

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JOSEPH B. MANSOUR,
dba Mansour Consulting CPA Firm,

Plaintiff-Appellant,

- vs -

PAUL CROUSHORE,

Defendant-Appellee.

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CASE NO. CA2010-06-133

OPINION
7/5/2011

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV 2007-08-3180

Joseph B. Mansour, 7248 Basswood Drive, West Chester, Ohio 45069, plaintiff-appellant,
pro se

Paul Croushore, P.O. Box 75170, Cincinnati, Ohio 45275, defendant-appellee, pro se

POWELL, P.J.

{¶1} An accountant asks this court to overturn a Butler County Common Pleas Court decision that dismissed his abuse of process complaint filed against his former attorney. We reverse the judgment and remand this case because we find the trial court could not determine from the complaint and answer that the case was outside the statute of limitations.

{¶2} Appellant, Joseph Mansour (accountant), filed a complaint in 2007 alleging that appellee, Paul Croushore (attorney), abused process when he filed a lawsuit against accountant in 2000, which ended in a judgment for accountant on September 16, 2003. Both parties moved for summary judgment. The trial court dismissed the case, finding that it should have been filed as a compulsory counterclaim in the case filed by attorney in 2000. The decision was appealed.

{¶3} In *Mansour v. Croushore*, Butler App. Nos. CA2008-07-061, CA2008-07-170, 2009-Ohio-2627, this court reversed the compulsory counterclaim decision, and remanded the case to the trial court. Given that accountant waited until the underlying litigation was completed to file his complaint, this court said he would need to show he "prevailed in at least some substantial aspect of the underlying litigation," and therefore, genuine issues of material fact remained on the second and third elements of the abuse of process claim.

{¶4} Attorney subsequently moved to dismiss accountant's complaint, arguing that the complaint was not filed within the four-year statute of limitations for abuse of process claims. The statute of limitations was set forth as an affirmative defense in attorney's answer.

{¶5} The trial court found that the original lawsuit was tried to a jury from July 30, 2003 to August 4, 2003. According to the trial court, accountant contends that attorney's testimony at trial was part of the abuse of process claim. The court found that the limitations period began to run at the conclusion of the trial itself, which was August 4. Finding that accountant's abuse of process complaint was filed 13 days after the limitations period, the trial court dismissed the complaint.

{¶6} Accountant appealed. There are two assignments of error for this court's review.

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY DISMISSING APPELLANT'S COMPLAINT FOR THE TORT OF ABUSE OF PROCESS UNDER A 12(C) MOTION TO DISMISS AS TO THE STATUTE OF LIMITATION BY OBTAINING DATES OUTSIDE THE ALLOWED 12(C) RULE THEREBY DENYING MANSOUR THE INTRODUCTION OF EVIDENCE OF THE CORRECT DATES FOR CROUSHORE'S CONTINUING TORTS[.]" [sic]

{¶9} Accountant argues that attorney did not indicate the proper legal basis upon which he sought to have the complaint dismissed, and the trial court erred in considering matters outside of the pleadings when it dismissed his abuse of process complaint.

{¶10} The three elements of the tort of abuse of process are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. *Yaklevich v. Kem, Schaeffer & Rowe Co.*, 68 Ohio St.3d 294, 1994-Ohio-503, paragraph one of the syllabus. There is no liability for abuse of process where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. *Id.* at fn. 2.

{¶11} Abuse of process encompasses cases where "legal procedure has been set in motion in proper form, with probable cause, and even with ultimate success, but nevertheless has been perverted to accomplish an ulterior purpose for which it was not designed." *Id.* at 297, quoting Prosser & Keeton, *The Law of Torts* (5 Ed.1984) 897, Section 121; *Grenga v. Bank One, N.A.*, Mahoning App. No. 04 MA 94, 2005-Ohio-4474, ¶87.

{¶12} Abuse of process differs from malicious prosecution in that abuse of process

connotes the use of process properly initiated for improper purposes, while malicious prosecution is the malicious initiation of a lawsuit that one has no reasonable chance of winning. *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 271, 1996-Ohio-189.

{¶13} The applicable statute of limitations for a cause of action for abuse of process is four years. *Yakelvich*, paragraph three of the syllabus; R.C. 2305.09 (applicable version). And the action for abuse of process accrues on the date of the allegedly tortious conduct. *Aaron v. Venator Group, a/k/a Footquarters Shoe Store* (Feb. 8, 2002), Erie App. No. E-01-023, 2002 WL 192098.

{¶14} As accountant noted, attorney moved to dismiss the complaint, but did not specify under which authority he was requesting such action; however, the trial court addressed the motion without requiring clarification. See *State ex rel. Midwest Pride IV, Inc. v. Pontious*, 75 Ohio St.3d 565, 569, 1996-Ohio-459 (reviewing court must examine the entire journal entry and the proceedings below where necessary to ascertain the precise basis of a lower court's judgment).

{¶15} A motion to dismiss filed after the pleadings have closed is appropriately considered a motion for judgment on the pleadings pursuant to Civ.R. 12(C). *Id.* Under Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief. *Pontious* at 570. The standards for Civ.R. 12(B)(6) and Civ.R. 12(C) motions are similar, but Civ.R. 12(C) motions are specifically for resolving questions of law. *Id.* Appellate courts review the granting of a motion for judgment on the pleadings de novo. *Fontbank, Inc. v. CompuServe, Inc.* (2000), 138 Ohio App.3d 801, 807.

{¶16} Civ.R. 12(C) permits consideration of the complaint and answer, whereas a Civ.R. 12(B)(6) motion must be judged on the face of the complaint alone. *Pontious* at 569; see, also, Civ.R. 7 (what constitutes pleadings). An exception exists to permit consideration of documents attached and incorporated into the pleadings. *Hawke, Inc. v. Universal Well Servs., Inc.*, Summit App. No. 25056, 2010-Ohio-4730, ¶9; see, also, Civ.R. 10.

{¶17} A review of the record indicates that neither party attached any documents to the pleadings. Attorney attached a number of documents to his motion to dismiss and argues that the trial court was permitted to take judicial notice of the proceedings that occurred from the case that began with his 2000 complaint and ended with the 2003 trial.

{¶18} We are mindful that a trial court may take judicial notice of "appropriate matters" in considering a [Civ.R. 12(B)(6)] motion to dismiss for failure to state a claim. *State ex rel. Neff v. Corrigan*, 75 Ohio St.3d 12, 16, 1996-Ohio-231. However, courts have said that a trial court cannot take judicial notice of court proceedings in another case, and may not take judicial notice of prior proceedings in the court even if the same parties and subject matter are involved; a court may only take judicial notice of the proceedings in the immediate case. *Charles v. Conrad*, Franklin App. No. 05AP-410, 2005-Ohio-6106, ¶26. The rationale for the rule is that the appellate court cannot review the propriety of the trial court's reliance on such prior proceedings because that record is not before the appellate court. *Id.*; *Northpoint Properties, Inc. v. Petticord*, 179 Ohio App.3d 342, 2008-Ohio-5996, ¶15-17.

{¶19} Before the trial court was authorized to consider the prior litigation history of the parties, it was required to notify all the parties at least 14 days prior to the time for hearing if it were converting the motion to dismiss [for failure to state a claim] into a motion for summary judgment. *Cf. Petrey v. Simon* (1983), 4 Ohio St.3d 154, syllabus; *cf.*

Lansing v. Hybud Equipment Co., Stark App. No. 2002CA00112, 2002-Ohio-5869. The trial court apparently did not do so for this motion.

{¶20} For these reasons, we find that the trial court erred in taking judicial notice of the 2003 dates of the trial in the previous case in considering the motion to dismiss. Construing the material allegations in the complaint and answer, with all reasonable inferences to be drawn therefrom in favor of the nonmoving party, we cannot say, beyond doubt, that accountant's complaint was filed outside of the applicable statute of limitations.

{¶21} Accountant's first assignment of error is sustained as it pertains to the trial court's consideration of the dates of the trial in the previous case in deciding attorney's motion to dismiss.

{¶22} Assignment of Error No. 2:

{¶23} "THE TRIAL COURT ERRS TO THE PREJUDICE OF APPELLANT MANSOUR BY DISMISSING APPELLANT'S COMPLAINT FOR THE TORT OF ABUSE OF PROCESS UNDER A MOTION TO DISMISS AS TO THE STATUTE OF LIMITATION WHEN CROUSHORE WAIVED THE STATUTE OF LIMITATION ISSUE IN THE FIRST APPEAL IN THIS CASE BY STATING IN FRONT OF THE APPELLATE COURT THAT THE CASE FOR ABUSE OF PROCESS IS FILED TIMELY[.]"

{¶24} Accountant argues that the law of the case doctrine precludes attorney from invoking the statute of limitations. Specifically, accountant states that attorney was asked about the statute of limitations by a panel of this court hearing oral arguments on the previous appeal. Accountant argues that attorney indicated that the statute of limitations had not expired if one would begin the limitation period on the date the final judgment in the previous case was filed. Accountant also noted that this court remanded the case, stating that genuine issues existed on the substantive part of the abuse of process claim.

{¶25} The law of the case doctrine provides that the decision of a reviewing court

in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 2-3.

{¶26} This doctrine precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal. *Clarke v. Warren Cty. Bd. of Comms.*, Warren App. No. CA2005-04-048, 2006-Ohio-1271, ¶21. The law of the case doctrine is a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results. *Nolan*.

{¶27} After reviewing the record, we do not find that the law of the case bars attorney from raising the statute of limitations defense. We also do not find that our previous remand likewise precluded the consideration of the statute of limitations issue. See *Graham v. Allen Cty. Sheriff's Office*, Allen App. No. 1-06-14, 2006-Ohio-4183, ¶9 (aware of no rule prohibiting party from filing subsequent motion for summary judgment; law of case doctrine inapplicable).

{¶28} Accountant's second assignment of error is overruled.

{¶29} Judgment reversed and this matter is remanded to the trial court for further proceedings.

RINGLAND and HUTZEL, JJ., concur.