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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-863**

Chris Gregerson,
Appellant,

vs.

Vilana Financial, Inc., et al.,
Defendants,

Morgan Smith, et al.,
Respondents,

Boris Parker, et al.,
Respondents,

Vladimir Kazaryan,
Respondent.

**Filed November 9, 2010
Affirmed
Harten, Judge***

Hennepin County District Court
File No. 27-CV-09-13489

Chris Gregerson, New Richmond, Wisconsin (pro se appellant)

Morgan Smith, Smith & Raver LLP, Minneapolis, Minnesota (for respondents Morgan Smith, et al.)

William L. Davidson, Paul C. Peterson, Lind, Jensen, Sullivan & Peterson, P.A., Minneapolis, Minnesota (for respondents Boris Parker, et al.)

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Vladimir Kazaryan, Plymouth, Minnesota (pro se respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Harten, Judge.

UNPUBLISHED OPINION

HARTEN, Judge

Appellant, who prevailed in a copyright action in federal district court, brought this action against respondents (his former opponents, the attorneys who represented them, and their law firms). The district court granted summary judgment dismissing appellant's claims of malicious prosecution and conspiracy, granted a motion to dismiss appellant's claims of abuse of process and vicarious liability, and denied appellant's motion for leave to amend his complaint to seek punitive damages. Because we see no disputed issues of material fact and no error of law impeding the summary judgment, we affirm it; because appellant's complaint did not set forth claims of abuse of process and vicarious liability for which relief could be granted, we affirm their dismissal; and because the district court did not abuse its discretion in denying the motion to amend the complaint, we affirm the denial.

FACTS

The Underlying Action in Federal Court

In 2005, appellant Chris Gregerson, a photographer, noticed that a photograph from his website had been used by respondent Vilana Financial Inc., whose principal is respondent Andrew Vilenchik. When appellant contacted Vilenchik to request payment of the license fees, Vilenchik told him that he had already paid license fees for the photos

to one “Michael Zubitskiy,” who claimed to have taken the photos, and that Vilenchik would not pay a licensing fee to appellant.

Appellant then posted disparaging information about Vilana on a website. Vilana obtained a temporary restraining order (TRO) restricting appellant’s use of his web page for a week.

Appellant, acting pro se, sued Vilana and Vilenchik for copyright infringement in conciliation court. Vilana and Vilenchik then sued appellant in district court, alleging damages from appellant’s web postings. The two actions were consolidated and moved to federal district court, because it has exclusive jurisdiction over copyright claims.

In August 2007, the federal court granted appellant summary judgment finding Vilana liable for copyright infringement, with the issue of damages reserved for trial, and dismissed some of Vilana’s counterclaims; the court denied summary judgment on Vilana’s counterclaims of deceptive trade practices, interference with contractual and business relationships, appropriation, and injunctive relief. The court granted summary judgment dismissing all claims against Vilenchik personally.

In November 2007, the federal court held a bench trial. The evidence included an agreement dated 19 March 2004, whereby Zubitskiy would provide Vilana with photos for \$850; it was notarized by Vladimir Kazaryan, a Vilana employee. The evidence also included a consent order dated 13 April 2007 in which Kazaryan surrendered his notary seal based on allegations that he had notarized a fraudulent document.

The trial resulted in *Gregerson v. Vilana Financial, Inc.*, No. 06-1164, 2008 WL 451060 (D. Minn. 15 Feb. 2008), which: (1) found that Zubitskiy was fictional;

(2) awarded appellant judgment against Vilana for actual damages of \$4,462, statutory damages of \$10,000 because Vilana flagrantly disregarded appellant's rights as a copyright owner, and statutory damages of \$5,000 for Vilana's willful removal of the digitally embedded signature watermark in appellant's photo (a total of \$19,462); (3) denied appellant's request for attorney fees from Vilana; and (4) dismissed with prejudice Vilana's claims of deceptive trade practices, interference with contractual relationships, and appropriation.

