[Cite as *Williams v. Ohio Edison*, 2009-Ohio-5702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92840

DIANA WILLIAMS

PLAINTIFF-APPELLANT

vs.

OHIO EDISON, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-644806

BEFORE: Kilbane, P.J., Boyle, J., and Celebrezze, J.

RELEASED: October 29, 2009

JOURNALIZED:

APPELLANT

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Appellant, Diana Williams ("Williams"), appeals the trial court's ruling in favor of appellees, Ohio Edison, Inc., Weltman, Weinberg & Reis Co., L.P.A. ("Weltman"), and Donald Mausar ("Mausar") (or collectively known as defendants) on their motion to dismiss and their motion for summary judgment. After reviewing the applicable law and facts, we affirm.

{¶ 2} On December 17, 2007, Williams filed a pro se complaint alleging that Ohio Edison and Weltman, by and through its counsel Mausar, violated the Seventh Amendment of the United States Constitution and violated R.C. 2716.03, Ohio's statutory scheme for commencement of proceeding in garnishment of personal earnings, by filing an action in Summit County Common Pleas Court ("Summit County action") to recover a debt Williams owed to Ohio Edison. Before proceeding to analyze the merits of the instant action further, a review of the procedural history of the underlying Summit County action is instructive.

{¶ 3} In the Summit County action, titled CV-1998-10-3882, Ohio Edison, through Mauser and Weltman as its counsel, alleged that Williams was delinquent in paying a balance for services provided to her by Ohio Edison in 1998 for the sum of $5,968.21, together with interest at 10% per

annum. On August 31, 1999, Ohio Edison obtained a default judgment against Williams in the Summit County action.[1] After various appeals and motions for relief from judgment, the default judgment against Williams was upheld by the Ninth District Court of Appeals in Appeal No. 23530. Williams's various motions for relief from judgment were ultimately disposed of by the Summit County trial court on September 9, 2008. Williams filed her action against Ohio Edison, Weltman, and Mausar in Cuyahoga County based entirely on the outcome of the Summit County litigation.

{¶ 4} On January 28, 2008, Ohio Edison, Weltman, and Mausar filed a motion to dismiss Williams's complaint in Cuyahoga County Common Pleas Court.

{¶ 5} On February 11, 2008, Williams filed a "motion to dismiss defendant[s'] motion to dismiss," and a motion for summary judgment.

{¶ 6} On March 28, 2008, Williams amended her complaint to include allegations that Ohio Edison, Weltman, and Mausar colluded and committed

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[1]After obtaining a certificate of judgment against her in Summit County Common Pleas Court, Ohio Edison attempted to recover the judgment against Williams. Williams responded by filing various motions for relief from judgment with the Summit County Common Pleas Court, and then filed a pro se appeal in the Ninth District Court of Appeals disputing the judgment against her. The Ninth District Court of Appeals affirmed the Summit County Common Pleas Court's decision against Williams on September 26, 2007. The gravamen of Williams's appeal to the Ninth District was that she disputed the trial court's denial of her motion to vacate default judgment and the garnishment order issued against her and in favor of appellee Ohio Edison by the Summit County Court of Common Pleas.

abuse of process in order to avoid judgment being granted against them in Summit County Common Pleas Court.

{¶ 7} On May 27, 2008, the trial court granted defendants' motion to dismiss in part when it dismissed Williams's collusion claim for failure to state a claim upon which relief could be granted. At that time, the trial court denied the motion to dismiss with respect to Williams's abuse of process claim.

{¶ 8} On November 3, 2008, Ohio Edison, Weltman, and Mausar collectively filed their motion for summary judgment with respect to the remaining abuse of process claim.

{¶ 9} On November 5, 2008, Williams filed a cross-motion for summary judgment.

{¶ 10} On January 26, 2009, the trial court granted the defendants' motion for summary judgment and denied Williams's cross-motion for summary judgment.

{¶ 11} On May 21, 2009, after numerous extensions, this appeal followed.

{¶ 12} In her appeal, which is filed pro se, Williams asserts no assignments of error per se, but instead makes thirteen separate "arguments."

Williams's Arguments

{¶ 13} In pertinent part, we quote Williams's arguments from her brief as follows:

> **"1. Plaintiff is a pro se Appellant, I was not afforded due process by the two trial judges in this case. The judges never took the bench to hear my side of this case[,] but the Appellee had ex parte communication with the judges and their assistant[s] at all scheduling hearings and sat in the judge's chambers at each hearing.**
>
> **2. On 5/27/08[,] motion for collusion was denied but motion for abuse of process was affirmed by Judge Lillian Green[e]. Judge Lance Mason took over and denied that motion without even taking the bench. I did not receive due process.**
>
> **3. 7/11/2008[,] defendant[s] filed [a] motion to strike my brief late[;] they did no[t] prove that the[y] never got my motion. Lack of due process.**
>
> **4. 7/11/2008[,] my motion for a summary should have been granted. I did not receive due process.**
>
> **5. 9/30/2009[,] pre trial set for 1/12/2009[,] failure for any party to appear shall (shall) result in sanctions including possible dismissal and or judgment[.] I did not receive due process.**
>
> **6. Judge never ruled on my motion for sanctions I filed on 1/26/2009[.] I did not receive due process.**
>
> **7. 1/26/2009[,] facts were provided to prove abuse of process[.] I was not provided do [sic] process.**
>
> **8. 10/23/2008[,] rule 6a was denied. A lack of due process.**
>
> **9. Violation of the 7th Amendment[.] I was not provided due process.**

10. The judge allowed a violation of ORC 2716.03[.] I was not provided due process.

11. The judge allowed a violation of ORC 2305.07[.] I was not provided due process.

12. There was a violation of the 7th Amendment[,] and she was denied due process.

13. There was a violation of the 14th Amendment and equal protection of the law[,] and I was denied due process.

14. Conclusion."

Standard of Review for 12(B)(6) Motions

{¶ 14} An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, at ¶5. In reviewing whether a motion to dismiss should be granted, we accept as true all factual allegations in the complaint. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. When granting a motion to dismiss under Civ.R. 12(B)(6), "it must appear beyond doubt that the plaintiff can prove no set of facts entitling her to relief." *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 1995-Ohio-187. (Internal citation omitted.)

{¶ 15} While Williams cannot survive a motion to dismiss through the mere incantation of an abstract legal standard, she can defeat such a motion if there is some set of facts consistent with her complaint that would allow her to recover. See *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584; *York v. Ohio State*

Hwy. Patrol (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063. However, the claims set forth in the complaint must be plausible, rather than conceivable. *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 127 S.Ct. 1955. While a complaint attacked by a Civ.R. 12(B)(6) motion to dismiss does not need detailed factual allegations, Williams's obligation to provide the grounds for her entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Id. Factual allegations must be enough to raise a right to relief above the speculative level. Id.

Whether the Trial Court Properly Granted Appellant's 12(B)(6) Motion

{¶ 16} The trial court committed no error in granting appellant's motion to dismiss under Civ.R. 12(B)(6). Even taking all the facts alleged from the face of Williams's amended complaint as true, it is apparent that she can prove no set of facts to state a claim for collusion upon which relief may be granted.

{¶ 17} Outside of the blanket assertions mentioned in her arguments, however, Williams offers no evidence of any kind with which to prove her claims. Aside from the allegations regarding her abuse of process claim made in the first sentence of paragraph four, and the allegations made in paragraph seven of Williams's brief regarding her summary judgment motion, Williams never raised the additional claims alleged in any of her arguments at the trial court. Based upon this failure, Williams has waived the right to

raise these additional arguments. We decline to consider these assigned errors for the first time here today as they are not adequately preserved for appeal. Errors assigned and briefed but not raised in the trial court need not be considered on appeal. *Merillat v. Fulton Cty.* (1991), 73 Ohio App.3d 459, 597 N.E.2d 1124.

{¶ 18} Even if Williams had properly argued these claims below and preserved them for appeal, they encompass constitutional claims that are inapplicable to cases of this nature where there has been no action upon her by the government as a party. Williams makes only vague references to the Summit County Court of Common Pleas, which is not a party to this action. Further, the named defendants/appellees in this litigation are not alleged to be government entities. As such, Williams cannot claim any constitutional violations or seek the protection of the Constitution in this matter for alleged violations of her right to trial by jury or due process violations. *Edmonson v. Leesville Concrete Co.* (1991), 500 U.S. 614, 619, 111 S.Ct. 2077.

{¶ 19} From the face of her amended complaint, Williams is unable to prove any type of collusion between Ohio Edison, its counsel and a judge on the Summit County Common Pleas Court bench in obtaining a default judgment against her.

{¶ 20} Williams alleged in her amended complaint that Mausar, who served as Ohio Edison's attorney in the underlying debt recovery action in

Summit County, worked with a Summit County Common Pleas Court judge to obtain a default judgment against Williams. Williams argues that these parties "colluded" to "help set the abuse of process In action [sic]" so that Ohio Edison could execute upon that judgment to garnish Williams's wages. She states that appellees' "ulterior motive was to extort monies that [they] had not proven I owed." No such facts are in the record or in her complaint.

{¶ 21} In Ohio, collusion is defined as "an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose." *Dutton v. Dutton* (1998), 127 Ohio App.3d 348, 713 N.E.2d 14, citing Black's Law Dictionary (6 Ed.1990) 264.

{¶ 22} In essence, Williams asserts a fraud claim against appellees and the judge in Summit County (who is not a named party), and charges that they conspired to defraud her of money they were not entitled to.

{¶ 23} Under Civ.R. 9(B), claims of fraud must be pled with particularity. In her complaint, Williams does not allege any facts regarding the state of mind of the parties, nor does she state with any specificity the acts or series of acts these parties engaged in so as to defraud her. Based upon the facts in the underlying litigation in Summit County, she cannot do so, because she was never present for any part of the case, as she failed to

answer or otherwise appear.

{¶ 24} Williams can allege no set of facts in this matter that contradict the validity of the default judgment obtained against her in Summit County or how it was obtained, because she has no proof of how it was obtained outside of the valid judgment entry against her. As such, she cannot state a claim upon which relief may be granted.

{¶ 25} The trial court committed no error in granting defendants' motion to dismiss in part, and in subsequently granting defendants' motion for summary judgment.

The Summary Judgment Standard on Appeal

{¶ 26} In Ohio, appellate review of summary judgment is de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336; *Zemcik v. LaPine Truck Sales & Equip. Co.* (1998), 124 Ohio App.3d 581, 585, 706 N.E.2d 860. The Ohio Supreme Court stated the appropriate test in *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 1998-Ohio-389, as follows:

> **"Pursuant to Civ.R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. *Horton v. Harwick Chem. Corp*. (1995), 73 Ohio St.3d 679, 1995-Ohio-286, paragraph three of the syllabus. The party moving for summary judgment bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-293, 1996-Ohio-107." *Zivich* at 369-370.**

{¶ 27} Once the moving party satisfies its burden, the nonmoving party "may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); see *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389. Doubts must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-359, 1992-Ohio-95.

Whether the Trial Court Properly Granted Appellees' Civ.R. 56 Motion for Summary Judgment

{¶ 28} The trial court did not err in granting summary judgment in favor of appellees on Williams's abuse of process claim. In Ohio, in order to establish a claim for abuse of process, the moving party must show: (1) that a legal proceeding was properly initiated and supported by probable cause; (2) that same legal proceeding was perverted by the nonmoving party in order to achieve "an ulterior motive for which it was not designed"; and (3) that the moving party has incurred damages as a result of the nonmoving party's wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503, 626 N.E.2d 115. In *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 682 N.E.2d 1006, the court explained the tort as follows:

"Abuse of process does not lie for the wrongful bringing of an action, but for the improper use, or 'abuse,' of process. * * * Thus, if one uses process properly, but with a malicious motive, there is no abuse of

process, though a claim for malicious prosecution may lie[.] * * * The tortious character of the defendant's conduct consists of his attempts to employ a legitimate process for a legitimate purpose in an improper manner[.]" Id., citing *Clermont Environmental Reclamation Co. v. Hancock* (1984), 16 Ohio App.3d 9, 11, 474 N.E.2d 357.

{¶ 29} Thus, "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." *Jones v. Norfolk S. Ry. Co.*, Cuyahoga App. No. 84394, 2005-Ohio-879, citing *Yaklevich*, supra. See, also, *Kavlich v. Hildebrand*, Cuyahoga App. No. 91489, 2009-Ohio-1090, at ¶12-17.

{¶ 30} Here, when viewing the facts in a light most favorable to the nonmoving party as the law requires, there is no evidence that Ohio Edison, Weltman, or Mausar perverted the legal proceeding against Williams in Summit County in order to achieve "an ulterior motive" for which the proceeding "was not designed." *Yaklevich*, supra.

{¶ 31} In fact, the record reveals that the opposite facts occurred. The action in Summit County that Williams complains of was instituted in order to recover a debt, and the record reveals that a valid default judgment was granted in favor of Ohio Edison as the creditor and against Williams for failure to appear or answer. That debt was upheld on appeal in *Ohio Edison Co. v. Williams* (Sept. 26, 2007), Summit App. No. 23530. The garnishment action taken in furtherance and in execution of that valid judgment does not

render it invalid; appellants were merely carrying out the process to its authorized conclusion, as the law allows. See *Jones*, supra.

{¶ 32} Because Williams cannot prove the elements of abuse of process, the trial court committed no error in granting summary judgment in favor of appellees under Civ.R. 56(C).

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MARY J. BOYLE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR