

[Cite as *Doyle v. Gauntner*, 2010-Ohio-6366.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95443

DUANE L. DOYLE

PLAINTIFF-APPELLANT

VS.

WILLIAM GAUNTNER, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-709860

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

RELEASED AND JOURNALIZED: December 23, 2010

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MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Duane Doyle (“Doyle”), appeals the trial court’s grant of summary judgment in favor of appellees, William and Susan Gauntner (“the Gauntners”), on Doyle’s claims for abuse of process and malicious prosecution. After reviewing the facts of the case and pertinent law, we affirm the trial court’s decision to grant summary judgment in favor of the Gauntners.

{¶ 2} Doyle’s claims emanated from an underlying federal case, *Gauntner v. Doyle* (N.D. Ohio 2008), 554 F.Supp.2d 779 (“the federal case”). In the federal case, the Gauntners alleged that Doyle violated the Fair Debt

Collection Practices Act (FDCPA) when trying to collect an alleged debt from the Gaunters on behalf of Bona Fide Builders, a contractor who performed home repair work for the Gauntners. The federal case was resolved in Doyle's favor at summary judgment, where the court held that Doyle was exempt from the FDCPA since less than 7 percent of his law practice was devoted to debt collection.

{¶ 3} In the interim, Bona Fide Builders proceeded with its collection action against the Gauntners and eventually won a jury verdict of over \$35,000.

{¶ 4} At the conclusion of the collection action, Doyle filed suit against the Gauntners setting forth the allegations mentioned above.

Factual and Procedural History

{¶ 5} The facts involved in the instant appeal arise from a melding of three underlying cases: the state court collection action filed by Bona Fide Builders, the federal court FDCPA action filed by the Gauntners against Doyle, and the state court malicious prosecution and abuse of process action filed by Doyle against the Gaunters.

The State Court Case

{¶ 6} On December 5, 2007, Doyle wrote a letter on behalf of his client, Bona Fide Builders, to attempt to collect an alleged debt from the Gauntners for unpaid bills relative to repair work performed at their home at 7700

Brookside Road, Independence, Ohio.

{¶ 7} On January 14, 2008, Doyle filed suit on behalf of Bona Fide Builders against the Gauntners in state court, seeking to collect on the alleged unpaid bills (“the state court case”).

{¶ 8} On October 6, 2008, the case went to trial, and a jury found the Gauntners liable to Bona Fide Builders in the amount of \$35,364.81.

The Federal Court Case

{¶ 9} On December 27, 2007, upon receipt of the letter from Doyle on behalf of Bona Fide Builders attempting to collect the debt, the Gauntners filed suit in federal court seeking damages for alleged violations of the FDCPA.

{¶ 10} On April 29, 2008, the federal court issued its decision granting summary judgment in favor of Doyle, finding that he was exempt from the FDCPA on the authority of *Schroyer v. Frankel* (C.A.6, 1999), 197 F.3d 1170, 1176, since Doyle was not a debt collector within the meaning of the FDCPA, as less than seven percent of his law practice was devoted to that type of work.

The Malicious Prosecution and Abuse of Process Case

{¶ 11} On March 10, 2009, Doyle filed suit against the Gauntners in Summit County Common Pleas Court, alleging abuse of process and malicious prosecution for bringing the federal case against him.

{¶ 12} On September 23, 2009, the Gauntners filed a motion to transfer venue to the Cuyahoga County Common Pleas Court, which was granted on October 2, 2009. The case was transferred to Cuyahoga County on November 16, 2009.

{¶ 13} On December 9, 2009, the Gauntners filed a motion to dismiss under Civ.R. 12(B)(6).

{¶ 14} On December 24, 2009, Doyle filed his brief in opposition. The Gauntners filed their reply brief on December 30, 2009.

{¶ 15} On February 18, 2010, the court conducted a case management conference and advised the parties that the pending motion to dismiss was being converted to a motion for summary judgment. The court set a discovery cutoff date of April 1, 2010. No discovery was ever conducted.

{¶ 16} On May 3, 2010, Doyle filed a supplemental reply to defendants' motion to dismiss and motion for partial summary judgment.

{¶ 17} On May 6, 2010, the Gauntners filed their reply to plaintiff's supplemental reply and partial motion for summary judgment.

{¶ 18} On June 22, 2010, the trial court granted the Gauntners' converted motion for summary judgment and denied Doyle's partial motion for summary judgment.

{¶ 19} On July 20, 2010, Doyle appealed. He asserts the following assignment of error:

“The trial court erred in granting defendants-appellees’ converted motion for summary judgment, thus terminating plaintiff-appellant’s litigation.”

