[Cite as *Henderson v. State*, 2015-Ohio-1742.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101862

TROY HENDERSON

PLAINTIFF-APPELLANT/
CROSS-APPELLEE

vs.

STATE OF OHIO, ET AL.

DEFENDANTS-APPELLEES/
CROSS-APPELLANTS

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART,
AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-824177

BEFORE: Stewart, J., McCormack, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: May 7, 2015

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MELODY J. STEWART, J.:

{¶1} Plaintiff-appellant/cross-appellee, Troy Henderson, appeals the Civ.R. 12(B)(1) and 12(B)(6) dismissal of his complaint against defendants-appellees, the state of Ohio, the Cuyahoga County Prosecutor's Office, and Assistant Cuyahoga County Prosecutor Carrie Heindrichs, and the denial of his motion for summary judgment. Cross-appellants, the Cuyahoga County Prosecutor's Office and Carrie Heindrichs (hereinafter, the prosecutors), appeal the denials of their request for leave to respond, instanter, to Henderson's motion to dismiss, their motion to strike Henderson's poverty affidavits, their motion to deem matters admitted and to compel discovery, and their motion to perpetuate discovery. Further, the prosecutors appeal the dismissal of their counterclaim seeking to have Henderson declared a vexatious litigator under R.C. 2323.52. For the reasons that follow, we affirm the trial court's decision to dismiss Henderson's complaint and deny the prosecutors' motion to strike Henderson's poverty affidavit, but reverse the court's dismissal of the prosecutors' counterclaim and the denial of all related motions.

{¶2} In 2011, the Cuyahoga County Grand Jury returned a four-count indictment charging Henderson with grand theft auto, receiving stolen property, forgery, and tampering with records. The indictment stemmed from a complaint filed by Henderson's former girlfriend and mother of his child that accused Henderson of stealing her vehicle and several other items from her home. Acting in his own defense, Henderson was found not guilty on all counts following a jury trial.

{¶3} On March 24, 2014, Henderson filed a complaint against the state of Ohio, the Cuyahoga County Prosecutor, and Assistant County Prosecutor Carrie Heindrichs, alleging claims of 1) interfering with civil rights; 2) dereliction of duty; 3) negligent supervision; 4) negligence; and 5) fraud, seeking money damages and unspecified equitable relief from the

defendants, for their involvement with the prosecution of his case. Along with the complaint, Henderson filed a poverty affidavit so that he would not have to put a down payment on court costs. On April 25, 2014, the prosecutors filed a motion to dismiss plaintiff's complaint pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted and also filed a counterclaim requesting that Henderson be declared a vexatious litigator pursuant to R.C. 2323.52. On the 28th of April, the state of Ohio responded to Henderson's complaint by filing a motion to dismiss, for lack of subject matter jurisdiction under Civ.R. 12(B)(1), and for failure to state a claim under Civ.R. 12(B)(6).

{¶4} On April 30, 2014, the prosecutors gave notice to the court that they served requests for admissions, interrogatories, and production of documents on Henderson in connection with his complaint and their counterclaim. On May 5, 2014, Henderson filed a brief in opposition to the prosecutors' and state's motions to dismiss, and on June 3, 2014, Henderson filed his answer to the prosecutors' counterclaim. Along with his answer, Henderson filed a Civ.R. 12(B)(6) motion to dismiss the counterclaim. Missing the deadline to file a response to the motion to dismiss, the prosecutors asked for leave to file a brief in opposition, instanter, on June 19, 2014. Prior to this, the prosecutors also filed a motion to deem matters admitted and compel discovery due to Henderson's failure to respond to their request for admissions and discovery documents. The prosecutors also filed a motion to perpetuate discovery and a motion to strike Henderson's poverty affidavit. On July 1, 2014, Henderson filed a motion for summary judgment on his claims.

