[Cite as *Lookabaugh v. Spears*, 2005-Ohio-1590.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

KENT LOOKABAUGH	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2004 CA 37
v.	:	T.C. NO. 2004 CV 0098
MARTIN SPEARS	:	(Civil Appeal from Common Pleas Court)
Defendant-Appellee	:	
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O P I N I O N

Rendered on the 1st day of April, 2005.

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WOLFF, J.

{¶ 1} Kent Lookabaugh appeals from a judgment of the Clark County Court of Common Pleas, which granted Martin Spears' motion to dismiss Lookabaugh's claims for interference with a business relationship and intentional infliction of emotional distress, and imposed sanctions for filing a frivolous lawsuit.

{¶ 2} In September 2003, Lookabaugh began to work for Landmark, Inc.

("Landmark") at its South Charleston facility. That fall, he was also running against Spears for the position of Madison Township Trustee. Spears was a customer of Landmark. Lookabaugh claims that, shortly after Spears won the election, he told Landmark that he would take his business elsewhere if Lookabaugh continued to work at the South Charleston facility and that he would convince other farmers to do the same. Lookabaugh left his employment with Landmark shortly thereafter. Landmark claims that it offered Lookabaugh a comparable position at a different location, which he refused to accept. Lookabaugh claims that the other position was not comparable.

{¶ 1} In January 2004, Lookabaugh filed a complaint against Spears alleging interference with a business relationship and intentional infliction of emotional distress. In response, Spears filed a Motion to Dismiss and for Sanctions. On July 6, 2004, the trial court granted the motion to dismiss and awarded sanctions by ordering Lookabaugh to pay Spears' attorneys fees in the amount of $2,370.

{¶ 2} Lookabaugh raises six assignments of error on appeal. The first five assignments present common issues, and we will address them together.

{¶ 3} "IT IS ERROR FOR THE COURT IN RULING ON A MOTION TO DISMISS UNDER CIV. RULE 12(B)(6) TO STATE THAT IT IS 'ACCEPTING THE FACTUAL ALLEGATIONS IN THE COMPLAINT AS TRUE' AND THEN PROCEED TO MAKE NUMEROUS FINDINGS OF FACT WHICH ARE CONTRARY TO THE ALLEGATIONS IN THE COMPLAINT ***."

{¶ 4} "IT IS ERROR FOR THE COURT IN RULING ON A MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER CIV. RULE 12(B)(6) TO CONSIDER AFFIDAVITS OF PARTIES AND WITNESSES SUBMITTED BY THE MOVING PARTY

DEFENDANT WHICH CREATE, IF THEY ARE BELIEVED, FACTUAL QUESTIONS REGARDING CERTAIN FACTUAL ALLEGATIONS SET FORTH IN THE COMPLAINT."

{¶ 5} "IT IS ERROR WHEN CONSIDERING MATTERS OUTSIDE THE PLEADINGS AND THEREBY CONVERTING A [CIV.R.]12(B)(6) MOTION INTO A RULE 56 MOTION TO FAIL TO NOTIFY ALL PARTIES OF THE CONVERSION PURSUANT TO RULE 12(B)."

{¶ 6} "IT IS ERROR FOR THE COURT IN RULING ON A MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER CIV. RULE 12(B)(6) TO CONDUCT A HEARING INTO FACTUAL QUESTIONS REGARDING FACTUAL ALLEGATIONS SET FORTH IN THE COMPLAINT AND SET INTO CONTROVERSY BY AFFIDAVITS OF THE DEFENDANT AND OTHER PARTIES, IN VIOLATION OF RULE 12(B)(6) AND RULE 56."

{¶ 7} "IT IS ERROR FOR THE COURT IN RULING ON A MOTION TO DISMISS PLAINTIFF'S COMPLAINT UNDER CIV. RULE 12(B)(6) TO SIT AS JURY MAKING FACTUAL DETERMINATIONS FROM CONTROVERSIES RAISED BY AFFIDAVITS AND TESTIMONY OF DEFENDANT AND OTHER PARTIES WHICH CONTRADICT THE FACTS SET FORTH IN THE PLEADINGS (COMPLAINT), AFFIDAVIT AND ORAL TESTIMONY OF PLAINTIFF, IN VIOLATION OF BOTH RULE 12(B)(6) AND RULE 56."

{¶ 8} Lookabaugh takes issue with several procedural aspects of the trial court's handling of his case. He contends that: 1) the trial court failed to accept the factual allegations in the complaint as true, as it was required to do in considering a

motion to dismiss; 2) the court treated the motion to dismiss as a motion for summary judgment without proper notice to the parties; and 3) the court made factual findings, which was inappropriate in response to either a motion to dismiss or a motion for summary judgment, and which deprived him of his right to a jury trial.

