[Cite as *Rhoades v. Chase Bank*, 2010-Ohio-6537.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael W. Rhoades,	:	
Plaintiff-Appellant,	:	
		No. 10AP-469
v.	:	(C.P.C. No. 09CVH09-13333)
Chase Bank,	:	(ACCELERATED CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 30, 2010

Michael W. Rhoades, pro se.

Steptoe & Johnson PLLC, *James C. Carpenter*, and *Vincent I. Holzhall*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Michael W. Rhoades ("appellant"), pro se, appeals from a judgment of the Franklin County Court of Common Pleas which granted summary judgment to defendant-appellee, Chase Bank ("appellee"), on appellant's claim for intentional infliction of emotional distress. For the reasons that follow, we affirm the trial court's judgment.

{¶2} The evidentiary materials submitted with appellee's motion for summary judgment establish the following facts. Appellant maintained a credit card account with appellee. When appellant became delinquent on the account, the parties submitted the matter to arbitration. On February 13, 2008, the arbitrator entered an award in favor of appellee in the amount of $7,194.23.

{¶3} Appellee thereafter proceeded to confirm and enforce the arbitration award in the Franklin County Court of Common Pleas. In a judgment entry filed September 17, 2008, the trial court confirmed the arbitration award and entered judgment for appellee in the amount of $7,194.23 plus costs and interest.

{¶4} To collect on its outstanding judgment, appellee initiated garnishment proceedings on possible bank accounts owned by appellant. In an answer of garnishee, the Huntington National Bank ("Huntington") responded that it had $1,192.61 of appellant's money in its possession. In response to the garnishment, Huntington, on April 10, 2009, deposited the entire $1,192.61 with appellee.

{¶5} On September 2, 2009, appellant filed a pro se complaint asserting a claim against appellee for intentional infliction of emotional distress. Therein, appellant alleged that he was "depressed and angry" because he was unable to pay for his father's cataract surgery as a result of his bank account having been garnished by appellee.

{¶6} Appellee filed an answer to appellant's complaint and thereafter attempted to depose him. Appellant did not appear for his scheduled deposition.

{¶7} Thereafter, on March 31, 2010, appellee filed a motion for summary judgment, asserting that it was entitled to judgment as a matter of law on appellant's claim for intentional infliction of emotional distress. On April 14, 2010, appellant filed a one-

page motion "to set aside summary [judgment] and [proceed] to trial." Appellant asserted only that he never received notice of the deposition, but was willing to be deposed. Appellant submitted no evidentiary materials with his motion. Appellee filed replies to appellant's motion on April 27 and 28, 2010.

{¶8} By decision filed May 5, 2010, the trial court granted appellee's March 31, 2010 motion for summary judgment and denied appellant's April 14, 2010 motion. Specifically, the court found that: (1) appellant's complaint failed to allege facts sufficient to assert a claim of intentional infliction of emotional distress; (2) appellee's garnishment of appellant's bank account did not amount to "extreme and outrageous" conduct required to establish a claim for intentional infliction of emotional distress; (3) appellant's allegations that he was "depressed and angry" did not constitute "serious emotional distress" required to establish a claim for intentional infliction of emotional distress; (4) appellee was entitled to enforce its contract rights against appellant; and (5) appellant failed to present any evidence contradicting appellee's evidence.

{¶9} On May 17, 2010, appellant filed a notice of appeal from the trial court's May 5, 2010 decision. On May 19, 2010, the trial court filed its judgment entry which granted appellee's March 31, 2010 motion for summary judgment, denied appellant's April 14, 2010 motion, and dismissed appellant's complaint with prejudice.

{¶10} Although appellant's notice of appeal was technically premature, having been filed prior to the trial court's May 19, 2010 judgment entry, we note that "[a] notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry." App.R. 4(C). See also *Smith v. McBride,* 10th Dist. No.

09AP-571, 2010-Ohio-1222, ¶10 ("Under App.R. 4, a premature notice of appeal is treated as filed immediately after the entry of the judgment or order; therefore, the notice of appeal in the instant case was timely."). Accordingly, appellant's appeal is timely. He advances one assignment of error for our review:

> The Trial Court Erred In Granting Summary [Judgment] in not considering:
>
> (A) Chapter 13 Bankruptcy Law when determining Chase Bank's legal standing in seizing the assets of MICHAEL W. RHOADES.
>
> (B) Chase Bank exceeded the authority granted by the garnishment order and that they knew it would harm a third party.
>
> (C) The financial status of the plaintiff, MICHAEL W. RHOADES, when determining assignment of court costs.

{¶11} Before we turn to the merits of appellant's assignment of error, we first set out the applicable standard of review. Summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶12} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving

party's claims." *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party meets its initial burden, the nonmoving party bears a reciprocal burden to produce competent evidence of the types listed in Civ.R. 56(C) demonstrating that there is a genuine issue for trial. Id.; Civ.R. 56(E). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg,* 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶13} Appellate review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Thus, we apply the same standard as the trial court and conduct an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107.

{¶14} We construe appellant's sole assignment of error to argue that the trial court erred in granting summary judgment to appellee on his claim for intentional infliction of emotional distress. We disagree with appellant's contention.

{¶15} The Supreme Court of Ohio first recognized a cause of action for intentional infliction of emotional distress in *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, abrogated on other grounds, *Welling v. Weinfeld,* 113 Ohio St.3d 464, 2007-Ohio-2451. The court defined intentional infliction of emotional distress as "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress." Id. at syllabus. To prevail on such a claim, a plaintiff must prove: (1) that the defendant either intended to cause emotional distress, or knew or should have known that its conduct would result in serious

emotional distress to the plaintiff; (2) that the defendant's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered utterly intolerable in a civilized community; (3) that the defendant's actions proximately caused psychological injury to the plaintiff; and (4) that the plaintiff suffered serious emotional distress of a nature no reasonable person could be expected to endure. *Roe v. Franklin Cty.* (1996), 109 Ohio App.3d 772, 783-84, citing *Jackson v. Wooster Bd. of Edn.* (1985), 29 Ohio App.3d 210, 211-12. Upon thorough review of the record, we conclude that appellant has failed to establish a claim for intentional infliction of emotional distress as a matter of law.

{¶16} Regarding the first and second elements of appellant's claim, we note that Ohio courts have held that where a party merely asserts its legal rights, there can be no intention to cause emotional distress, nor should that party know that assertion of its legal rights would result in serious emotional distress to the party against whom the legal rights are asserted. In *Morrow v. Reminger & Reminger Co. L.P.A.,* 183 Ohio App.3d 40, 2009-Ohio-2665, this court held that "[p]arties cannot generally be held liable for intentional infliction of emotional distress for having performed an act they were legally entitled to perform." Id. at ¶49, citing *Sears Roebuck & Co. v. Swaykus,* 7th Dist. No. 02 JE 8, 2002-Ohio-7183, citing *S. Ohio Med. Ctr. v. Harris* (Sept. 3, 1999), 4th Dist. No. 98 CA 2604. Similarly, in *Scott v. Spearman* (1996), 115 Ohio App.3d 52, the court held that a legally sanctioned act cannot give rise to the tort of intentional infliction of emotional distress. Id. at 58. Here, appellee merely asserted its legal right to enforce its judgment against appellant by using legally appropriate means, i.e., a bank garnishment.

{¶17} Moreover, given the fact that appellee obtained a lawful judgment against appellant and sought to enforce that judgment through a lawful garnishment, appellee cannot be found to have engaged in extreme and outrageous conduct. With regard to the requirement that the defendant's conduct be extreme and outrageous, the *Yeager* court looked to the Restatement of the Law 2d, Torts (1965) 73, Section 46, comment *d,* for guidance:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 374-75.

{¶18} Appellee's assertion of its legal rights against appellant does not constitute conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." To the contrary, by resorting to the legal system, appellee followed the rules of a civilized community. Further, by utilizing the tools of a civilized community, i.e., the legal process, to resolve its conflict with appellant, appellee acted wholly within the "bounds of decency." In *Uebelacker v. Cincom Sys., Inc.* (1988), 48 Ohio App.3d 268, 277, the court held no liability for intentional infliction of emotional distress exists where a party simply does what its legal rights allow:

> Conduct that might otherwise be extreme and outrageous, and thus actionable upon a claim for intentional infliction of emotional distress, is privileged when "the actor * * * has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress. * * *" 1 Restatement of the Law 2d, Torts (1965), 76, Section 46, Comment *g*.

{¶19} Appellee's legally permissible actions thus cannot, as a matter of law, give rise to a claim for intentional infliction of emotional distress. *Scott; Uebelacker.*

{¶20} Appellant has also failed to establish the third and fourth elements of his claim. Appellant did not allege in his complaint, nor did he provide any evidence to establish, that he suffered the type of serious mental anguish required to establish a claim for intentional infliction of emotional distress. The *Yeager* court made clear that "in order to state a claim alleging the intentional infliction of emotional distress, the emotional distress alleged must be serious." *Yeager* at 374. In *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, the Supreme Court of Ohio described "serious emotional distress" as "emotional injury which is both severe and debilitating" and held that "serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." Id. at 78.

{¶21} Plaintiff provided no evidence that he is either debilitated as a result of appellee's conduct or that he suffers from a mental or emotional condition sufficient to constitute serious emotional distress. Appellant's complaint merely alleged that he was "depressed and angry" because he felt powerless to assist his father. Appellant submitted no evidence establishing that his depression and anger rendered him unable to function in daily life, or that he sought or received any medical, psychiatric or

psychological treatment for emotional distress resulting from the incident giving rise to his lawsuit. In *Crable v. Nestle USA, Inc.,* 8th Dist. No. 86746, 2006-Ohio-2887, the court held that "[s]ummary judgment [on an intentional infliction of emotional distress claim] is appropriate when the plaintiff presents no testimony from experts or third parties as to the emotional distress suffered and where the plaintiff does not seek medical or psychological treatment for the alleged injuries." Id. at ¶58.

{¶22} As appellant has failed to present any evidence establishing any of the elements of his claim for intentional infliction of emotional distress, the trial court properly entered summary judgment for appellee.

{¶23} In addition to his general assertion that the trial court erred in granting summary judgment to appellee on his intentional infliction of emotional distress claim, appellant also asserts that the trial court improperly granted summary judgment to appellee because it failed to consider: (1) the applicability of Chapter 13 bankruptcy law to appellee's legal standing in seizing appellant's assets; (2) whether appellee exceeded the authority granted by the garnishment order; and (3) appellant's financial status when determining assignment of court costs.

{¶24} Initially, we note that appellant failed to raise these arguments in the trial court, and has thus waived them for purposes of appeal. *State ex rel. O'Brien v. Messina,* 10th Dist. No. 10AP-37, 2010-Ohio-4741, ¶17, citing *Porter Drywall, Inc. v. Nations Constr., LLC,* 10th Dist. No. 07AP-726, 2008-Ohio-1512, ¶11, citing *State v. Childs* (1968), 14 Ohio St.2d 56, paragraph three of the syllabus. Furthermore, all three arguments lack merit. As to appellant's first argument, the record contains no evidence establishing when, or even if, appellant filed for bankruptcy, and what, if any, disposition

there may have been of such bankruptcy case. Regarding the second argument, the record contains no evidence suggesting that appellee exceeded the authority granted it by the garnishment order. To the contrary, the record establishes that appellee properly followed Ohio garnishment procedures. As to appellant's final argument, Ohio law permits, absent an affidavit of indigency, the imposition of court costs against an indigent civil litigant. *Jackson v. Herron,* 11th Dist. No. 2004-L-045, 2005-Ohio-4039, ¶12.

{¶25} Although we are sympathetic to the plight of appellant and his father, we are constrained to apply the law as it exists to the facts of the case before us. Having done so, we must conclude that the trial court properly granted summary judgment to appellee on appellant's claim for intentional infliction of emotional distress. We, therefore, overrule appellant's sole assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BRYANT, J., concur.

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