{¶5} The court granted the prosecutors' motion to dismiss pursuant to Civ.R. 12(B)(6) and the state's motion to dismiss pursuant to Civ.R. 12(B)(1) and 12(B)(6) on July 31, 2014, and denied as moot Henderson's motion for summary judgment on the claims. That same day, the

court also denied the prosecutors' motion to strike Henderson's poverty affidavit and their request for leave to file, instanter, a brief in opposition to Henderson's motion to dismiss. The court then granted Henderson's motion to dismiss the counterclaim against him. As a result of the dismissal of the complaints, the court denied as "moot" the prosecutor's motion to deem matters admitted and compel discovery and their motion to perpetuate discovery.

The Dismissal of Henderson's Complaint

{¶6} Henderson contends that the trial court committed reversible error by granting the defendants' motions to dismiss and abused its discretion by not granting his motion for summary judgment.

{¶7} A Civ.R. 12(B)(6) motion to dismiss a complaint for failure to state a claim upon which relief can be granted tests the sufficiency of a complaint. In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him to the relief sought. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14. "The allegations of the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Antoon v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 101373, 2015-Ohio-421, ¶ 7. Appellate courts review a trial court's decision to dismiss a complaint pursuant to Civ.R. 12(B)(6) de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5.

{¶8} In their motion to dismiss, the prosecutors contend that Henderson did not plead sufficient facts, if accepted as true, to state a claim for relief that is plausible on its face. Further, they contend that they have absolute immunity or statutory immunity, or both.

{¶9} The prosecutors suggest that because Fed.R.Civ.P. 8 and Ohio Civ.R. 8 (rules that outline pleading standards) are "virtually identical" and "the Ohio Rule was based on the Federal Rule," citing *DiGiorgio v. Cleveland*, 8th Dist. Cuyahoga No. 95945, 2011-Ohio-5878, ¶ 41, this court should adopt the federal interpretation of Fed.R.Civ.P. 8 requirements laid out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed. 929 (2007), and *Ashcroft v. Iqbol*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d. 868 (2009), that requires a complaint contain sufficient factual matter that, if accepted as true, states a claim for relief that is plausible upon its face. This court has recently explained, in great detail, the reasons we decline to adopt the federal pleading standard. *See Tuleta v. Med. Mut. of Ohio*, 2014-Ohio-396, 6 N.E.3d 106 (8th Dist.). Therefore, we decline to review the complaint under the heightened *Twombly/Iqbol* standard and proceed to review the complaint under the Ohio notice pleading standard.

{¶10} Under the notice pleading requirements of Civ.R. 8(A)(1), the plaintiff need only plead sufficient, operative facts to support recovery under his claims. *Doe v. Robinson*, 6th Dist. Lucas No. 1-07-1051, 2007-Ohio-5746, ¶ 17. Nevertheless, to constitute fair notice, the complaint must still allege sufficient underlying facts that relate to and support the alleged claim, and may not simply state legal conclusions. *See DeVore v. Mut. of Omaha Ins. Co.*, 32 Ohio App.2d 36, 38, 288 N.E.2d 202 (7th Dist.1972).

{¶11} Even under the lower pleading standard, we agree with the prosecutors that Henderson's complaint is almost entirely devoid of the necessary underlying facts needed to support his claims of interfering with civil rights, dereliction of duty, negligent supervision,

negligence, and fraud.[1] In support of his claims, Henderson generally only asserts bare legal conclusions. However, Henderson does assert that the defendants permitted perjured testimony during the criminal trial and the defendants concealed evidence favorable to him during the criminal prosecution and then cites to attached exhibits as evidence of the concealment . Henderson then incorporates these allegations by reference under each claim. This is enough to put the prosecutors on notice of at least those alleged acts that might support his claims.

{¶12} However, even if we assume that Henderson has complied with the Civ.R. 8 pleading standard for his claims of interfering with civil rights, dereliction of duty, negligent supervision, and negligence, we agree with the prosecutors that they are absolutely immune.

{¶13} Ohio Revised Code Section 2744.03(A)(7) provides as follows:

> The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

And R.C. 2744.03(A)(6) provides that, in addition to any immunity or defense referred to in R.C. 2744.03(A)(7), an employee, as defined in R.C. 2744.01(B), is immune from liability unless one of the following applies:

> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities; (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless

[1] Pursuant to Civ.R. 9(B), claims of fraud must be plead with "particularity." As Henderson has failed to do so here, we find that his fraud claim was properly dismissed under Civ.R. 12(B)(6).

manner; [or] (c) Civil liability is expressly imposed upon the employee by a section of the Revised Code.

{¶14} The United States Supreme Court has held that prosecutors are considered "quasi-judicial officers" entitled to the absolute immunity granted to judges when their activities are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *see also Henderson v. Euclid*, 8th Dist. Cuyahoga No. 101149, 2015-Ohio-15, ¶ 26. Activities that are intimately associated with the judicial phase of the criminal process include initiating a prosecution and presenting the state's case. *Id.* at 431. However, absolute immunity often will not apply to a prosecutor's actions that are more removed from the judicial phase, such as when a prosecutor gives advice to police during a criminal investigation; *see Burns v. Reed*, 500 U.S. 478, 496, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), when the prosecutor makes statements to the press, *Buckley v. Fitzsimmons*, 509 U.S. 259, 277, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993), or when a prosecutor acts as a complaining witness in support of a warrant application, *Kalina v. Fletcher*, 522 U.S. 118, 127, 132, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997) (Scalia, J., concurring). *See also Willitzer v. McCloud*, 6 Ohio St.3d 447, 449, 453 N.E.2d 693 (1983) (explaining that absolute immunity does not apply when the prosecutor is involved in "essentially investigative or administrative functions."). Thus, the critical inquiry when determining the applicability of absolute immunity in these cases is how closely related the prosecutor's challenged activity is to his role as an advocate of the state in the judicial phase of the criminal process. *Moore v. Cleveland*, 8th Dist. Cuyahoga No. 100069, 2014-Ohio-1426, ¶ 25, citing *Carmichael v. Cleveland*, 881 F. Supp.2d 833, 846 (N.D.Ohio 2012).

{¶15} Here, the only factual allegations that survive the Civ.R. 8 standard and that could possibly amount to a claim, are that the prosecutors concealed favorable evidence during the criminal prosecution and were aware of, and allowed, perjury during the criminal prosecution. Thus, by Henderson's statements on the face of his complaint, his claims arise out of alleged prosecutorial conduct that involved initiating a prosecution and presenting the state's case. Therefore, the prosecutors enjoy absolute immunity.

{¶16} Further the trial court correctly granted the state's motion to dismiss the complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). The standard of review on a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction is de novo. *Rheinhold v. Reichek*, 8th Dist. Cuyahoga No. 99973, 2014-Ohio-31, ¶ 7. When ruling on a Civ.R. 12(B)(1) motion, the trial court must determine whether a plaintiff has alleged any cause of action that the court has authority to decide. *Id.* "The trial court is not confined to the allegations of the complaint when determining its subject-matter jurisdiction pursuant to a Civ. R. 12(B)(1) motion to dismiss, and it may consider material pertinent to such inquiry without converting the motion into one for summary judgment." *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976), paragraph one of the syllabus.

{¶17} The state of Ohio argued in its motion to dismiss that, pursuant to R.C. 2743.03, the trial court lacked subject matter jurisdiction to hear the case.

{¶18} R.C. 2743.03 (A) states, in pertinent part:

> (1) The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code and exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims.* * *

> (2) If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action. This division does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.

{¶19} The Ohio Supreme Court has stated that if an "action involves a civil suit for money damages against the state, the Court of Claims has original, exclusive jurisdiction" over the suit. *Boggs v. Ohio,* 8 Ohio St.3d 15, 17, 455 N.E.2d 1286 (1983). The Court of Claims has exclusive jurisdiction over claims of money damages even if the plaintiff also asks for declaratory or injunctive relief. *See Friedman v. Johnson*, 18 Ohio St.3d 85, 87–88, 480 N.E.2d 82 (1985).

{¶20} Henderson's complaint requests money damages from each defendant, including the state of Ohio. Therefore, the court of claims has exclusive jurisdiction over Henderson's causes of action against the state. Because the trial court did not have jurisdiction to hear and determine the claims against the state, the court properly dismissed them.

{¶21} Lastly, the court correctly dismissed the complaint against the state under Civ.R. 12(B)(6) for failure to state a claim. The complaint does not establish how the state of Ohio was in any way connected to, or involved in, the allegations that the prosecutors concealed evidence or permitted perjury to occur. Therefore, the court also properly dismissed the claims against the state for failure to state a claim upon which relief can be granted.

{¶22} In light of our conclusion that the court properly dismissed the complaint against the appellees, Henderson's second assignment of error, that the trial court abused its discretion by not granting his motion for summary judgment, is moot.

Cross-Appellants' Assignments of Error

{¶23} On June 19, 2014, the prosecutors asked the court to strike the poverty affidavit Henderson filed with his complaint. Under Loc.R. 7(D) of the Court of Common Pleas of Cuyahoga County, General Division, a plaintiff may submit a poverty affidavit when initiating a case in lieu of making a security deposit for court costs. The poverty affidavit must state the reasons for the inability to prepay costs and is subject to court review at any stage in the proceedings. Loc.R. 7(D).

{¶24} In their motion to strike, the prosecutors argued that although Henderson's poverty affidavit states that he had zero income in 2014 and 2013, had zero assets, and that he was unemployed when he filed the action — he nonetheless apparently has room and board, internet service, and access to legal research tools. Furthermore, the prosecutors assert that in discovery requests, they asked Henderson to provide documentation regarding his lack of income, but that he failed to comply. According to the prosecutors, these facts call into question whether Henderson really is impoverished. Therefore, they asked the court to conduct a hearing on Henderson's poverty status and, if appropriate, order him to pay all court costs incurred herein to date and to make a security deposit for future costs.

{¶25} We review a trial court's decision on a motion to strike a poverty affidavit for an abuse of discretion. *See Wilson v. Dept. of Rehab. & Corr.*, 138 Ohio App. 3d 239, 243, 741 N.E.2d 152 (10th Dist. 2000). An abuse of discretion connotes an unreasonable, arbitrary or unconscionable act on the part of the trial court. *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (1983). We cannot say that the trial court abused its discretion in denying the prosecutors' motion to strike the poverty affidavit or for declining to hold a hearing on the issue. While Loc.R. 7(D) allows a court to review poverty affidavits, it does not say that a court

must review them. Furthermore, the prosecutors offer no evidence, only mere speculation, to support their claim that Henderson has any assets or income. Therefore, we overrule this assignment of error.

{¶26} The prosecutors further contend that it was error for the trial court to dismiss their counterclaim for vexatious litigator designation. On this issue, we agree.

{¶27} In their counterclaim, the prosecutors alleged that since his not-guilty verdict, Henderson has initiated four separate lawsuits (including the present complaint) related to his criminal prosecution. The lawsuits included the city of Euclid, his former girlfriend, the judge presiding over his trial, and the court-supervised-release probation officer. The prosecutors further alleged that Henderson filed numerous pleadings, motions, objections, and briefs that have no basis in law or fact, but nevertheless demand the attention and resources of both the court and the named defendants in each suit. The prosecutors, therefore, asked the trial court to declare Henderson a vexatious litigator pursuant to R.C. 2323.52 and that Henderson be enjoined indefinitely from continuing any legal proceedings in any Ohio court, acting pro se, that he has instituted prior to the entry of the order, and that Henderson be assessed the amount of the prosecutors' reasonable attorney fees and court costs for filing the instant frivolous action.

{¶28} On June 3, 2014, Henderson filed his answer to the prosecutors' counterclaim. With his answer, Henderson also filed a Civ.R. 12(B)(6) motion to dismiss the counterclaim. Missing the seven-day deadline to oppose the motion to dismiss as of right (*see* Cuyahoga County Court of Common Pleas Loc.R. 11(C)) on June 19, 2014, the prosecutors asked for leave of court to oppose Henderson's motion to dismiss, instanter. On July 31, 2014, the court denied motion for leave to oppose the motion to dismiss and, in a separate order, granted Henderson's motion to dismiss the counterclaim, after finding that the motion to dismiss went unopposed.

{¶29} Our court has summarized Ohio's vexatious litigator statute as follows:

> R.C. 2323.52(B) provides that a person who has defended against habitual and persistent vexatious conduct "may commence a civil action in the court of common pleas * * * to have that person declared a vexatious litigator." R.C 2323.52(C) provides as follows: "A civil action to have a person declared a vexatious litigator shall proceed as any other civil action and the Ohio Rules of Civil Procedure apply to the action."

State ex rel. Tauwab v. Ambrose, 8th Dist. Cuyahoga No. 97472, 2012-Ohio-817, ¶ 4.

{¶30} The prosecutors timely filed a counterclaim against Henderson alleging that he was a vexatious litigator under the statute. In their complaint, the prosecutors pleaded facts that, if true, would establish that Henderson is a vexatious litigator under R.C. 2323.52. *See* Civ.R. 12(B)(6). While Henderson filed a Civ.R. 12(B)(6) motion to dismiss the counterclaim, from our review of the complaint, the counterclaim stated a claim for relief.

{¶31} Despite the fact that Henderson's Civ.R. 12(B)(6) motion could not support a dismissal, the court granted the motion to dismiss on the grounds that the motion was unopposed by the prosecutors. A court may not grant a motion to dismiss simply because the nonmoving party failed to file a brief in opposition to it; rather, the court must comply with the Civ.R. 12 standards for dismissal. When ruling on a Civ.R. 12(B)(6) motion, the trial court must take all factual allegations as true and then determine whether those facts are sufficient to state a claim that entitles the pleader to the relief sought. *O'Brien*, 42 Ohio St.2d at 245, 327 N.E.2d 753. Because we can find no reason for the court's dismissal under Civ.R. 12(B)(6), we agree that the court erred in dismissing the prosecutors' counterclaim and reverse.

{¶32} Finally, because we reverse the trial court's decision to dismiss the prosecutor's counterclaim, whether the trial court erred in denying the prosecutors leave to file instanter a brief in opposition to the motion to dismiss is rendered moot. We also reverse the trial court's decision to deny as "moot" the prosecutor's motions and remand for further proceedings.

{¶33} The trial court's decision to dismiss Henderson's complaint is affirmed. The trial court's decisions to dismiss the prosecutors' counterclaim and related discovery motions are reversed.

{¶34} Judgment affirmed in part, reversed in part, and remanded.

It is ordered that appellees/cross-appellants recover of said appellant/cross-appellee 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 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.

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MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS IN PART AND DISSENTS IN PART (WITH SEPARATE OPINION)

SEAN C. GALLAGHER, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶35} I concur fully with the majority in all respects except the conclusion in paragraph 25 regarding the poverty affidavit, with which I respectfully dissent.

{¶36} Although I agree Loc.R. 7(D) does not mandate a hearing, the practice of rubber-stamping the validity of such affidavits must be called into question when the opposing party has raised a viable question of validity following repeated and excessive filings. At some point, inquiry in the form of a hearing is warranted. I see this as a most appropriate case. When, as here, there is a blanket attempt to paper the courthouse, common sense dictates a more prudent response.