[Cite as *Lisboa v. Lisboa*, 2011-Ohio-351.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95673

JOSE C. LISBOA, JR.

PLAINTIFF-APPELLANT

vs.

KIMBERLY Y. LISBOA, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-694524

BEFORE: Stewart, P.J., Boyle, J., and Gallagher, J.

RELEASED AND JOURNALIZED: January 27, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} Plaintiff-appellant, Jose C. Lisboa, Jr., appeals from an order of the general division of the common pleas court that dismissed all of his claims against defendants-appellees, Kimberly Lisboa, Sharon Arslanian, Becky Blair, and Robert Brown. For the reasons stated below, we affirm.

{¶ 2} Appellant and Kimberly were divorced pursuant to a decree entered February 11, 2005. Incorporated into the decree was the parties' separation agreement. While the divorce action was proceeding, the state of Ohio indicted appellant on criminal charges. On September 24, 2004, appellant entered into a plea agreement in which, in exchange for the dismissal of other charges, he pleaded guilty to one count of aggravated assault and one count of domestic violence and was sentenced to an agreed sentence of ten years of community control sanctions. As part of the plea agreement appellant agreed to voluntarily leave the country and not seek reentry for at least ten years. Before he could voluntarily leave the country, immigration officials arrested and detained appellant for violations of the Immigration and Naturalization Act resulting from this and a prior conviction, and, in June of 2005, he was deported.

{¶ 3} In February 2008, this court reversed appellant's conviction finding that the agreed sentence of ten years of community control was contrary to law and void. Appellant's plea was also vacated because we

found the agreed sentence was an integral part of the plea agreement. *State v. Lisboa*, 8th Dist. No. 89283, 2008-Ohio-571.[1]

{¶ 4} In April 2008, appellant filed a motion to have his immigration removal case reopened on the ground that his conviction had been vacated. The immigration judge that presided over the removal proceedings granted the motion on July 7, 2008 and vacated the previous order of removal. The Department of Homeland Security ("DHS") filed an appeal with the Board of Immigration Appeals ("BIA") challenging the authority of the immigration judge to reopen the proceedings. Kimberly Lisboa retained immigration attorneys Robert Brown and Wayne Benos to file amicus curiae briefs on her behalf in the DHS appeal. On November 20, 2009, the BIA issued an order sustaining the DHS appeal upon a finding that under federal law the immigration judge lacked jurisdiction to sua sponte reopen the removal proceedings after appellant had been removed from the country. The BIA vacated the July 7, 2008 order and reinstated the order of removal against appellant.

{¶ 5} On June 2, 2009, appellant filed the instant action against Kimberly and Sharon Arslanian, Kimberly's mother, Becky Blair, the guardian ad litem appointed by the court to represent the interest of the

[1] Appellant is being retried on the criminal charges in Cuyahoga Court of Common Pleas Case No. CR-522757. See *State ex rel. Lisboa v. McCafferty*, 8th Dist. No. 93051, 2009-Ohio-4377 (dismissing appellant's challenge to the retrial).

Lisboas' minor child during post-decree proceedings, and attorneys Robert Brown and Wayne Benos, who represented Kimberly's interest in the BIA appeal.

{¶ 6} Appellant's complaint sought monetary damages, claims of breach of contract, third-party malpractice, fraud, conspiracy, civil aiding and abetting, and intentional infliction of emotional distress. In the complaint appellant alleged that Kimberly and Arslanian conspired to "set him up" for criminal proceedings so that he would be deported and Kimberly could obtain millions of dollars and sole custody of their daughter in the divorce. He claimed that Kimberly and Arslanian breached the "leave alone" clause of the separation agreement in the divorce decree by providing false information, documents, and other evidence against him in the domestic relations case, the criminal case, and the immigration case. Appellant further alleged that Blair, Benos, and Brown, in collusion with Kimberly and Arslanian, knowingly provided false information and documents in court proceedings.

{¶ 7} Kimberly, Arslanian, Blair, and Brown moved for dismissal of appellant's claims against them under Civ.R. 12(B).[2] Kimberly and Arslanian filed a joint motion to dismiss under Civ.R. 12(B)(1) and (6). They argued that the domestic relations court had exclusive jurisdiction over the

[2]Benos was dismissed from the action pursuant to Civ.R. 4(E) for failure to timely perfect service. Appellant has not appealed this decision and Benos is not a party to this appeal.

breach of the divorce decree claim and that they were entitled to immunity from liability for appellant's tort claims because those claims are based upon alleged misconduct during court proceedings. Blair moved for dismissal under Civ.R. 12(B)(6) on the ground that she had absolute immunity from civil liability for actions taken in her role as a guardian ad litem, and alternatively under Civ.R. 12(B)(1), on the ground that the trial court lacked jurisdiction over a domestic relations matter. Brown moved for dismissal under Civ.R. 12(B)(6) on the ground that he was immune from civil liability for actions taken in his capacity as an attorney representing a client in a judicial proceeding.

{¶ 8} Appellant filed motions for discovery, opposed the motions to dismiss, and moved the court to convert appellees' motions to dismiss to motions for summary judgment on the ground that the parties had attached documents to their motions.

{¶ 9} By order of August 16, 2009, the trial court denied appellant's motions, granted appellees' Civ.R. 12(B) motions, and dismissed the action with prejudice. Appellant appeals, raising four assignments of error for our review, which we discuss out of order and together where appropriate.

{¶ 10} In his first three assignments of error, appellant asserts that the trial court erred in granting appellees' Civ.R. 12(B)(1) and (6) motions to dismiss. He argues that the trial court did not lack jurisdiction over the

action and that appellees were not entitled to immunity from civil liability. Appellant attempts to support his arguments on appeal by attaching to his appellate brief copies of documents from other cases. However, because these documents were not in the record below, we cannot consider them. This court cannot consider matters dehors the record. *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500. An exhibit attached to an appellate brief and not filed with the trial court is not part of the record. *In re Estate of Price* (Oct. 26, 1995), 8th Dist. No. 68628, citing *Middletown v. Allen* (1989), 63 Ohio App.3d 443, 449, 579 N.E.2d 254.

{¶ 11} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.* (1992), 65 Ohio St.3d 545, 605 N.E.2d 378. "[W]hen a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party." *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 60, 565 N.E.2d 584, citing *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. However, while the factual allegations of the complaint must be taken as true, "[u]nsupported conclusions of a complaint are not considered admitted * * * and are not sufficient to withstand a motion to dismiss." *State ex rel. Hickman v. Capots* (1989), 45 Ohio St.3d 324, 544 N.E.2d 639.

{¶ 12} To grant a motion to dismiss for failure to state a claim, it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id., quoting *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242, 245, 327 N.E.2d 753. An order granting a Civ.R. 12(B)(6) motion is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5.

{¶ 13} Appellant's complaint is lacking in factual allegations and comprised almost entirely of unsupported conclusions. He makes sweeping assertions that Kimberly and Arslanian "concocted lies, produced false documents, and false evidence to be used in courts" in order to have him deported so as to gain custody of his daughter and an unfair advantage in the divorce case. He alleges Blair "testified under oath with self-serving, fraudulent and wreck less [sic] statements." He claims Brown knew when he filed the amicus briefs that the information and documents Kimberly provided were false. He alleges generally that all of the appellees used "nefarious" means to keep him out of the country even after his conviction was reversed.

{¶ 14} The lack of facts notwithstanding, all of appellant's claims are based upon alleged misconduct that took place during, or as a part of judicial proceedings, and are thus subject to a defense of absolute immunity. The

existence of immunity as a defense in a civil action is a purely legal issue, properly determined by a trial court prior to trial. *Rolfe v. Giusto*, 8th Dist. No. 87831, 2007-Ohio-78, ¶9, citing *Dolan v. Kronenberg* (July 22, 1999), Cuyahoga App. No. 76054.

{¶ 15} In *Pisani v. Pisani* (Dec. 11, 1997), 8th Dist. No. 72136, this court provided a detailed review of the law regarding immunity to those involved in litigation, noting:

{¶ 16} "In *Willitzer v. McCloud* (1983), 6 Ohio St.3d 447, 448-49, 453 N.E.2d 693, the court stated:

{¶ 17} "'It is a well-established rule that judges, counsel, parties, and witnesses are absolutely immune from civil suits for defamatory remarks made during and relevant to judicial proceedings.'

{¶ 18} "Such immunity also extends to a guardian ad litem. See *Penn v. McMonagle* (1990), 60 Ohio App.3d 149, 573 N.E.2d 1234. Further, the same rule of law precludes actions for invasion of privacy. *Wallace v. Feador* (November 3, 1983), Cuy. App. No. 46662, unreported.

{¶ 19} "Additionally, the court in *Elling v. Graves* (1994), 94 Ohio App.3d 382, 387, 640 N.E.2d 1156, stated in relevant part: '[A] witness is immune from civil liability for giving false testimony. * * * This ban on civil liability for false statements applies even in cases where the party testifying knew his statements were false.' See *Stoll v. Kennedy* (1987), 38 Ohio

App.3d 102, 526 N.E.2d 821; *Schmidt v. Statistics, Inc.* (1978), 62 Ohio App.2d 48, 403 N.E.2d 1026; *Baker v. Orlowsky* (1971), 28 Ohio App.2d 188, 275 N.E.2d 342; *Wallace*, supra.

{¶ 20} "In *Fallang v. Cormier* (1989), 63 Ohio App.3d 450, 452, 579 N.E.2d 258, the court held that '[t]he absolute privilege that applies to trial and deposition testimony likewise extends to communications involving pending litigation as between parties, counsel and potential witnesses.' (Emphasis added). See *Kelley v. Sweeney* (November 18, 1993), Cuy. App. No. 63931, unreported." Id.

{¶ 21} Accordingly, Kimberly, Arslanian, and Blair, in their respective roles as parties, witnesses, and guardian ad litem, are entitled to absolute immunity from liability for appellant's claims based upon testimony and evidence submitted by them in judicial proceedings.

{¶ 22} "Although the result may be harsh in some instances and a party to a lawsuit may possibly be harmed without legal recourse, on balance, a liberal rule of absolute immunity is the better policy, as it prevents endless lawsuits because of alleged defamatory statements in prior proceedings. Sufficient protection from gross abuse of the privilege is provided by the fact that an objective judge conducts the judicial proceedings and that the judge may hold an attorney in contempt if his conduct exceeds the bound of legal

propriety or may strike irrelevant, slanderous or libelous matter." *Surace v. Wuliger* (1986),

{¶ 23} 25 Ohio St.3d 229, 495 N.E.2d 939, quoting, *Justice v. Mowery* (1980), 69 Ohio App.2d 75, 430 N.E.2d 960.

{¶ 24} Appellant's claims of third party malpractice, fraud, conspiracy, civil aiding and abetting, and intentional infliction of emotional distress against Brown are based upon allegations that Brown conspired to hurt him by including false information in the amicus briefs filed on Kimberly's behalf in the DHS immigration appeal. Brown argues that he is immune from liability on appellant's claims because his only actions were those of an attorney representing his client in good faith in a judicial proceeding in which the interests of his client were directly opposed to appellant's interests. He further argues that he has absolute immunity for statements made during a judicial proceeding.

{¶ 25} In *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 462 N.E.2d 158, paragraph one of the syllabus, the Ohio Supreme Court held:

{¶ 26} "An attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously."

{¶ 27} The rationale for this position is that, "the obligation of an attorney is to direct his attention to the needs of the client, not to the needs of a third party not in privity with the client." *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 76, 512 N.E.2d 636. The fear of indiscriminate third-party actions against attorneys would make attorneys reluctant to properly represent their client's interests. Id.

{¶ 28} In this case, appellant does not allege that he was in privity with Brown's client, Kimberly. Neither does he make any factual allegations in his complaint in support of his claim that Brown acted maliciously in his representation of Kimberly. Appellant's complaint merely contains general conclusory statements that Brown acted maliciously and in bad faith. Such unsupported conclusions are not sufficient to withstand a motion to dismiss. Accordingly, the trial court's dismissal of appellant's claims against Brown was not in error.

Jurisdiction

{¶ 29} Appellant challenges the trial court's determination that it lacked jurisdiction over the breach of contract claim in Count 1 of the complaint. Civ.R. 12(B)(1) permits dismissal where the trial court lacks jurisdiction over the subject matter of the claim. The standard of review for a dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *Ferren v. Cuyahoga Cty. Dept. of*

Children & Family Servs., 8th Dist. No. 92294, 2009-Ohio-2359, ¶3. In making that determination, a court is "not confined to the allegations of the complaint and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *Shockey v. Fouty* (1995), 106 Ohio App.3d 420, 423, 666 N.E.2d 304. Appellate review of an appeal of a dismissal for lack of subject matter jurisdiction under Civ.R. 12(B)(1) is de novo. *Boutros v. Noffsinger*, 8th Dist. No. 91446, 2009-Ohio-740, ¶12.

{¶ 30} Appellant relies upon our decisions in *Lisboa v. Karner*, 167 Ohio App.3d 359, 2006-Ohio-3024, 855 N.E.2d 136, and *Dinu v. Dinu*, 8th Dist. No. 91705, 2009-Ohio-2879, and argues that because his complaint raises claims against third parties who were not part of the domestic relations case, the common pleas court has subject matter jurisdiction over the complaint. We find the instant case is distinguishable from those cited by appellant.

{¶ 31} Both *Lisboa* and *Dinu* concern the rights of creditors to seek collection of debts. In *Lisboa*, the parties hired an independent contractor to value and preserve the marital estate. After the parties entered into a fee dispute, the contractor sought to collect his fees as costs in the underlying divorce action. This court held that the domestic relations court lacked subject matter jurisdiction over the independent contractor's claims, holding that R.C. 3105.11, "limits the jurisdiction of the domestic relations [court] to

the determination of domestic relations matters. Any collateral claims must be brought in a separate action in the appropriate court or division when the claim involves the determination of the rights of a third-party." Id., 167 Ohio App.3d at ¶6, citing *Tanagho v. Tanagho* (Feb. 23, 1993), 10th Dist. No. 92AP-1190, and *State ex rel. Ross v. O'Grady* (Sept. 27, 1994), 10th Dist. No. 94APD03-443.

{¶ 32} In *Dinu*, the plaintiff was seeking to collect on a judgment for child support arrearage against her former spouse by filing an action in the common pleas court against him and other third-party defendants under the Ohio Uniform Fraudulent Transfers Act. This court held that plaintiff's status as a judgment creditor entitled her to bring claims under the Ohio Uniform Fraudulent Transfers Act and, since the claims she raised were collateral to the domestic relations case and against third parties not a part of the domestic relations case, the common pleas court had jurisdiction over her claims. *Dinu*, 2009-Ohio-2879 at ¶13.

{¶ 33} Unlike *Lisboa* and *Dinu*, appellant's claims do not concern creditor rights, money judgments, or other matters collateral to the domestic relations case. The only rights asserted are those allegedly due appellant under a clause in the written separation agreement that provides that each party "agrees that she and he shall not annoy, harass, or interfere with the other in any manner whatsoever."

{¶ 34} Once a separation agreement is incorporated into a divorce decree, the agreement is superseded by the decree and its terms are imposed not by contract, but by the decree. *Greiner v. Greiner* (1979), 61 Ohio App.2d 88, 399 N.E.2d 571, citing *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413; *Robrock v. Robrock* (1958), 167 Ohio St. 479, 150 N.E.2d 421; *Newman v. Newman* (1954), 161 Ohio St. 247, 118 N.E.2d 649; *Law v. Law* (1901), 64 Ohio St. 369, 60 N.E. 560. As appellant's complaint states a cause of action for an alleged violation of the terms of the divorce decree unrelated to any rights except those claimed by appellant, this is a domestic relations matter that remains within the continuing jurisdiction of the domestic relations court to hear and decide.

{¶ 35} Accordingly, appellant's first three assignments of error relating to the trial court's grant of appellees' motions to dismiss are overruled.

{¶ 36} In his fourth assignment of error, appellant asserts that the court erred by not converting the motions to dismiss to motions for summary judgment. He contends that because the parties introduced matters "outside the pleadings," the court was required to treat the motions as motions for summary judgment and give consideration to the affidavits and other evidence he filed with his brief in opposition. The record discloses that the following documents were attached to appellees' motions: a copy of the divorce separation agreement attached to Kimberly's and Arslanian's joint

motion for dismissal under Civ.R. 12(B)(1) and (6); a copy of the domestic relations court docket in the divorce case attached to Blair's motion for dismissal under Civ.R. 12(B)(1) and (6); and, a copy of the docket from a civil case filed by appellant and the amicus curiae briefs filed on Kimberly's behalf in the immigration appeal attached to Brown's motion for dismissal under Civ.R. 12(B)(6).

{¶ 37} Appellees contend that the court may consider outside material that is pertinent to the jurisdictional issue without converting the motion into one for summary judgment and that the documents attached to their motions were incorporated into the complaint by appellant and as a result, are not "outside the pleadings."

{¶ 38} Civ.R. 12(B)(6) provides that if the motion to dismiss presents matters outside the pleadings and such matters are not excluded by the court, the court must treat the motion as a motion for summary judgment as provided in Rule 56. "Documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6)." *NCS Healthcare, Inc. v. Candlewood Partners, LLC*, 160 Ohio App.3d 421, 427, 2005-Ohio-1669, 827 N.E.2d 797, citing *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 1997-Ohio-274, 673 N.E.2d 1281. The court may review documents that were incorporated into the complaint, even if not attached to the complaint. *Irvin v. Am. Gen. Fin.*,

Inc., 5th Dist. No. CT2004-0046, citing *Fillmore v. Brush Wellman, Inc.*, 6th Dist. No. OT-03-029, 2004-Ohio-3448; *Connolly Constr. Co. v. The City of Circleville* (Mar. 16, 1988), 3d Dist. No. 9-87-10; *Weiner v. Klais & Co.* (C.A.6, 1997), 108 F.3d 86, 89. Furthermore, the court may consider material pertinent to jurisdictional issues without converting the motion into one for summary judgment. *Shockey*, 106 Ohio App.3d at 423.

{¶ 39} Appellant's breach of contract claim was based upon the written separation agreement from his and Kimberly's divorce. Pursuant to Civ.R. 10(D)(1), appellant should have attached a copy of the agreement to his complaint. Thus, although not attached, the agreement was incorporated into the complaint and could be considered by the trial court. Additionally, both the separation agreement and the court docket attached to Blair's brief were pertinent to the Civ.R. 12(B)(1) jurisdictional issue and could be considered by the court without converting the motions to ones for summary judgment. Finally, appellant's claims against Brown are based solely on the amicus briefs filed by Brown on Kimberly's behalf in the immigration appeal. In his complaint, appellant references these briefs, quotes from the briefs, and takes issue with photographs included in the briefs. Therefore, although not attached to the complaint, appellant incorporated the briefs into the complaint. Accordingly, the trial court did not err by not treating the

motions to dismiss as motions for summary judgment. Appellant's fourth assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant their 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 Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR