good Foods Defendants could be categorized as derivative, and that the motion was generally premature and untimely.

On October 24, 2014, the Police Defendants moved to stay discovery on Geoff's remaining claims against them until Geoff's pending appeal on his criminal convictions was finalized. Geoff responded, arguing against the stay of discovery. Following a hearing, the circuit court entered an order dismissing all of Geoff's claims against the Good Foods Defendants with prejudice on November 17, 2014. An order staying discovery on the Geoff's remaining claims against the Police Defendants was entered on November 19, 2014. Geoff moved to alter, amend, or vacate the circuit court's order dismissing his claims against the Good Foods Defendants on November 26, 2014. In his motion, Geoff argued that his claims should not have been dismissed with prejudice because the circuit court had

not mentioned the phrase “with prejudice” during the hearing. Geoff therefore requested that the order be amended to include the transcript of the hearing on the Good Foods Defendants’ motion to dismiss. Geoff additionally contended that he was likely planning on amending his complaint, at which point he would make more specific allegations against the Good Foods Defendants. Geoff’s motion was denied on December 15, 2015. On January 6, 2015, Geoff filed a notice of appeal to this Court from the circuit court’s order dismissing his claims against the Good Foods Defendants. A panel of this Court dismissed Geoff’s appeal as interlocutory on March 20, 2015.² Geoff filed a motion with this Court requesting that it vacate its order dismissing his appeal. His motion was denied in May of 2015.

On October 28, 2015, the Police Defendants filed a motion for summary judgment on the remainder of Geoff’s claims against them. Therein, the Police Defendants argued that Geoff was estopped from arguing that the Police Defendants had wrongfully arrested/imprisoned him, as the convictions of the crimes for which they had arrested Geoff had been upheld on appeal. As to Geoff’s claim that the Police Defendants had failed to read him his *Miranda*³ rights, the Police Defendants argued that an action for money damages is unavailable for alleged constitutional violations. Further, the Police Defendants noted that, during Geoff’s criminal trial, the district court had already determined, and the circuit court had affirmed, that Geoff had not been subjected to custodial

² Order Denying Motion for Reconsideration and Motion for Prehearing Conference, No. 2015-CA-000017-MR (Ky. App. May 13, 2015).

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

interrogation such that it was necessary to read him his *Miranda* rights. The Police Defendants additionally argued that Geoff's excessive force claims should be dismissed, as a police officer is entitled to use such force as is necessary to take a suspect into custody and Geoff's only allegation of excessive force was that he had been handcuffed upon his arrest.

On December 7, 2015, Geoff filed a motion to amend his complaint and a response to the Police Defendants' motion for summary judgment. Geoff did not tender an amended complaint with his motion. His response to the Police Defendants' motion for summary judgment argued that he would soon file an amended complaint, which would render all of the Police Defendants' arguments moot. Geoff additionally contended that the Police Defendants had made their motion in bad faith – as disputed issues of material fact remained, that their argument concerning his excessive force claim was “illogical and invalid,” and that he considered the case law cited by the Police Defendants to be bad law and “a squib.” The circuit court granted summary judgment in favor of the Police Defendants and dismissed all of Geoff's claims, with prejudice, on December 22, 2015. That same day, the circuit court entered an order denying Geoff's motion to amend his complaint.

On January 4, 2016, Geoff filed a “Motion to Vacate Several Orders,” which sought to vacate all orders entered by the circuit court since the beginning of the case. In his motion, Geoff argued that the circuit court had exceeded its authority and Section 2 of the Kentucky Constitution by denying his motion to

amend his complaint. Geoff contended that he had made a *prima facie* case as to why justice required that he should be allowed to amend his complaint in his motion to amend and that the Police Defendants' response to his motion lacked any merit. Further, Geoff argued that, while the Police Defendants had filed an answer to his original complaint, he believed that their answer did not constitute a responsive pleading. Accordingly, Geoff argued that he was entitled to amend his complaint as of right under CR⁴ 15.01. Geoff contended that the order granting the Police Defendants' motion for summary judgment must be vacated because there were numerous issues of material fact that remained unresolved and unaddressed and because he had "demolished" every argument that the Police Defendants had made to support their motion for summary judgment. As to the circuit court's order dismissing his claims against the Good Foods Defendants, Geoff argued that the circuit court erred in agreeing with the Good Foods Defendants that his claims for securities and tax fraud constituted a derivative action and erred in dismissing those claims on the ground that he lacked standing to bring them. Along with his motion, Geoff tendered an "unfinished first draft" of his amended complaint and requested that the circuit court allow him 30 additional days to finish and file the final version of that amended complaint. Geoff did not notice a time for his motion to be heard.

The Police Defendants responded to Geoff's motion to vacate on January 27, 2016. In their response, the Police Defendants argued that Geoff had

⁴ Kentucky Rules of Civil Procedure.

failed to articulate any grounds upon which his motion could be granted as to any of the orders he sought to vacate, but merely rehashed his earlier arguments in support of his claims against all defendants. On September 7, 2016, Geoff filed a notice of hearing for his motion to vacate. The Police Defendants filed a supplemental response to Geoff's motion to vacate on September 12, 2016, arguing that the motion should be dismissed as untimely. On September 26, 2016, the circuit court denied the motion to vacate on the grounds that the motion was not timely made – due to Geoff's failure to notice it for a hearing until eight months after filing the motion – and on the merits. This appeal followed.