The Instant Action in Hennepin County District Court

In May 2009, appellant brought this action against Vilana; Vilenchik; Kazaryan¹; Morgan Smith, Vilana's attorney prior to 24 April 2006, and his law firm, Smith & Raver, LLP (Smith respondents); and Boris Parker, Vilana's attorney after 24 April 2006, Parker's then law firm, Saliterman and Siefferman, PC, and his subsequent law firm, Bassford Remele, PA (Parker respondents). By July 2009, appellant had settled all claims with Vilana and Vilenchik, and those claims were dismissed with prejudice.² The remaining claims against the Smith and Parke respondents, were for malicious prosecution; abuse of process; vicarious liability for malicious prosecution and abuse of process under Minn. Stat. §§ 481.07, .071 (2008); and conspiracy to commit malicious prosecution and abuse of process. Appellant sought damages for attorney fees and costs in the underlying action, loss of income for the time he spent representing himself, and loss of his First Amendment rights for the week in 2005 when his website was shut down.

¹ Appellant's claim against Kazaryan was also dismissed; although listed as a respondent, Kazaryan takes no part in this appeal.

² Vilana and Vilenchik, although listed as respondents, take no part in this appeal.

The Parker respondents moved to dismiss, and appellant moved for sanctions. In October 2009, the district court issued an order that: (1) dismissed appellant's claims for abuse of process and for vicarious liability for malicious prosecution and abuse of process under Minn. Stat. §§ 481.07, .071; (2) concluded that appellant was not entitled to damages for loss of his First Amendment rights from the Parker respondents, who were not representing Vilana at the time; and (3) denied appellant's motion for sanctions. In November 2009, the district court denied appellant's motion to amend his complaint to add a claim for punitive damages.

In January 2010, the district court granted the Smith and Parker respondents' motion for summary judgment dismissing appellant's remaining claims of malicious prosecution and conspiracy. Appellant challenges the summary judgment, the dismissal of his claims of abuse of process and vicarious liability, and the denial of his motion to amend his complaint to seek punitive damages.³

D E C I S I O N

1. Malicious Prosecution

To state a claim for malicious prosecution, [a person] must demonstrate that: (1) the action was brought without probable cause or reasonable belief that the plaintiff would ultimately prevail on the merits; (2) the action must be instituted and prosecuted with malicious intent; and (3) the action must terminate in favor of [the person].

³ The Smith respondents ask this court to address the issue of their costs and attorney fees. A request for attorney fees on appeal must be made by separate motion under Minn. R. Civ. App. P. 127. Minn. R. Civ. App. P. 139.06. Because the Smith respondents did not make a separate motion, this issue is not properly before us.

Dunham v. Roer, 708 N.W.2d 552, 569 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. 28 Mar. 2006). A party is entitled to summary judgment as a matter of law when the record reflects a complete lack of proof on an essential element of the opposing party's claim. *Id.* The district court concluded that appellant had failed to present a genuine issue of material fact as to either the first or the second element of malicious prosecution.

A. Probable Cause To Reasonably Believe That Client Would Succeed

Respondents, as the district court concluded, “were entitled to rely on their client’s sworn testimony as an evidentiary basis to assert their claims against [appellant] in the prior state and federal litigation.” “If the attorney proceeds upon facts stated to him by his client, believing those facts to be true, and if those facts, if true, would constitute probable cause for instituting such a prosecution, then the attorney is exonerated.” *Hoppe v. Klapperich*, 224 Minn. 224, 242, 28 N.W.2d 780, 792 (1947) (quotation omitted). Respondents’ client, Vilenchik, assured them that he had paid Zubitskiy, the purported owner of the photographs, and produced a notarized sales agreement. Appellant implies that, because Vilenchik’s account ultimately was found not to be credible and Zubitskiy was determined to be fictitious, respondents must have lacked probable cause to prosecute their counterclaims against him. But, as the district court concluded, “assertions [that cast doubt on the truthfulness of Vilenchik’s claims] do not create a genuine issue of material fact for trial on a claim for malicious prosecution because they do not establish that [respondents] did not or could not believe those facts to be true.” Respondents did believe their client and had a reasonable belief that the

counterclaims against appellant would succeed. *See Dunham*, 708 N.W.2d at 569 (only “reasonable belief” that probable cause existed is necessary to defeat a malicious prosecution claim).