{¶ 9} When construing a complaint upon a motion to dismiss for failure to state a claim, a court "must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139, 144, 2004-Ohio-3780, 814 N.E.2d 505, ¶15, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. Before the complaint may be dismissed, it must appear beyond doubt that the plaintiff can prove no set of facts warranting a recovery. Id. See, also, *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus. An appellate court reviews judgments of dismissal de novo. *State ex rel. Karmasu v. Tate* (1992), 83 Ohio App.3d 199, 202, 614 N.E.2d 827.

{¶ 10} "***When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleadings and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." Civ.R. 12(B)(6).

{¶ 11} In this case, both parties presented evidence outside the pleadings.

Spears attached to his motion to dismiss his own affidavit and an affidavit from the president of Landmark. Lookabaugh included affidavits in his response to the motion to dismiss: one from a manager at Landmark, one from a member of the board of directors, and an affidavit of his own. The trial court clearly relied on this evidence in its Judgment Entry. Therefore, the trial court should have notified the parties of its intent to treat the motion to dismiss as a motion for summary judgment, which is governed by the provisions of Civ.R. 56. Under such circumstances, the trial court is not required to presume that all factual allegations in the complaint are true. Based on the fact that Lookabaugh did offer extensive evidence of the type permitted by Civ.R. 56(C) and did not object to the trial court's consideration of evidence outside the pleadings, we conclude that Lookabaugh was not prejudiced by the court's failure to notify him that the motion to dismiss would be treated as a motion for summary judgment.

{¶ 12} Next, we will consider whether the trial court acted in accordance with Civ.R. 56 in its handling of Spears' motion to dismiss. Civ.R. 56(C) provides:

{¶ 13} "***Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule."

{¶ 14} In this case, the trial court conducted an evidentiary hearing. Although neither party objected to the hearing, Civ.R. 56(C) clearly does not provide for

conducting an evidentiary hearing prior to ruling on a motion for summary judgment. By doing so, the trial court effectively conducted a bench trial, thereby depriving Lookabaugh of the jury trial to which he was entitled if there was a genuine issue of material fact, and which he had requested.

{¶ 15} Because our review of a summery judgment is de novo, we will consider only the evidence presented by the parties that was permissible under Civ.R. 56(C) – i.e., the affidavits attached to Spears' motion to dismiss and Lookabaugh's opposition thereto – to determine whether summary judgment on either of Lookabaugh's claims was appropriate.

{¶ 16} We first consider the claim for interference with a business relationship. "The elements essential to recovery for a tortious interference with a business relationship are: (1) a business relationship; (2) the wrongdoer's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom." *Miller Bros. Excavating, Inc. v. Stone Excavating, Inc.* (Jan 16, 1998), Greene App. No. 97-CA-69, citing *Wolf v. McCullough-Hyde Memorial Hosp., Inc.* (1990), 67 Ohio App.3d 349, 355, 586 N.E.2d 1204. Interference with a business relationship generally occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another. *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council* (1995), 73 Ohio St.3d 1, 14, 651 N.E.2d 1283.

{¶ 17} The court had before it numerous affidavits. Spears submitted an affidavit which stated that, after his successful election contest with Lookabaugh, Doug

Wical of Landmark had asked him whether he would continue to do business with Landmark in light of Lookabaugh's employment there. Spears indicated that he would not. Shortly thereafter, Wical contacted Spears and told him that Lookabaugh would be transferred to Landmark's nearby Catawba facility, and he asked whether such a transfer would change Spears' mind about continuing to do business with Landmark. Spears replied affirmatively. Spears denied that he had demanded that Lookabaugh be fired or transferred and denied that he had recruited any other customers to take their business away from Landmark.

{¶ 18} Spears also presented an affidavit from Gordon Wallace, president of Landmark. Wallace's affidavit stated that the job duties that Lookabaugh had been offered at the Catawba facility were comparable to those he performed at South Charleston, that his compensation and health insurance would have remained unchanged, and that Lookabaugh had "declined the transfer and then voluntarily left his employment" with Landmark.

{¶ 19} Lookabaugh presented contradictory evidence. Doug Wical, the manager of the Landmark facility at South Charleston, stated by affidavit that in November 2003, Spears had entered his facility and had insisted that Wical "get rid of" Lookabaugh or Spears would take his business elsewhere. According to Wical, Spears also indicated that he would "influence whomever he could to go with him in removing their business." Spears was a "major customer." Wical stated that he had tried to arrange for Lookabaugh's transfer to the Catawba facility, thinking that it might be "a win, win situation," but Lookabaugh had not accepted the transfer.

{¶ 20} Lookabaugh stated by affidavit that, although he had been offered a job at the Catawba location, he did not feel that he could be protected from Spears at Catawba. In other words, Lookabaugh apparently believed that a new position at Catawba would not be a secure one because it would be contingent on Spears' ongoing approval. Lookabaugh further stated that his conversations with his supervisors at Landmark led him to believe that Spears had been consulted about whether it was acceptable for him to go to Catawba. The complaint also revealed that the location of his employment – in South Charleston – was important to Lookabaugh because his wife suffered from multiple sclerosis and, from that location, he was able to check on her at lunch.

{¶ 21} Lookabaugh offered the affidavit of Steve Waddle, a former member of the Board of Directors of Landmark, as well. Waddle stated that he felt Landmark had "made the wrong decision by caving in to the wantings of one individual" and that the company should have "called Spear's bluff," even though he thought that Spears' threat to take other customers with him had been credible. It is unclear whether Waddle had first hand knowledge of the events that transpired at Landmark.

{¶ 22} Construing the evidence most strongly in Lookabaugh's favor, it is our view that there was a genuine issue of material fact as to whether Spears had interfered with the business relationship between Landmark and Lookabaugh by causing Lookabaugh – at the very least – to be transferred to a different facility. Although the Catawba job apparently had comparable pay and benefits, the Catawba position was less appealing to Lookabaugh because it made it more difficult for him to

check on his wife on his lunch hour. Lookabaugh also claimed that the position at Catawba was not comparable to the position at South Charleston because Spears could have interfered with that position at any time. He claims that Spears had "fouled the entire Landmark setting" for him. There was a genuine issue of material fact as to whether Spears' actions in causing Landmark to transfer Lookabaugh amounted to a breach or termination of its business relationship with Lookabaugh. See *Miller Bros. Excavating*, supra.

{¶ 23} Next, we turn to Lookabaugh's claim for intentional infliction of emotional distress. To establish a claim for intentional infliction of emotional distress, a plaintiff must show (1) that the actor either intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotional distress to the plaintiff, (2) that the actor's conduct was so extreme and outrageous as to go "beyond all possible bounds of decency" and was such that it could be considered as "utterly intolerable in a civilized community," (3) that the actor's actions were the proximate cause of plaintiff's psychological injury, and (4) that the mental anguish suffered by the plaintiff was serious and of such a nature that "no reasonable man could be expected to endure it." *Buckman-Peirson v. Brannon*, 159 Ohio App.3d 12, 2004-Ohio-6074, 822 N.E.2d 830, ¶29.

{¶ 24} The trial court found that the "complaint and the evidence submitted in no way allege or support any extreme or outrageous conduct on the part of [Spears] that recklessly caused [Lookabaugh] to suffer emotional distress." Construing the evidence in the light most favorable to Lookabaugh, we conclude that, while Spears' actions were

arguably outrageous, Lookabaugh had failed to present any evidence of psychological injury or of mental anguish that was beyond endurance. Thus, there was no genuine issue of material fact as to Lookabaugh's claim for intentional infliction of emotional distress, and summary judgment was appropriate on that claim.

{¶ 25} The first, second, third, fourth, and fifth assignments of error are sustained in part and overruled in part.

{¶ 26} "IT IS ERROR FOR THE COURT TO AWARD ATTORNEY FEES TO DEFENDANT AFTER GRANTING DEFENDANT'S MOTION TO DISMISS BASED ON THE COURT'S FINDINGS OF FACT IN CONTRADICTION TO THE ALLEGATIONS SET FORTH IN PLAINTIFF'S COMPLAINT AND IN CONSIDERATION OF AFFIDAVITS AND ORAL TESTIMONY IN WHICH THE COURT FAILED UTTERLY TO AFFORD PLAINTIFF ALL REASONABLE INFERENCES POSSIBLY DERIVED FROM HIS COMPLAINT."

{¶ 27} Lookabaugh claims that the trial court erred in awarding attorneys fees to Spears on the basis that his claims had been frivolous.

{¶ 28} R .C. 2323.51(B)(1) provides that "the court may award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action or appeal to any party to the civil action or appeal who was adversely affected by frivolous conduct." "Frivolous conduct" is defined as that which "obviously serves merely to harass or maliciously injure another party to the civil action or appeal" or which "is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." R.C.

2323.51(A)(2).

{¶ 29} In light of our conclusion that there was a genuine issue of material fact as to Lookabaugh's claim for intentional interference with a business relationship, his claim clearly was not frivolous, and we must conclude that the trial court erred in awarding sanctions.

{¶ 30} The sixth assignment of error is sustained.

{¶ 31} The judgment of the trial court will be affirmed to the extent that it granted summary judgment on Lookabaugh's claim for intentional infliction of emotional distress. In all other respects, the judgment is reversed. The matter will be remanded for further proceedings.

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BROGAN, P.J. and GRADY, J., concur.

Copies mailed to:

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