II. ANALYSIS

Geoff's notice of appeal indicates that he is seeking reversal of the circuit court's order dismissing his perjury and defamation claims against the Police Defendants; the order dismissing all his claims against the Good Foods Defendants; the order granting the Police Defendants' motion to stay discovery; the order granting summary judgment in favor of the Police Defendants; the order denying his motion to amend his complaint; and the order denying his motion to vacate each of those orders. While Geoff's brief to this Court continually argues that he believes that the circuit court committed reversible error in entering the above-listed orders, his brief is generally devoid of any substantive legal argument as to how the circuit court committed reversible error. The essence of the arguments contained in Geoff's brief is that if the circuit court had either ordered him to file a more definite statement or granted him leave to file an amended

complaint, none of his claims would have been dismissed. Geoff essentially contends that, because of his *pro se* status, the circuit court lacked any discretion to deny his motion to amend his complaint. Additionally, Geoff contends that the order granting summary judgment in favor of the Police Defendants was in error as genuine issues of material fact remain.

Under CR 15.01, if responsive pleadings have already been served, “a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” In the instant case, Geoff filed his motion to amend his complaint well after all defendants had filed their responsive pleadings and, in fact, after the Good Foods Defendants had already been dismissed from the case. While leave to amend should be given “when justice so requires[,]” *id.*, “the trial court has wide discretion and may consider such factors as the failure to cure deficiencies by amendment or the futility of the amendment itself.” *First Nat’l Bank of Cincinnati v. Hartman*, 747 S.W.2d 614, 616 (Ky. App. 1988). Accordingly, we will not disturb the circuit court’s denial of Geoff’s motion to amend absent an abuse of discretion. *Lambert v. Franklin Real Estate Co.*, 37 S.W.3d 770, 779 (Ky. App. 2000). Abuse of discretion “implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (quoting *Kentucky Nat’l Park Comm’n v. Russell*, 301 Ky. 187, 191 S.W.2d 214 (1945)).

Having reviewed the record, we cannot find that the circuit court abused its discretion in denying Geoff's motion to amend his complaint. Geoff's motion to amend merely indicates that the Good Foods Defendants – who had already been dismissed from the case, Steven P. Stadler – a Fayette County prosecutor who has never been a party to the case, and the Police Defendants had committed “additional violations” since the time he filed his complaint in January of 2014. Geoff did not indicate what those violations were, nor did he tender an amended complaint with his motion. We recognize that a circuit court judge has a duty to “liberally construe *pro se* pleadings to extract the [*pro se* litigant]’s intent and bring about a full adjudication of the relevant issues. . . .” *Taylor v. Commonwealth*, 354 S.W.3d 592, 594 (Ky. App. 2011). In this case, however, there was nothing in Geoff's motion to amend his complaint even suggesting any valid reason to allow him to do so.

Geoff additionally argues that the circuit court's entry of summary judgment in favor of the Police Defendants was in error as genuine issues of material fact remain. Specifically, Geoff notes that the Police Defendants denied his allegation that he was arrested by three officers and his allegation that he was entitled to a *Miranda* warning before his arrest, thereby creating a genuine dispute of material fact. “The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to 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) (citing CR 56.03).

While “[t]he moving party bears the initial burden of demonstrating that no genuine issue of material fact exists . . . the burden shifts to the party opposing summary judgment to produce at least some affirmative evidence showing that there is a genuine issue of material fact requiring trial.” *First Fed. Sav. Bank v. McCubbins*, 217 S.W.3d 201, 203 (Ky. 2006). A plaintiff’s subjective “[b]elief is not evidence and does not create an issue of material fact.” *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990). Further, the fact that a dispute exists as to *immaterial* facts does not preclude an entry of summary judgment, so long as the court determines that there is no dispute as to *controlling material facts*. *Rone ex rel. Payne v. Daviess Cty. Bd. of Educ.*, 655 S.W.2d 28, 29 (Ky. App. 1983) (citing *Bennett v. S. Bell Tel. & Tel. Co.*, 407 S.W.2d 403 (Ky. 1966)). Because factual findings are not at issue, our review is *de novo*. *Scifres*, 916 S.W.2d at 781 (citing *Goldsmith v. Allied Bldg. Components, Inc.*, 833 S.W.2d 378, 381 (Ky. 1992)).

When the Police Defendants moved for summary judgment, Geoff’s claims against them for perjury and defamation had already been dismissed. This left remaining Geoff’s claims for false arrest/imprisonment, his claim that he had not been read his *Miranda* rights, and his claim that the Police Defendants had used excessive force against him by handcuffing him upon his arrest. Looking first to Geoff’s contention that a genuine issue of material fact remains because the Police Defendants have denied his allegation that he was arrested by three officers, we cannot see how that fact is material to any of Geoff’s claims. Geoff has not

indicated in his brief how the dispute as to how many officers were present on the date of his second arrest is relevant to his claims. While the parties may continue to dispute this fact, it alone cannot preclude summary judgment as it is immaterial.

Additionally, Geoff contends that a disputed issue of material fact remains as to whether he was subjected to custodial interrogation and therefore, entitled to receive *Miranda* warnings. Whether a person has been subjected to custodial interrogation is a mixed question of law and fact. *See Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). Here, Geoff does not contend that there is a dispute as to the facts surrounding his interactions with the Police Defendants. Rather, his dispute is with the application of the law to those facts.

We agree with the circuit court that there were no genuine issues of material fact precluding summary judgment. Additionally, a review of Geoff's claims against the Police Defendants shows that the Police Defendants were entitled to a favorable judgment as a matter of law. "False imprisonment is the intentional confinement or instigation of confinement of a plaintiff of which confinement the plaintiff is aware at the time." *Dunn v. Felty*, 226 S.W.3d 68, 71 (Ky. 2007) (citing Dan B. Dobbs, *The Law of Torts* § 36, p. 67 (2000)). When the tort is committed by a police officer, it is referred to as false arrest. *Id.* "A law enforcement officer is liable for false imprisonment unless he or she enjoys a privilege or immunity to detain an individual." *Id.* One such instance in which a law enforcement officer enjoys the privilege to detain an individual is when the officer has probable cause to believe that "a crime was committed and that the

plaintiff committed it.” *Id.* (quoting *Dobbs, supra* at §83, p. 195). As noted above, following the incident that Geoff claims constitutes a false arrest, Geoff was convicted on all criminal charges. Those convictions were upheld on appeal. Thus, it has already been determined that the arresting officers did have probable cause to arrest Geoff. The trial court was correct in concluding that Geoff is now collaterally estopped from making the argument that he was wrongfully arrested in his civil case. *See Gossage v. Roberts*, 904 S.W.2d 246 (Ky. App. 1995).

Geoff’s only cited instance in support of his allegation that the Police Defendants used excessive force against him is that, when arresting him, the Police Defendants handcuffed him too tightly, which caused him pain.

In the context of an arrest, an officer is liable for excessive force in two circumstances: (1) he or she has reasonable grounds for making the arrest but used more force than was necessary; and (2) he or she only used necessary force in effecting the arrest but there were, in fact, no reasonable grounds for the arrest.

Dunn, 226 S.W.3d at 74 (citing *Lexington-Fayette Urban Cty. Gov’t v. Middleton*, 555 S.W.2d 613, 618-19 (Ky. App. 1977)). As it has already been determined that Geoff’s arrest was proper, to prevail on this claim Geoff was required to show that the Police Defendants used more force than necessary when arresting him.

Notably, Geoff has not claimed that he suffered any injury as a result of being handcuffed; he has only alleged that the handcuffing was tight and painful. While there is no Kentucky precedent directly on point, the Sixth Circuit has held that a plaintiff can survive summary judgment and “get to a jury upon a showing that

officers handcuffed the plaintiff excessively and unnecessarily tightly and ignored the plaintiff's pleas that the handcuffs were too tight." *Burchett v. Kiefer*, 310 F.3d 937, 944-45 (6th Cir. 2002) (citing *Kostrzewa v. City of Troy*, 247 F.3d 633, 641 (6th Cir. 2001); *Martin v. Heideman*, 106 F.3d 1308, 1310, 1313 (6th Cir. 1997)).

Geoff has not stated facts indicating that he complained to the arresting officers – at the time that he was handcuffed – that he was in pain.⁵ In both his complaint and his response to the Police Defendants' motion for summary judgment, Geoff argues that the handcuffing constitutes excessive force because the arrest was unlawful. It was not. In the response to motion for summary judgment, Geoff avers that the handcuffs were "extremely painful." While this certainly may be true, without facts indicating that he complained of this pain to the arresting officers there is nothing to show that the Police Defendants were even aware that the handcuffs were causing Geoff discomfort. Therefore, we cannot find that the Police Defendants used excessive force in handcuffing Geoff upon his arrest.

The final "claim" disposed of on summary judgment was Geoff's contention that he was not read *Miranda* warnings. The issue of whether a *Miranda* violation occurred has already been fully litigated and decided in Geoff's criminal case. *See* R. 396-406.⁶ Further, while Geoff has noted the fact that he did not receive *Miranda* warnings, he has failed to state any real claim based on that

⁵ Geoff alleges that he informed the Police Defendants, at the time of his second arrest, that he had previously been handcuffed too tightly.

⁶ Fayette Circuit Court Case No. 14-XX-00018, Opinion and Order (Aug 27, 2014).

failure. Inasmuch as Geoff’s complaint sought damages, there is no “private cause of action for alleged violations of the state constitution. . . .” *St. Luke Hosp., Inc. v. Straub*, 354 S.W.3d 529, 541 (Ky. 2011). Therefore, the circuit court was correct in dismissing the claim on summary judgment.

III. CONCLUSION

In light of the foregoing, we affirm the orders of the Fayette Circuit Court.

ALL CONCUR.

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