

DA 17-0481

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 126N

CHRISTOPHER KELLEY,

Plaintiff and Appellant,

v.

CHURCH UNIVERSAL AND TRIUMPHANT, INC.,
EDWIN JOHNSON, and MONTANA GUIDE SERVICES, INC.,

Defendants and Appellees.

APPEAL FROM: District Court of the Sixth Judicial District,
In and For the County of Park, Cause No. DV-15-63
Honorable Brenda R. Gilbert, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Christopher Kelley, Self-Represented, Emigrant, Montana

For Appellee Church Universal and Triumphant, Inc.:

Shane A. Vannatta, Jori L. Quinlan, Worden Thane, P.C.,
Missoula, Montana

For Appellee Edwin Johnson:

Vuko J. Voyich, Anderson & Voyich, P.L.L.C., Livingston, Montana

For Appellee Montana Guide Services, Inc.:

Thomas A. Marra, Marra, Evenson & Bell, P.C., Great Falls, Montana

Submitted on Briefs: April 18, 2018
Decided: May 22, 2018

Filed:



Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Christopher Kelley brought various claims against Church Universal and Triumphant, Inc. (the "Church"), Edwin Johnson, and Montana Guides Services, Inc., alleging that the parties had interfered improperly with his right to access and cross the Church's property for hunting and recreational purposes. The Sixth Judicial District Court, Park County, granted summary judgment to all three Defendants. Kelley appeals the grants of summary judgment and other District Court orders. We affirm.

¶3 The Church employed Kelley from 1989 until he was terminated in 2002. As part of a severance agreement, the Church granted Kelley limited access to the Church's property for tracking and photographing mountain lions, together with the right to cross the Church's property to reach United States Forest Service lands for recreational purposes. Addendum A to the severance agreement, originally signed on December 24, 2002, granted Kelley access until December 31, 2014. Kelley alleges that this agreement was modified several times, in part to accommodate Montana Guide Services, which contracts with the Church to guide outfitted hunting trips on the Church's property. Johnson owns Montana Guide Services. Kelley alleges that Johnson and his employees harassed Kelley while he was using his access rights. After several years of escalating

tensions between Kelley and Johnson, the Church notified Kelley in February 2014 that it would no longer allow Kelley to access its property. Kelley filed suit against the Church, Johnson, and Montana Guide Services, alleging breach of contract, tortious interference with contract, fraud, wrongful or malicious conduct, attorney fees, and punitive actions.

¶4 We review de novo a district court's grant or denial of summary judgment using the criteria in M. R. Civ. P. 56. *Pilgeram v. GreenPoint Mortg. Funding, Inc.*, 2013 MT 354, ¶ 9, 373 Mont. 1, 313 P.3d 839. The moving party must demonstrate that no genuine issue of material fact exists. *Gliko v. Permann*, 2006 MT 30, ¶ 12, 331 Mont. 112, 130 P.3d 155. The burden then shifts to the non-moving party to provide substantial credible evidence that a genuine issue does exist. *Gliko*, ¶ 12. If no genuine issues of material fact exist, the court must then determine whether the moving party is entitled to judgment as a matter of law. *Gliko*, ¶ 12. We review a district court's decision regarding the imposition of sanctions for an abuse of discretion. *Schuff v. Jackson*, 2008 MT 81, ¶ 15, 342 Mont. 156, 179 P.3d 1169. We review the denial of a motion to amend pleadings for an abuse of discretion. *Kershaw v. Mont. Dep't of Transp.*, 2011 MT 170, ¶ 11, 361 Mont. 215, 257 P.3d 358.

¶5 The District Court found that Kelley failed to raise genuine issues of material fact that would preclude the grant of summary judgment in favor of the Church. It found that Kelley had "wholly failed to establish that the Church breached any contractual obligation to him." In regard to Kelley's fraud claim, the District Court found that Kelley relied upon his own allegations and speculation to support his fraud claim against the

Church and thus failed to satisfy his burden under M. R. Civ. P. 56. Finally, the District Court held that Kelley failed to establish any monetary damages to support either claim.

¶6 Kelley argues that the District Court erred in granting summary judgment in favor of the Church because he provided evidence of the Church's breach as attachments to his complaint, such as a February 2014 letter from the Church to Kelley, in which the Church informed Kelley that it would no longer allow him to access or to cross its property. He maintains, further, that the December 24, 2002 Addendum A was superseded by a new Addendum A signed two days later on December 26, 2002, as well as by an oral agreement in 2007 or 2008. The second Addendum A is the same as the first Addendum A except that it extends the access agreement until Kelley's youngest child turns eighteen. Kelley maintains that there is a dispute of material fact about the validity of the second Addendum A and his oral agreement with the Church. He further alleges that he demonstrated fraud because he testified during his deposition and in his interrogatories that the Church made promises to him that it never intended to keep.

¶7 The District Court did not address whether Kelley had raised an issue of material fact as to the validity of the second Addendum A or the alleged oral agreement, because it determined that Kelley failed to establish the Church had breached an obligation to Kelley under any contract. Upon de novo review of the record, we agree with the District Court that Kelley failed to supply verified facts demonstrating a genuine issue of material fact on his claim of breach.

It is well established that unauthenticated documents cannot be considered on a motion for summary judgment. To be considered by the court, documents must be authenticated by and attached to an affidavit that meets

the requirements of [Rule] 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence. A document which lacks a proper foundation to authenticate it cannot be used to support a motion for summary judgment.

Smith v. Burlington N. & Santa Fe Ry., 2008 MT 225, ¶ 47, 344 Mont. 278, 187 P.3d 639 (quoting *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550-51 (9th Cir. 1989) (internal quotations and citations omitted)). Kelley did not provide foundation or authentication for any of the documents that he attached to his complaint and briefing before the District Court. Kelley might have been able to lay a foundation for these documents. But he did not do so, either by verifying his complaint, or by filing an affidavit, or through his deposition testimony. The authenticated documents, interrogatory responses, and deposition testimony before the District Court did not establish that the Church breached any contractual obligation to Kelley.

¶8 Kelley also failed to provide evidence establishing all nine elements of fraud against the Church. *See C. Haydon Ltd. v. Mont. Mining Props.*, 262 Mont. 321, 325, 864 P.2d 1253, 1256 (1993). For instance, Kelley provided no evidence, authenticated or otherwise, demonstrating that the Church knew it made false representations to Kelley, which the Church knew to be false at the time it made the representations. His unfounded speculation in his interrogatories and depositions is not evidence that the Church knew it made false representations.

¶9 Finally, Kelley has failed to establish any monetary damages from the Church's alleged breach that are recoverable under § 27-1-311, MCA.¹ A judgment for damages must be supported by substantial evidence that is not mere guess or speculation. *In re Marriage of Mease*, 2004 MT 59, ¶ 42, 320 Mont. 229, 92 P.3d 1148. "Proof of damages must consist of a reasonable basis for computation and the best evidence obtainable under the circumstances which will enable a judge to arrive at a reasonably close estimate of the loss." *In re Marriage of Mease*, ¶ 42. Either version of Addendum A precluded Kelley from using his access to or across Church property as a moneymaking venture. Any monetary damage thus must flow from the value of his right to cross the property. The only evidence Kelley provided to establish monetary damages from his alleged lost right to cross Church property were unauthenticated printouts from the Montana Guide Services' website about the costs of guided hunting trips with that company. For purposes of determining the lost value of Kelley's access rights, his access across Church property to hunt on Forest Service lands is not comparable to a guided hunting trip on both Church and Forest Service property. Kelley provided no verified evidence of the monetary value of his right to cross the property.

¶10 Proof of damages also is an essential element in Kelley's claims of tortious interference with contract against both Johnson and Montana Guide Services. *See Hughes v. Lynch*, 2007 MT 177, ¶ 25, 338 Mont. 214, 164 P.3d 913 ("In order to assert a prima facie claim of tortious interference, the plaintiff must show that the defendant's

¹ On appeal, Kelley argues only for monetary damages. He does not raise an argument that he is entitled to nominal damages under § 27-1-204, MCA, or specific performance under §§ 27-1-401 and -411, MCA.

acts were (1) intentional and willful, (2) calculated to cause damage to the plaintiff in his business, (3) done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor, and (4) *that actual damages and loss resulted.*” (emphasis added)). Kelley’s failure to prove damages is fatal to these claims, and the District Court properly granted summary judgment in favor of Johnson and Montana Guide Services.

¶11 Finally, wrongful or malicious conduct, attorney fees, and punitive actions cannot be maintained as stand-alone actions under Montana law. Because summary judgment was granted properly for the Defendants on the breach of contract, tortious interference with contract, and fraud claims, these claims also must fail.

¶12 Kelley also argues on appeal that the District Court abused its discretion in denying Kelley’s motion for default judgment against Montana Guide Services. Kelley argues that he properly served Montana Guide Services with his complaint when he served Johnson, its designated agent, citing *Richland Nat’l Bank & Trust v. Swenson*, 249 Mont. 410, 816 P.2d 1045 (1991). Kelley argues that the District Court erred when it denied his motion for default judgment against Montana Guide Services, because Montana Guide Services failed to answer within twenty-one days of the complaint being served on Johnson. Montana Guide Services maintains that it was never served with the complaint, but voluntarily chose to file an answer when it became apparent that Kelley was not going to serve it properly. Kelley is correct that under *Richland National Bank & Trust* a complaint properly may be served against an individual both personally and as the representative of a corporation. That is not what occurred in this case. The District

Court issued separate summonses for Johnson and Montana Guide Services. The record shows that Kelley returned the summons for Montana Guide Services to the District Court unserved. Thus, Montana Guide Services was never served. Because Montana Guide Services was not obligated to answer the complaint until twenty-one days after service, the District Court correctly denied Kelley's motion for default judgment.

¶13 The District Court also did not abuse its discretion when it denied Kelley's motion to strike Montana Guide Services' answer to his complaint. M. R. Civ. P. 8(b)(5) provides that a party "that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state." Most of the allegations in the complaint referred to Johnson, whom Kelley had named as a separate party to the case. The District Court did not abuse its discretion when it refused to strike Montana Guide Services' answer, because Montana Guide Services was not in a position to admit or deny allegations against Johnson.

¶14 Finally, the District Court did not err in not ruling on Kelley's motion to amend the complaint and motion to extend discovery. M. R. Civ. P. 15(a)(2) provides that "the court should freely give leave [to amend] when justice so requires." A district court is justified in denying a motion to amend when an amendment is untimely or it would prejudice the opposing party. *See Farmers Coop Ass'n v. Amsden, LLC*, 2007 MT 286, ¶ 12, 339 Mont. 445, 171 P.3d 690. Kelley's motion to amend the complaint came after almost two years of litigation and after three motions for summary judgment had been briefed fully. Granting the motion at that point in litigation would have prejudiced the Defendants, who already had filed and briefed summary judgment motions and taken

Kelley's deposition. The District Court did not abuse its discretion when it did not rule on the motion to amend before granting summary judgment. Further, the District Court did not abuse its discretion when it did not rule on Kelley's motion to extend discovery before granting summary judgment. Kelley did not argue in his motion that summary judgment was premature under M. R. Civ. P. 56(f) because of inadequate opportunity to depose various persons or obtain documents. Nor did he "establish how the proposed discovery could preclude summary judgment." *Envtl. Contractors, LLC v. Moon*, 1999 MT 178, ¶ 19, 295 Mont. 268, 983 P.2d 390. Once the court granted summary judgment, the motion was moot.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent. The District Court's orders granting summary judgment are affirmed.

/S/ BETH BAKER

We Concur:

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON
/S/ JIM RICE