Appellant argues that, because he claimed ownership of the photographs, respondents could not have believed that their clients’ claims had merit. But believing one’s clients’ claims and disbelieving one’s opponent’s conflicting arguments and evidence is the norm for litigation attorneys. Appellant also relies on the fact that he ultimately prevailed in federal district court, but, while this meets the third requirement for malicious prosecution, it does not fulfill the other two elements. *See id.*

Moreover, the federal district court denied appellant summary judgment on three of respondents’ counterclaims—deceptive trade practices, interference with contractual and business relationships, and appropriation. The standards for denying a summary judgment motion are similar to those for denying a motion for judgment as a matter of law (JMOL). *See Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 545 n.9 (Minn. 2001) (standards for granting summary judgment and JMOL are the same). Denial of JMOL on an underlying claim will “fatally undermine[.]” a claim for malicious prosecution. *Porous Media Corp v. Pall Corp.*, 186 F. 3d 1077, 1080 (8th Cir. 1999). Thus, the federal district court’s denial of summary judgment on the three underlying claims here is a persuasive, if not a dispositive, factor in defeating appellant’s malicious prosecution claim.

B. Malicious Intent

Appellant cites four instances that he claims are direct evidence that respondents had malicious intent: two pertain to the Smith respondents and two to the Parker respondents. Both instances concerning the Smith respondents are based on one document: the district court's order responding to appellant's motion to dismiss Vilana's defamation claim, which alleged that essays on appellant's website were defamatory. The district court ruled that the claim was too broad because it failed to specify exactly which statements were defamatory and noted that the Smith respondents' letter asking appellant to remove the entire essay rather than only the defamatory statements "appears to be a bullying tactic." Appellant asserts that "[c]onduct ruled to be 'apparent bullying' is evidence of malice" but offers no support for that assertion; in any event, the letter was written prior to the complaint alleging defamation and was therefore not part of the alleged "malicious prosecution." The district court also stated that, "according to [appellant], Vilenchik ignored [appellant], then forced [appellant] to bring a lawsuit, and then bargained with [appellant] in bad faith. Vilenchik's bad faith, as described in [appellant's website] essays, is the moral equivalent of 'theft.'" Thus, the only evidence for the district court's "bad faith" allegation was appellant's own account of what Vilenchik (not his attorneys, the Smith respondents) did. Appellant has not shown evidence of malicious intent on the part of the Smith respondents.

Appellant's two assertions about the Parker respondents are supported only by appellant's affidavit. He claims that, during a phone call, Parker asked him sarcastically, "You speak English, don't you?" and referred to an altercation in which Parker asked him

how he would like it if “[Parker] did that to [appellant’s] wife!” The remark involved comments on appellant’s website to the effect that Vilana’s receptionist was a prostitute. Neither incident provides evidence of malicious intent.

Malicious prosecution actions historically have been “carefully circumscribed” and “not favored in law.” See *Lundberg v. Scoggins*, 335 N.W.2d 235, 236 (Minn. 1983). The district court did not err in granting respondents’ motion for summary judgment on appellant’s malicious prosecution claim.⁴

2. Dismissal Under Minn. R. Civ. P. 12.02(e)

Appellant challenges the dismissal, under Minn. R. Civ. P. 12.02(e), of his claims that the law firms were vicariously liable for the attorneys’ acts and that the attorneys abused the legal process. When reviewing a dismissal under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, this court asks whether the complaint sets forth a legally sufficient claim for relief. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

A. Vicarious Liability Claims Under Minn. Stat. §§ 481.07, .071

Appellant brought claims under Minn. Stat. § 481.07 and Minn. Stat. § 481.071 (both providing treble damages for parties injured by attorneys’ deceit or collusion) for the malicious prosecution and abuse of process allegedly committed by the attorneys who

⁴ The Parker respondents argue that the *Noerr-Pennington* doctrine (protecting those who file lawsuits from tort liability) also supports dismissal of appellant’s malicious prosecution claim. The district court did not rely on the *Noerr-Pennington* doctrine, and we do not address its application. See *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (reviewing court generally considers only matters presented to and considered by district court).

represented Vilana. We review de novo issues of statutory construction. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007).⁵

It is well established that Minn. Stat. § 481.07 and Minn. Stat. § 481.071 do not provide an independent cause of action. *See, e.g. Baker v. Ploetz*, 616 N.W.2d 263, 270 (Minn. 2000); *Love v. Anderson*, 240 Minn. 312, 316, 61 N.W.2d 419, 422 (1953); *Smith v. Chaffee*, 181 Minn. 322, 326 N.W. 515, 517 (1930). Thus, the district court did not err in dismissing appellant’s vicarious liability claim.

B. Abuse of Process

Appellant also challenges the district court’s dismissal, under Minn. R. Civ. P. 12.02(e), of his abuse of process claim.

The essential elements for a cause of action for abuse of process are the existence of an ulterior purpose and the act of using the process to accomplish a result not within the scope of the proceedings in which it was issued, whether such result might otherwise be lawfully obtained or not.

Kellar v. VonHoltum, 568 N.W.2d 186, 192 (Minn. App. 1997), *review denied* (Minn. 31 Oct. 1997).

Appellant’s complaint alleged that Vilana and Vilenchik brought their counterclaims against him with “the ulterior purpose of pressuring [him] to remove his

⁵ This issue arguably is not before us. Appellant, in his memo opposing the Parker respondents’ motion to dismiss, said he “agree[d] with [them] that Minn. Stat. §§ 481.07 and 481.071 do not provide an independent cause of action.” A party may not change position on appeal. *See Farmers State Bank of Delavan v. Easton Farmers Elevator*, 457 N.W.2d 763, 765 (Minn. App. 1990) (not permitting party that took one position in seeking summary judgment to change position on appeal), *review denied* (Minn. 20 Sept. 1990).

web page about Vilana and drop his claim for copyright infringement.” The district court concluded that:

[Vilana’s and Vilenchik’s] attempt to shut [appellant’s] website down through prosecuting their federal counterclaims was not an improper ulterior motive, but brought openly by [Vilana and Vilenchik] for the purpose of preventing damage to their business interests that they claim would have been caused by the defamatory language the website allegedly contained. . . . [T]his was . . . a legitimate use of process to prevent potential harm to [Vilana and Vilenchik].

Appellant now argues that, if Vilana and Vilenchik had been successful in the pursuit of their counterclaims, the result would have been payment of damages, removal of trademarks, and removal of name and likeness, not shutting down the website. But Vilana and Vilenchik aimed to stop the publication of negative information and opinion about themselves, and a favorable judgment on their counterclaims would presumably have achieved that objective by requiring appellant to cease that publication on his website. Moreover, appellant has settled his claims against Vilana and Vilenchik. His showing is inadequate to demonstrate any abuse of process by respondents.

3. Denial of Motion to Amend

Appellant challenges the denial of his motion to amend his complaint to include a claim for punitive damages. We will not reverse the denial of a motion for leave to amend a complaint absent a clear abuse of the district court’s broad discretion. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A plaintiff may assert a claim for punitive damages only after establishing a prima facie case by clear and convincing evidence. *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990), *review denied* (Minn. 5 Oct. 1990).

(a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

(b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

(1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or

(2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1 (2008); *see also Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 268 (Minn. 1992) (to support a punitive damages claim in a legal malpractice case, “[a] mere showing of negligence is not sufficient; instead, the conduct must be done with malicious, willful, or reckless disregard for the rights of others”).

Appellant asserts that, because respondents’ client Vilenchik had lied about Zubitskiy and how he acquired appellant’s photograph, respondents could be liable for punitive damages. The district court concluded that

the issue . . . is not whether Vilenchik lied about Zubitskiy. . . . [It] is whether [appellant] has established by “clear and convincing evidence” that Vilenchik’s lawyers knew he was lying or are guilty of such willful ignorance on the subject as to classify their assertions of defenses and counterclaims as a deliberate disregard for [appellant’s] rights.

That is simply not the case. [Respondents] had Vilenchik’s sworn testimony to rely on when asserting their defenses and counterclaims This fact, coupled with a lack of evidence as to [respondents’] actual knowledge of the falsity of Vilenchik’s claims, is sufficient to defeat [appellant’s] motion. In the absence of such evidence, [respondents] were not only justified in believing their client’s testimony, but were entitled to rely on it when advocating on their client’s behalf.

As with the malicious prosecution claim, appellant failed to produce any evidence that respondents knew that Vilenchik, their client, was lying both when he conversed with them and when he testified. Appellant has not shown that respondents acted with malicious, willful or reckless disregard for his rights in pursuing claims based in good-faith reliance on their client's statements. The district court did not abuse its discretion in denying appellant's motion for leave to add a claim seeking punitive damages. *See Admiral Merchants*, 494 N.W.2d at 268 (no abuse of discretion in denying motion to amend complaint to add claim for punitive damages where "there was no direct evidence submitted . . . of any fraud, deceit, bad faith, or maliciousness on the part of [the law firm]").

The district court did not err in granting summary judgment dismissing appellant's claims of malicious prosecution and conspiracy or in dismissing his claims of abuse of process and vicarious liability, nor did it abuse its discretion in denying his motion for leave to amend his complaint.

Affirmed.