DA 21-0610

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 29N

MARK DEMING,

Plaintiff and Appellant

v.

JASON DEMING and KELLY DEMING,

Defendants and Appellees.

APPEAL FROM: District Court of the Seventh Judicial District,
In and For the County of Richland, Cause No. DV-21-51
Honorable Katherine M. Bidegaray, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Penelope S. Strong, Penelope Strong Law Office, Billings, Montana

For Appellees:

Kevin J. Chapman, Kari Lyn Jensen, Chapman Law Firm, Williston, North Dakota

Submitted on Briefs: October 5, 2022

Decided: February 21, 2023

Filed:

Clerk

Justice Ingrid Gustafson 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, 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 Appellant Mark Deming (Mark) appeals from the Seventh Judicial District Court order granting Appellees Jason and Kelly Deming's (Jason and Kelly) Motion to Dismiss Mark's Complaint pursuant to M. R. Civ. P. 12(b)(6). We affirm.

¶3 In 2016, Jason and Kelly brought a civil case against Mark seeking compensatory and punitive damages following Mark's criminal conviction for a sexual offense against Jason and Kelly's minor daughter (B.D., who is Mark's granddaughter). While Mark was incarcerated for this criminal conviction, the parties reached and signed a civil settlement agreement through mediation in *B.D. ex rel. Deming v. Deming*, No. DV-16-101 (Mont. Seventh Judicial Dist. 2018). Jason and Kelly filed a motion to enforce the agreement when Mark refused to sign the formal memorialization of the agreement and, after a hearing on the matter, the District Court found no factual or legal basis that would preclude enforcement of the binding settlement agreement. Mark appealed the District Court order in that case, which resulted in this Court's ruling affirming and enforcing the civil settlement agreement. *B.D. ex rel. Deming v. Deming*, No. DA 19-0508, 2020 MT 205N, 2020 Mont. LEXIS 2187.

¶4 Rather than filing a motion with the District Court to enforce the terms of the settlement agreement or seeking an order of contempt for Jason and Kelly's failure to abide by the settlement agreement, Mark instead filed a new complaint alleging Jason and Kelly committed theft of personal property, breached the settlement agreement causing fraud on the court, and violated his state and federal constitutional rights. In the action now on appeal, Mark sought the return of personal property allegedly removed or made inaccessible to him in violation of the settlement agreement as well as substantial compensatory and punitive damages. In response, Jason and Kelly filed a Rule 12(b)(6) motion to dismiss, arguing Mark brought a criminal theft complaint in a civil action and, as such, failed to state a claim upon which relief may be granted. Mark did not file a response and on November 3, 2021, the District Court dismissed his complaint.

¶5 We review de novo a district court's ruling on a motion to dismiss under M. R. Civ. P. 12(b)(6). *Barthel v. Barretts Minerals Inc.*, 2021 MT 232, ¶ 9, 405 Mont. 345, 496 P.3d 541 (citation omitted). A claim is subject to dismissal if, as pled, it is insufficient to state a cognizable claim entitling the claimant to relief. M. R. Civ. P. 12(b)(6). A district court's determination that a complaint fails to state a claim upon which relief can be granted is a conclusion of law, which we review for correctness. *McKinnon v. Western Sugar Coop. Corp.*, 2010 MT 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221 (citing *Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 15, 337 Mont. 1, 155 P.3d 1247). "A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set

of facts in support of his claim that would entitle him to relief." *Jones*, ¶ 15 (citation omitted).

¶6 In reviewing Mark's complaint, we agree with Jason and Kelly's characterization that Mark's complaint "makes a rather disjointed series of allegations . . . which . . . seem to fall under three categories, that Kelly and Jason committed theft of property; breached the settlement agreement causing fraud on the court; and violated [Mark's] constitutional rights under the U.S. and Montana Constitutions." The Complaint in this matter asserts, "[t]his complaint is for theft of personal property in value in excess of $250,000.00, breach of settlement agreement causing fraud on the court, violations of rights guaranteed by the United States Constition [sic] and the Montana Constitution." Later in the Complaint, Mark sets forth his "LEGAL CLAIMS AND VIOLATIONS" to include "Breach of Settlement Agreement, fraud on the [c]ourt," as well as violations of criminal statute § 45-6-301, MCA; the U.S. Constitution, "Article II Amendent [sic] 5 and 14 Section 1"; and the Montana Constitution, "Article II Section 4 and 17."

¶7 Now represented on appeal, Mark asserts the District Court abused its discretion by dismissing his pro se complaint and not construing the factual allegations in the light most favorable to Mark—seeking that we now construe his original allegations of violation of a criminal statute as a civil conversion. Mark abandons his claims that Jason and Kelly violated Montana's criminal theft statute and further, he does not now claim they violated his rights under either the U.S. or Montana Constitutions. Instead, Mark asserts he set forth facts sufficient to support breach of the settlement agreement and, for the first time on

appeal, he asserts the District Court erred by not construing his criminal theft claim as a civil conversion claim. He believes as a self-represented litigant, he should have been afforded wider latitude in construing his complaint. Finally, he asserts this Court's memorandum opinion in *B.D. ex rel. Deming v. Deming*, No. DA 19-0508, 2020 MT 205N, ¶ 11, 2020 Mont. LEXIS 2187, indicated he could sue for enforcement of the settlement agreement if necessary.

¶8 Jason and Kelly counter, Mark's failure to respond to their motion to dismiss the underlying complaint, in itself, is sufficient grounds to grant their motion under Montana's Uniform District Court Rules. Jason and Kelly assert Mark brought a criminal theft complaint, not a conversion claim, and even where pro se litigants are concerned, the courts cannot be required to stretch the pleading rules to the point of reimagining arguments to meet civil guidelines, as such would result in unfair prejudice. They contend Mark's allegations of fraud, constitutional violations, and settlement breach are all related to the theft complaint and not properly brought in the underlying civil action.

¶9 Pursuant to Montana's Uniform District Court Rules, after the moving party files and serves a motion and brief upon the opposing party, "within fourteen days after service of the movant's brief, the opposing party shall file an answer brief which may also be accompanied by appropriate supporting documents." MUDCR 2(b). MUDCR Rule 2(c) further provides that "failure to file briefs may subject the motion to summary ruling," and "[f]ailure to file an answer brief within the time allowed shall be deemed an admission that the motion is well taken." MUDCR 2(c). While the adverse party's failure to file a brief

within the time allowed may be viewed as an admission the motion is well-taken, MUDCR Rule 2 does not require a district court to grant the unanswered motion. *State v. Loh*, 275 Mont. 460, 466, 914 P.2d 592, 596 (1996). We have interpreted MUDCR Rule 2 "as allowing the trial court discretion to either grant or deny an unanswered motion." *Loh*, 275 Mont. at 466, 914 P.2d at 596; *Marez v. Marshall*, 2014 MT 333, ¶ 36, 377 Mont. 304, 340 P.3d 520.

¶10 "A claim is subject to M. R. Civ. P. 12(b)(6) dismissal only if it either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under that claim." *Anderson v. ReconTrustCo., N.A.*, 2017 MT 313, ¶ 8, 390 Mont. 12, 407 P.3d 692 (collecting cases). "[T]he complaint must state something more than facts which, at most, would breed only a suspicion that the claimant may be entitled to relief." *Anderson*, ¶ 8 (internal quotation marks and citations omitted). From our review of the record, as Mark failed to file a response brief to Jason and Kelly's motion to dismiss, even according wide latitude to Mark as a self-represented litigant, it was within the sound discretion of the District Court to grant dismissal of Mark's complaint for failure to state a claim.

¶11 Although he would now like to recharacterize the theft claim in his Complaint, in his Complaint Mark brought a theft complaint under § 45-6-301, MCA. He asserts Jason and Kelly committed "theft of personal property in value in excess of $250,000" and "Breach of Settlement Agreement, fraud on the [c]ourt." He then seeks relief of "compensatory damages of $650,000" and "punitive damages of $1,200,000.00." Adding

additional confusion, with the Complaint, Mark provides a list of property he asserts belongs to him. Using Mark's designated values, as set forth in Exhibit 5 referenced in his Complaint, he indicates this property to have a total value of slightly over $103,000—which does not correspond to any of the damages he asserts. Although many of the allegations in the Complaint appear to be based on the Settlement Agreement, that agreement is not included. From the Complaint and attached documents, one cannot discern what property Mark asserts to own, how the property Mark asserts to own relates to the Settlement Agreement, or the basis for his ownership claim in the property. Likewise absent are any averments setting forth the specific details of the Settlement Agreement, the exact nature of the asserted breach, or the particular relief or damage he seeks. Taking all of the allegations of fact pled in the complaint as true "at most, would breed only a suspicion" that Mark may be entitled to relief. *Anderson*, ¶ 8. The liberal notice pleading requirements of Rule 12(b)(6) do "not go so far to excuse omission of that which is material and necessary in order to entitle relief." *Anderson*, ¶ 8 (quoting *Jones*, ¶ 42). No set of facts could allow relief for criminal allegations in civil proceedings. Despite counsel's valiant effort to recharacterize Mark's Complaint from asserting a criminal complaint of theft brought inappropriately in a civil action to a claim for conversion, we agree with Jason and Kelly—the court cannot be required to stretch the pleading rules to the point of reimagining and construing a self-represented litigant's claims to meet civil guidelines.

¶12 We conclude the District Court did not abuse its discretion in granting Jason and Kelly's unanswered motion to dismiss. Accordingly, we affirm.

¶13 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶14 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE