STATE OF MICHIGAN

COURT OF APPEALS

MARTIN RENEL,

Plaintiff-Appellant,

v

EDWARD S. FORTUNA,

Defendant,

and

RICHARD SAUGER, DIANE SAUGER, and MELANIE RENEL,

Defendants-Appellees.

UNPUBLISHED
September 16, 2014

No. 315642
Oakland Circuit Court
LC No. 2012-129729-NZ

MARTIN RENEL,

Plaintiff-Appellant,

v

EDWARD S. FORTUNA AND MELANIE RENEL,

Defendants,

and

RICHARD SAUGER and DIANE SAUGER,

Defendants-Appellees.

No. 318866
Oakland Circuit Court
LC No. 2012-129729-NZ

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

In Docket No. 315642, plaintiff appeals as of right the order granting summary disposition in favor of defendants, Richard Sauger, Diane Sauger, and Melanie Renel ("Melanie")[1], in this action alleging silent fraud/nondisclosure, civil conspiracy, and intentional infliction of emotional distress. We affirm.

In Docket No. 318866, plaintiff appeals as of right the judgment awarding attorney fees to Richard Sauger and Diane Sauger ("the Saugers"). We reverse.

Plaintiff and Melanie were romantically involved in the late 1980s, and Melanie informed plaintiff that she was pregnant and that he was the father of the child.[2] Plaintiff and Melanie were married in May 1990, and Melanie gave birth later that year. In 2009, plaintiff initiated divorce proceedings, and a judgment of divorce was entered in January 2011. In May 2011, plaintiff received an anonymous e-mail informing him that he was not the child's biological father, among other information. Plaintiff presented the e-mail to Melanie, and she admitted that the information was true. Melanie affirmed that she knew her high school boyfriend, defendant Edward S. Fortuna, was the child's biological father because she had DNA testing performed when the child was approximately two years old.

In June or July 2011, plaintiff was informed that when Melanie initially learned that she was pregnant, she told Fortuna that he was the likely father of the child and Fortuna stated that he wanted to have nothing to do with the child. Melanie told her parents, the Saugers, of the situation, and they advised Melanie to tell plaintiff that he was the father, and she did so. Plaintiff agreed to marry Melanie based on the representation that he was the father of her child.

On October 4, 2012, plaintiff filed a complaint against defendants[3] alleging silent fraud/nondisclosure (Count I), civil conspiracy (Count II), and intentional infliction of emotional distress (Count III). Melanie and the Saugers moved for summary disposition, and the trial court granted their motions. The trial court also granted the Saugers' request for sanctions as a result of plaintiff's claims being frivolous.

I. DOCKET NO. 315642

In Docket No. 315642, plaintiff first contends that the trial court erred in granting summary disposition in favor of the Saugers and Melanie on his claims of silent fraud, intentional infliction of emotional distress, and civil conspiracy. Plaintiff also argues that he

[1] Plaintiff named Melanie as a "nominal defendant" in the complaint and explained that he was not seeking damages against her, but that he might seek damages against her after conducting discovery.

[2] The facts are taken from the complaint, as this case was decided on the motions for summary disposition and no discovery was conducted.

[3] Defendant Fortuna was never served with process, however, so this appeal does not concern him.

should be allowed to amend his complaint to add a claim of fraudulent misrepresentation against the Saugers. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Bryan v JP Morgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim and should only be granted if: (1) the pleadings fail to state a claim on which relief may be granted and (2) no factual development could justify the claim for relief." *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 589; 848 NW2d 425 (2014).

A. SILENT FRAUD CLAIM

To prove silent fraud, also known as fraudulent concealment, a plaintiff must establish (1) that the defendant suppressed the truth with the intent to defraud the plaintiff and (2) that the defendant had a legal or equitable duty of disclosure. *Lucas v Awaad*, 299 Mich App 345, 363-364; 830 NW2d 141 (2013). Further, "[a] plaintiff cannot merely prove that the defendant failed to disclose something; instead, 'a plaintiff must show some type of representation by words or actions that was false or misleading and was intended to deceive.'" *Id.* at 364, quoting *Roberts v Saffell*, 280 Mich App 397, 404; 760 NW2d 715 (2008), aff'd 483 Mich 1089 (2009) (internal citation omitted).

The Saugers were entitled to summary disposition because they owed no duty, equitable or otherwise, to plaintiff. "Whether a duty exists is a question of law, not a question of fact." *Lucas*, 299 Mich App at 365. When analyzing summary disposition under MCR 2.116(C)(8), "only factual allegations, not legal conclusions, are to be taken as true." *Davis v Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2006). In *Hill v Sears, Roebuck & Co*, 492 Mich 651, 661; 822 NW2d 190 (2012), the Michigan Supreme Court stated:

> At common law, "[t]he determination of whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part *to act* for the benefit of the subsequently injured person." "[T]he ultimate inquiry in determining whether a legal duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." Factors relevant to the determination whether a legal duty exists include the "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." We have recognized, however, that "[t]he most important factor to be considered [in this analysis] is the relationship of the parties" and also that there can be no duty imposed when the harm is not foreseeable. In other words, "[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable." If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors. [Citations omitted; emphasis in original.]

In the complaint, plaintiff's allegations that the Saugers owed him a duty were not supported by any relevant factual allegations. The only alleged fact that supposedly demonstrated that the Saugers owed plaintiff a duty was that they knew that plaintiff was not the

one who got Melanie pregnant. This fact is wholly insufficient to establish any kind of relationship between the Saugers and plaintiff that would create any type of legal or equitable duty.[4]

Furthermore, plaintiff failed to allege *any* representations that the Saugers made to him, let alone any that would qualify as misleading or false. Instead, plaintiff relies on the fact that the Saugers knew that he was not the biological father and made *no* representations to him. This is inadequate to sustain a claim of silent fraud. *Lucas*, 299 Mich App at 364.

Thus, the trial court properly granted the motion for summary disposition in favor of the Saugers.

It is a much closer question whether Melanie had a duty to disclose to plaintiff, but we need not address this because summary disposition was proper because tort claims by plaintiff against Melanie are barred by the release provision of their judgment of divorce. The mutual release provision of the judgment of divorce provides: "The parties hereby release each other from any claims, including tort claims, that the other party may have against them, except for failure to disclose substantial assets and any liabilities which effect [sic] the other party." Contrary to plaintiff's contention, this provision does not exempt the failure to disclose generally, but only the failure to disclose "substantial assets and any liabilities." Accordingly, plaintiff's tort claims against Melanie are barred by this provision, and summary disposition was proper under MCR 2.116(C)(7).[5]

Plaintiff also argues that he should be allowed to amend his complaint to add a claim of fraudulent misrepresentation against the Saugers. We disagree.

In Michigan,

> [t]o prove a claim of fraudulent misrepresentation, or common-law fraud, a plaintiff must establish that: (1) the defendant made a material representation; (2) the representation was false; (3) when the representation was made, the defendant knew that it was false, or made it recklessly, without knowledge of its truth, and as a positive assertion; (4) the defendant made it with the intention that the plaintiff should act upon it; (5) the plaintiff acted in reliance upon the representation; and (6) the plaintiff thereby suffered injury. [*Roberts*, 280 Mich App at 403.]

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[4] Although not mentioned in plaintiff's complaint, the Saugers are Melanie's parents. Even if this fact was mentioned, it still would not create a duty to plaintiff.

[5] Summary disposition under MCR 2.116(C)(7) is appropriate when a party is entitled to judgment, among other things, "because of release." Similar to the analysis under MCR 2.116(C)(8), the contents of the complaint are accepted as true. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). But unlike a motion under MCR 2.116(C)(8), the movant can support a motion under MCR 2.116(C)(7) with documentary evidence. *Id.*

Thus, unlike silent fraud, it is not necessary to establish the existence of a duty to prove fraudulent misrepresentation.

However, plaintiff again does not allege that the Saugers made any representations to him. Rather, plaintiff alleges that the Saugers advised Melanie to lie to plaintiff and that the Saugers failed to come forward with the truth. Thus, the allegations do not state a cause of action for fraudulent misrepresentation against the Saugers. See *id.* Consequently, allowing plaintiff the opportunity to amend his complaint to add a claim of fraudulent misrepresentation against the Saugers would be futile because the claim would still fail as a matter of law. See *Ghanam v Does*, 303 Mich App 522, 543; 845 NW2d 128 (2014) ("MCR 2.116(I)(5) requires that if summary disposition is appropriate under MCR 2.116(C)(8), as is the case here, plaintiffs shall be given the opportunity to amend their pleadings, unless the amendment would be futile.").

Plaintiff, on appeal, also claims that the Saugers are liable under theories of agency or as coconspirators. However, plaintiff has failed to allege an agency relationship between Melanie and the Saugers. "[F]undamental to the existence of an agency relationship is the right to control the conduct of the agent with respect to the matters entrusted to him." *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 558; 581 NW2d 707 (1998) (citations omitted). Plaintiff did not allege any facts to suggest that the Saugers controlled Melanie's conduct.

In sum, the trial court properly granted summary disposition in favor of the Saugers because plaintiff failed to state a claim for silent fraud. Further, plaintiff is not permitted to amend his complaint to add a cause of action for fraudulent misrepresentation against the Saugers because the amendment would be futile. The trial court also properly granted summary disposition in favor of Melanie because the release provision of the judgment of divorce bars tort claims against her by plaintiff.

B. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

Next, plaintiff contends that the trial court erred in granting summary disposition in favor of the Saugers and Melanie on his claim of intentional infliction of emotional distress.

This Court has stated:

> To establish a prima facie claim of intentional infliction of emotional distress, the plaintiff must present evidence of (1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff. Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been 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. Accordingly, [l]iability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. [*Lucas*, 299 Mich App at 359 (citations and internal quotation marks omitted).]

In this case, plaintiff alleged that the Saugers knew that plaintiff was not the child's biological father and never informed him of this fact. He claimed that this conduct was extreme and outrageous. We disagree. The act of not telling someone something is not "outrageous," especially when there is no duty to do so. Put another way, failing to inject oneself into someone else's marriage or romantic relationship (here, plaintiff and Melanie's marriage and romantic relationship) cannot be construed as behavior "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." *Id.* An opposite conclusion would have dire effects. For example, if a person knows their best friend is having an adulterous affair, under plaintiff's view, that person must notify the friend's spouse, or else risk possibly becoming tortuously liable if the affair gets discovered by the friend's spouse some years down the road. That is what plaintiff essentially is suggesting, and we emphatically reject it. Accordingly, the Saugers were entitled to summary disposition under MCR 2.116(C)(8). With respect to Melanie, the answer is not as clear cut. But as noted before, any tort claims by plaintiff against Melanie are barred by the release provision of the judgment of divorce, and summary disposition was proper under MCR 2.116(C)(7).

C. CIVIL CONSPIRACY CLAIM

Plaintiff also contends that the trial court erred in granting summary disposition in favor of the Saugers and Melanie on his claim of civil conspiracy. We disagree.

A civil conspiracy is defined as

> a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. In addition, to establish a concert-of-action claim, a plaintiff must prove that all defendants acted tortiously pursuant to a common design that caused harm to the plaintiff. For both civil conspiracy and concert of action, the plaintiff must establish some underlying tortious conduct. [*Urbain v Beierling*, 301 Mich App 114, 131-132; 835 NW2d 455 (2013) (citations and internal quotation marks omitted).]

Plaintiff avers that if we reverse on either the silent fraud claim or the intentional infliction of emotional distress claim, then the civil conspiracy count should be reinstated as well. But because we have concluded that plaintiff cannot establish any tortious conduct on behalf of the Saugers, they were entitled to summary disposition under MCR 2.116(C)(8) on this claim as well. And, once again, Melanie is entitled to summary disposition under MCR 2.116(C)(7) due to the release contained in the judgment of divorce.

II. DOCKET NO. 318866

In Docket No. 318866, plaintiff contends that the trial court erred in finding that his lawsuit was frivolous and abused its discretion in awarding attorney fees for unwarranted and unnecessary legal services. We agree.

"We review for clear error the circuit court's decision to impose sanctions on the ground that an action was frivolous within the meaning of MCR 2.625(A)(2) and MCL 600.2591." *Ladd v Motor City Plastics Co*, 303 Mich App 83, 103; 842 NW2d 388 (2013). "A finding is clearly

erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake." *Duskin v Dep't of Human Servs*, 304 Mich App 645, 651; 848 NW2d 455 (2014).

MCL 600.2591 provides:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
>
> (2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.
>
> (3) As used in this section:
>
> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (*i*) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (*ii*) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (*iii*) The party's legal position was devoid of arguable legal merit.
>
> (b) "Prevailing party" means a party who wins on the entire record.

The trial court found that plaintiff's claims against the Saugers were frivolous because they were devoid of any legal merit. MCL 600.2591(3)(a)(*iii*). Though plaintiff's claims against the Saugers failed under Michigan law, plaintiff's brief contained decisions from other states where a claim of intentional infliction of emotional distress has been successful against the parents of the mother. See, e.g., *Miller v Miller*, 956 P2d 887, 902 (Okla, 1998).[6] Because plaintiff's intentional infliction claim against the Saugers had some legal support from out-of-state jurisdictions, and no Michigan case had yet to preclude such a claim, his seeking to establish that same law in Michigan was a reasonable and good-faith argument for the extension of the law in this state. *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NE2d 245 (2002).

[6] Ultimately, *Miller* does not support plaintiff's intentional infliction claim because the facts relied upon by the *Miller* court for the "outrageous" acts were that of the former spouse, see *Miller*, 956 P2d at 902, and those same types of facts do not exist against the Saugers.

Therefore, we conclude that the trial court clearly erred, and we reverse that portion of the judgment reflecting an award of sanctions against plaintiff for the claims against the Saugers.

Affirmed in part and reversed in part. No costs, as neither plaintiff nor the Saugers prevailed in full. MCR 7.219. Melanie, while a prevailing party in Docket No. 315642, did not make an appearance and did not incur any costs at the Court, so is not entitled to any costs.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello