NO. COA05-1682

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

MAMDOUH KESHK,

Plaintiff,

v. Wake County
No. 03 CVS 9156

HARVEY MONTAGUE, TEXANNA J. MONTAGUE, HARVEY L. MONTAGUE, JR., TERESA MONTAGUE, LEONARDUS JOSEMANS, MARIA C. JOSEMANS, and THE JOSEMANS'S FAMILY TRUST,

Defendants.

Appeal by plaintiff from orders entered 3 December 2003 and 15 September 2005 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 13 September 2006.

Stark Law Group, PLLC, by Seth A. Neyhart, for the plaintiff-appellant.

Burns, Day & Presnell, P.A., by Lacy M. Presnell III, for the defendant-appellee.

ELMORE, Judge.

Mamdouh Keshk (plaintiff) and his family moved into the residence at 5420 Den Heider Way in Raleigh in August 1998. The Montagues and Josemanses (defendants) were his neighbors at that address. Plaintiff brought six causes of action against defendants based on defendants' harassing and hostile behavior toward him and

his family in the time his family has lived at this address.

Specifically, plaintiff alleges that defendants have repeatedly harassed his family in an attempt to force them to leave the neighborhood. In his complaint, plaintiff relates numerous instances of harassing language, such as racial epithets, and harassing behavior, such as spitting, that defendants have exhibited toward him and his family.

Plaintiff also alleges that defendants have sought to enforce certain restrictive covenants only against him and not against other members of the subdivision. In 2003, pursuant to a suit brought by defendants, a district court ordered plaintiff to comply with the restrictive covenants; when he did not, he was held in contempt and jailed for eight days in June 2003. As a result, plaintiff alleges, he lost a large amount of business and suffered a variety of health problems.

In the 3 December 2003 order, the court granted defendants' motion to dismiss as to plaintiff's claim of intentional infliction of emotional distress and three other claims. Defendants made a motion for summary judgment as to the remaining two claims, but the court deferred its ruling until after discovery was complete. At that time, in a 13 September 2005 order, the court granted the motion for summary judgment on the claims of selective enforcement and interference with civil rights.

In his appeal to this Court, plaintiff makes arguments addressing the validity of the trial court's actions only as to three claims: selective enforcement, civil rights, and intentional

infliction of emotional distress. We affirm the trial court on all counts.

The trial court granted summary judgment to defendants on the claim of interference with plaintiff's civil rights. This Court reviews the granting of summary judgment *de novo*. *See, e.g., Harrison v. City of Sanford*, ___ N.C. App. ___, ___, 627 S.E.2d 672, 675 (2006).

Summary judgment is proper where "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2005). "There is no genuine issue of material fact where a party demonstrates that the claimant cannot prove the existence of an essential element of his claim." *Harrison*, ___ N.C. App. at ___, 627 S.E.2d at 675 (citing *Vares v. Vares*, 154 N.C. App. 83, 86, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576 (2003)).

A private cause of action for interference with the civil rights of any person was created in North Carolina by statute. N.C. Gen. Stat. § 99D-1(b) (2005). The statute authorizes courts to award compensatory and punitive damages as well as "restrain and enjoin such future acts[.]" *Id.* To make out a cause of action under this statute, plaintiff must show that:

> (1) Two or more persons, motivated by race, religion, ethnicity, or gender, . . . conspire to interfere with the exercise or enjoyment by any other person or persons [of a constitutional right] . . . ;
> (2) One or more persons engaged in such a conspiracy use force, repeated harassment, violence, physical harm to persons or

> property, or direct or indirect threats of physical harm to persons or property to commit an act in furtherance of the object of the conspiracy; and
> (3) The commission of an act described in subdivision (2) interferes, or is an attempt to interfere, with the exercise or enjoyment of a right, described in subdivision (1), of another person.

N.C. Gen. Stat. § 99D-1(a) (2005).

We consider the evidence or claims plaintiff puts forth to fulfill these criteria in the light most favorable to plaintiff, as defendants made the initial motion for summary judgment. *See Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998) (On appeal of summary judgment, "[t]he evidence is to be viewed in the light most favorable to the nonmoving party."). To survive the motion for summary judgment, plaintiff must "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a prima facie case at trial." *Id.* (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)).

In his complaint, plaintiff describes in detail racial slurs, harassing behavior, and the like committed by defendants against plaintiff that could constitute the "repeated harassment" required by the statute. Plaintiff also states how this behavior has interfered with his right to quiet enjoyment of his property and resulted in money damages to him, which could fulfill the third requirement of the statute.

However, plaintiff has in no way claimed or forecast evidence that will prove the existence of a conspiracy as required by the

statute. In his complaint, plaintiff makes only the bare assertion that defendants conspired to interfere with his civil rights, unaccompanied by any supporting facts or statements. Such an unsupported statement does not constitute a proper forecast of evidence in support of a claim under N.C. Gen. Stat. § 99D-1. *Townsend v. Bd. of Education of Robeson County*, 118 N.C. App. 302, 305-06, 454 S.E.2d 817, 819 (1995). Because plaintiff did not forecast evidence in support of an essential element of this claim, the trial court properly granted summary judgment to defendants.

The trial court also granted summary judgment to defendants on the claim of selective enforcement of the restrictive covenants applicable to plaintiff's property. As mentioned above, this Court reviews the granting of summary judgment *de novo*. *See, e.g., Harrison*, ___ N.C. App. at ___ , 627 S.E.2d at 675.

As both parties acknowledge, a cause of action for selective enforcement of restrictive covenants does not exist in North Carolina. As both parties agree this cause of action does not exist and this Court sees no reason to create such a cause of action at this time, we affirm the trial court's order of summary judgment.

Plaintiff's claim of intentional infliction of emotional distress was dismissed on motion by defendants for failure to state a claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2005). This Court reviews the granting of such motions *de novo*. *See, e.g., Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414-15 (2003); *McCarn v. Beach*, 128 N.C. App. 435,

437, 496 S.E.2d 402, 404 (1998).

"The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. . . . [Defendant's] conduct must exceed[] all bounds of decency tolerated by society." *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 412-13, 473 S.E.2d 38, 40-41 (1996) (internal quotations omitted). Further, the conduct must "cause[] mental distress of a very serious kind." *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 487, 340 S.E.2d 116, 119 (1986).

The conduct complained of in this case consists of the racial slurs, enforcement of restrictive covenants, and generally harassing behavior described above. Although the use of racial epithets is deplorable, this Court cannot find that the behavior alleged rises to the level of "extreme and outrageous" required for such a claim. In the case of *Wilson v. Pearce*, for example, this Court found such extreme and outrageous conduct where the conduct complained of included the defendant (a neighbor) firing a gun in plaintiff's presence and threatening violence, including death, against plaintiff and his family. *Wilson v. Pearce*, 105 N.C. App. 107, 116, 412 S.E.2d 148, 153, *disc. review denied,* 331 N.C. 291, 417 S.E.2d 72 (1992). Defendants' behavior here can be best characterized as "mere insults, indignities, [or] threats," to which liability does not extend. *Hogan*, 79 N.C. App. at 493, 640 S.E.2d at 123 (quoting Restatement (Second) of Torts, § 46 comment (d) (1965)). Because plaintiff does not sufficiently allege facts

to support an essential element of this claim, we affirm the trial court's dismissal.

Affirmed.

Judges McGEE and BRYANT concur.

Report per Rule 30(e).