Standard of Review

{¶ 20} We review an appeal from summary judgment under a de novo standard. *Baiko v. Mays* (2000), 140 Ohio App.3d 1, 10, 746 N.E.2d 618. Accordingly, we afford no deference to the trial court’s decision and independently review the record to determine whether summary judgment is appropriate. *N.E. Ohio Apt. Assn. v. Cuyahoga Cty. Bd. of Commrs.* (1997), 121 Ohio App.3d 188, 192, 699 N.E.2d 534.

{¶ 21} Civ.R. 56(C) provides that before summary judgment may be granted, a court must determine that “(1) no genuine issue as to any material fact remains to be litigated, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party.” *Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 1996-Ohio-326, 672 N.E.2d 654.

{¶ 22} The moving party carries the initial burden of setting forth specific facts that support the motion for summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 1996-Ohio-107, 662 N.E.2d 264. If the movant fails to meet this burden, summary judgment is not appropriate. If the movant does meet this burden, summary judgment will be appropriate only if the nonmovant fails to

establish the existence of a genuine issue of material fact. Id. at 293.

Analysis

{¶ 23} In Ohio, the 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. Kemp, Schaeffer & Rowe Co.*, 68 Ohio St.3d 294, 298, 1994-Ohio-503, 626 N.E.2d 115.

{¶ 24} The elements of a claim for malicious prosecution in Ohio include: (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. *Criss v. Springfield Twp.* (1990), 56 Ohio St.3d 82, 84, 564 N.E.2d 440. For purposes of malicious prosecution, malice means an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice. Id. at 85.

{¶ 25} When we view the record in the instant case in a light most favorable to Doyle as the law requires, we agree with the trial court that no genuine issue of material fact remains to be litigated. The Gauntners, through their converted motion for summary judgment, successfully set forth specific facts entitling them to summary judgment under the *Dresher*

standard; namely, that their FDCPA complaint was brought against Doyle in good faith, and that his various demand letters contained violations of the FDCPA. There is no evidence in the record before us indicating that the federal case was brought solely to harass or annoy Doyle, that it was brought with an ulterior motive, or that it was brought without probable cause. However, the federal court in its opinion stated that Doyle was exempt because his collection practice was less than seven percent, and therefore, did not qualify as a debt collector. *Doyle* at 783-784. The question of whether Doyle violated the FDCPA through his communication with the Gauntners has thus been resolved. Under the facts, Doyle's better remedy would have been to seek sanctions under Fed.R.Civ.P. 11 in the federal case, not to file an entirely separate lawsuit in state court.

{¶ 26} Other than the general allegations listed in his complaint, Doyle has not raised a question of fact with respect to whether the Gauntners committed abuse of process or malicious prosecution when they filed their federal case. Doyle was given the opportunity to conduct discovery in this matter in order to rebut the Gauntners' defenses in their converted motion for summary judgment but chose not to do so. Instead, he filed a response that contained his own affidavit that recapitulated the history of the litigation and the animosity between the parties. The affidavit itself raised no questions of fact that would lead a rational factfinder to deny summary judgment. It

does not even state that the Gauntners committed any of the acts alleged in Doyle's complaint.

{¶ 27} This type of proof does not meet the burden-shifting requirements of *Dresher*. “Generally, a party's unsupported and self-serving assertions, offered by way of affidavit, standing alone and without corroborating materials under Civ.R. 56, will not be sufficient to demonstrate material issues of fact. Otherwise, a party could avoid summary judgment under all circumstances solely by simply submitting such a self-serving affidavit containing nothing more than bare contradictions of the evidence offered by the moving party.” *N. Eagle, Inc. v. Kosas*, 8th Dist. No. 92358, 2009-Ohio-4042, at ¶26, citing *Davis v. Cleveland*, 156 Ohio App.3d 205, 2004-Ohio-662, 805 N.E.2d 146 (citation omitted).

{¶ 28} While it is true that Doyle has submitted an affidavit to rebut the Gauntners' defenses, “* * * a nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit contradicting the evidence offered by the moving party. This rule is based upon judicial economy: Permitting a nonmoving party to avoid summary judgment by asserting nothing more than ‘bald contradictions of the evidence offered by the moving party’ would necessarily abrogate the utility of the summary judgment exercise. Courts would be unable to use Civ.R. 56 as a means of assessing the merits of a claim at an early stage of the litigation and

unnecessarily dilate the civil process.” *Greaney v. Ohio Turnpike Comm.*, 11th Dist. No. 0012, 2005-Ohio-5284 (internal citations omitted). See, also, *Coleman v. Great Lakes Dredge & Dock Co.* (Aug. 23, 1990), 8th Dist. No. 57440.

{¶ 29} Doyle raises no genuine issue of material fact in his affidavit. Summary judgment in favor of the Gauntners was therefore appropriate.

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 Cuyahoga County 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
COLLEEN CONWAY COONEY, J., CONCUR

