[Cite as *Fourtounis v. Verginis*, 2015-Ohio-2518.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102025

MARK N. FOURTOUNIS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

THEOLOGOS VERGINIS, ET AL.

DEFENDANTS-APPELLEES

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

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-829086

BEFORE: Blackmon, J., Keough, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: June 25, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellants Mark N. Fourtounis, Nikolas and Marika Fourtounis, Nikolas and Marika Fourtounis Living Trust, and Global Outdoor Solutions (collectively referred to as "Fourtounis") appeal the trial court's dismissal of their complaint against appellees Theologos Verginis ("Verginis") and Benesch, Friedlander, Coplan, and Aronoff, L.L.P. (the "firm") and assign the following two errors for our review:

> I. The trial court erred by dismissing this action for failure to state a claim upon which relief may be granted where appellants have standing to bring such claims, the claims are pleaded with sufficient specificity so as to give appellants [sic] notice of their nature, and the complaint alleges specific facts which — when accepted as true — satisfy all elements of each cause of action.
>
> II. The trial court erred by dismissing the action entirely, which consists of six (6) distinct causes of action, without considering the separate and distinct issues of law relating to each cause of action and without stating the legal reasons supporting its decision to dismiss each and every cause of action.

{¶2} After reviewing the record and relevant law, we affirm the trial court's decision in part and reverse and remand for proceedings consistent with this opinion. The apposite facts follow.

{¶3} Fourtounis filed a complaint against attorney Verginis and his law firm for actions that Verginis took while representing Evangelos Stamatopoulos and Lighting Capital Holdings, L.L.C. (collectively referred to as Stamatopoulos), in a suit against Fourtounis that was filed in June 2012.

{¶4} According to the facts alleged in Fourtounis's complaint against Verginis and his firm, Fourtounis and Stamatopoulos were business partners from 2010 until 2012. After the partnership was dissolved, a dispute arose between the parties regarding the ownership of various pieces of business equipment. Fourtounis believed that a settlement agreement signed by Stamatopoulos addressed the disposition of the assets. However, Stamatopoulos argued he was forced to sign the agreement under duress. Stamatopoulos retained the services of attorney Verginis because he was being denied access to the business equipment by Fourtounis. As a result, Verginis filed an emergency motion for possession of property to protect his client's interest in the business equipment.

{¶5} Attached to the motion was an affidavit by Stamatopoulos in which he stated that Fourtounis was holding his equipment as ransom and that Fourtounis was using the equipment for his own personal gain. Stamatopoulos also expressed his concern that Fourtounis would remove the equipment from the jurisdiction of the court. After obtaining prejudgment possession of the property, Verginis withdrew from the representation of Stamatopoulos and the litigation continued with other counsel. Judgment was eventually awarded in Fourtounis's favor.

{¶6} On June 27, 2014, Fourtounis filed a complaint against Verginis in an attempt to hold Verginis liable for statements made and actions taken while representing Stamatopoulos in the emergency motion. Fourtounis alleged claims for wrongful seizure and deprivation of property in violation of 42 U.S.C. 1983, civil conspiracy, malicious

prosecution in a civil proceeding, intentional infliction of emotional distress, third-party legal malpractice, and vicarious liability.

{¶7} Verginis and the firm filed a joint motion to dismiss the complaint, which Fourtounis opposed. The trial court granted the motion to dismiss after concluding that Fourtounis's complaint failed "to state a claim upon which relief may be granted."

Analysis

{¶8} We will address Fourtounis's two assigned errors together because they both concern Fourtounis's argument that the trial court erred by granting Verginis's Civ.R. 12(B)(6) motion to dismiss the complaint.

{¶9} This court applies a de novo standard of review when reviewing a trial court's ruling on a Civ.R.12(B)(6) motion to dismiss for failure to state a claim. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, citing *Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 2002-Ohio-2480, 768 N.E.2d 1136. Under this standard of review, we must independently review the record and afford no deference to the trial court's decision. *Herakovic v. Catholic Diocese of Cleveland*, 8th Dist. Cuyahoga No. 85467, 2005-Ohio-5985, ¶ 13.

{¶10} Pursuant to Civ.R. 12(B)(6), a complaint is not subject to dismissal for failure to state a claim upon which relief may be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11, citing *O'Brien v. Univ. Community Tenants*

Union, Inc., 42 Ohio St.2d 242, 327 N.E.2d 753 (1975). Therefore, "[a]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991). The court's factual review is confined to the four corners of the complaint. *Grady v. Lenders Interactive Servs.*, 8th Dist. Cuyahoga No. 83966, 2004-Ohio-4239, ¶ 6. Within those confines, a court accepts as true all material allegations of the complaint and makes all reasonable inferences in favor of the nonmoving party. *Fahnbulleh v. Strahan*, 73 Ohio St.3d 666, 667, 653 N.E.2d 1186 (1995).

1) 42 U.S.C. 1983 Action

{¶11} Fourtounis argues that the trial court erred in dismissing his 42 U.S.C. 1983 action. He claims that the Supreme Court's decision in *Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), supports his claim that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the state act jointly with a creditor in securing the property in dispute.

{¶12} In *Lugar*, the plaintiff in the underlying suit filed a prejudgment motion to attach property based on his fear that the defendant may attempt to dispose of the property. The clerk of the state court issued a writ of attachment, which was then executed by the county sheriff. After a hearing was conducted, the trial court ordered the

attachment dismissed because the plaintiff had failed to establish the statutory grounds for attachment.

{¶13} Lugar brought an action under 42 U.S.C. 1983 against the plaintiff alleging that in attaching his property, "respondents had acted jointly with the state to deprive him of his property without due process of law." The U.S. Supreme Court held that although Lugar could challenge the constitutionality of the state's replevin statute, it could not sustain a Section 1983 action based on the misuse or abuse of the statute. As *Lugar* held, "that respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under Section 1983 but challenges only a private action." *Id.* at 940.

{¶14} Similarly, in the instant case, Fourtounis seeks to bring a Section 1983 action based on his claims that the replevin statute was misused and abused by Verginis filing a baseless emergency motion for possession and by the trial court not requiring a bond to be posted. This claim does not attribute any violation because of a state rule, but contends the rule was misused or not complied with.

{¶15} Fourtounis also argues the Ohio Supreme Court's decision in *Peebles v. Clement*, 63 Ohio St.2d 314, 408 N.E.2d 689 (1980), supports his Section 1983 claim. However, the plaintiff in *Peebles* alleged that Ohio's attachment procedure was unconstitutional. The plaintiff was not arguing that the statute was being abused or violated like Fourtounis does in the instant case.

{¶16} Additionally, the fact that no bond was required to be filed as part of the motion cannot be attributed to Verginis. Although he drafted a complimentary order for the trial court to use, the trial court was obligated to review the order to assure it complied with what the trial court intended to order. Moreover, the posting of a bond is not mandatory in a replevin action. *First Fed. S. & L. Assn. of Warren v. A & M Towing & Road Serv., Inc.*, 127 Ohio App.3d 46, 711 N.E.2d 755 (11th Dist.1998). Accordingly, the trial court did not err by dismissing Fourtounis's Section 1983 action.

2) Malicious Civil Prosecution/Third-Party Malpractice

{¶17} Fourtounis's claims for third-party malpractice and malicious civil prosecution were based on his allegation that Verginis acted with malice in filing the emergency motion for possession because he was aware that Stamatopoulos was not under duress when he signed the settlement agreement and was aware that there was no basis to believe that Fourtounis would conceal the equipment outside of the court's jurisdiction.

{¶18} It is "well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice." *Simon v. Zipperstein*, 32 Ohio St.3d 74, 76, 512 N.E.2d 636 (1987), citing *Scholler v. Scholler*, 10 Ohio St.3d 98, 462 N.E.2d 158 (1984), paragraph one of the syllabus. In *Criss v. Springfield Twp.*, 56 Ohio St.3d 82, 84-85, 564 N.E.2d 440 (1990), the Ohio Supreme Court defined malice as:

> The requirement of malice turns directly on the defendant's state of mind. Malice is the state of mind under which a person intentionally does a wrongful act without a reasonable lawful excuse and with the intent to inflict injury or under circumstances that the law will imply an evil intent. Black's Law Dictionary (6 Ed. 1990) 956. *See also Page v. Miller* (1895), 13 Ohio C.C. 663, 669, 6 Ohio C.D. 676, 680; *Adams v. State* (1910), 11 Ohio N.P.(N.S.) 11, 13, 25 Ohio Dec. 77, 79; *Skarbinski v. Henry H. Krause Co.* (C.A. 6, 1967), 378 F.2d 656, 658; *Brown v. Monticello State Bank* (Iowa 1984), 360 N.W. 2d 81, 87; *Eaves v. Broad River Elec. Coop., Inc.* (1982), 277 S.C. 475, 479, 289 S.E. 2d 414, 416. For purposes of malicious prosecution it means an improper purpose, or any purpose other than the legitimate interest of bringing an offender to justice. Black's, *supra*; Prosser [& Keeton, The Law of Torts (5 Ed. 1984) 883 Section 119]; *Hickland v. Endee* (D.C.N.Y. 1983), 574 F. Supp. 770, 778; *Sanders v. Daniel Internatl. Corp.* (Mo. 1984), 682 S.W. 2d 803, 807; *Chittenden Trust Co. v. Marshall* (1986), 146 Vt. 543, 550, 507 A.2d 965, 970.

{¶19} By asserting that Verginis filed the emergency motion for possession of property knowing that there was no basis for doing so, Fourtounis alleged the necessary requirement to bring a third-party malpractice claim based on malicious prosecution.

> In *Simon* * * * the court stated that an allegation of fraud, bad faith, or collusion in the complaint is sufficient to state a viable claim of malicious conduct on the part of an attorney [to support a third party malpractice

> claim]. This holding would be applicable even if the attorney's actions were on behalf of [his] clients.

Duncan v. Bender, 11th Dist. Geauga No. 90-G-1610, 1991 Ohio App. LEXIS 5719 (Nov. 29, 1991).

{¶20} Verginis argues that even if a third party malpractice claim was sufficiently pled, the statute of limitations had expired on the malpractice claim. The statute of limitations for an attorney malpractice claim is one year after the cause of action accrued. R.C. 2305.11(A).

> An action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the [plaintiff] discovers or should have discovered that his injury was related to [the] attorney's act * * * and the [plaintiff] is put on notice of a need to pursue his possible remedies against the attorney.

Zimmie v. Calfee, Halter and Griswold, 43 Ohio St.3d 54, 538 N.E.2d 398 (1989), syllabus.

{¶21} Verginis argues that the cognizable event was the filing of the motion for emergency possession, which was filed two years prior to Fourtounis's filing the complaint. However, the cognizable event was when Fourtounis became aware that Verginis knew that the claims in his client's affidavit were false. Because the date of the cognizable event is not apparent from the face of the complaint, we find that the trial court erred by dismissing the attorney malpractice claim.

{¶22} Fourtounis also set forth the requisite elements in his complaint for bringing a malicious civil prosecution claim. In order to state a cause of action for malicious civil prosecution in Ohio, four essential elements must be alleged by the plaintiff: (1)

malicious institution of prior proceedings against the plaintiff by defendant, (2) lack of probable cause for the filing of the prior lawsuit, (3) termination of the prior proceedings in plaintiff's favor, and (4) seizure of plaintiff's person or property during the course of the prior proceedings. *Robb v. Chagrin Lagoons Yacht Club*, 75 Ohio St.3d 264, 662 N.E.2d 9 (1996), syllabus.

{¶23} This court in *Woyczynski v. Wolf*, 11 Ohio App.3d 226, 227, 464 N.E.2d 612 (8th Dist.1983), held that in the context of attorney liability for malicious prosecution, it must be shown that the attorney did not have a good faith basis for believing that the civil or criminal proceeding was warranted under existing law, or under a good-faith argument for extension, modification or reversal of existing law. *Id.* at 228. Likewise, in *Border S.&L. Assn. v. Moan*, 15 Ohio St.3d 65, 472 N.E.2d 350 (1984), the plaintiff sought to bring a malicious prosecution claim against an attorney claiming that the attorney had attempted to intentionally inflict harm by initiating an action without excuse or justification. After noting that the Civil Rules only require a short and plain statement of the claim, the court held that the trial court had erred in dismissing the complaint under Civ.R. 12(B)(6). Thus, Fourtounis's allegation that Verginis filed the emergency motion knowing it was baseless is sufficient to prove the first two elements of the claim.

{¶24} Fourtounis also set forth the last two requirements of a malicious civil prosecution claim by pleading that his property was seized and that eventually the proceedings were resolved in his favor.

{¶25} Verginis argues that the statute of limitations has run on the malicious prosecution claim because Verginis's assault charges against Fourtounis were dropped on November 21, 2012. Verginis accused Fourtounis of assaulting him while he was at the warehouse where the property was stored. As a result, Verginis filed a complaint in Cleveland Municipal Court for assault, menacing, and criminal trespass, which was then dismissed on November 21, 2012.

{¶26} However, the malicious prosecution claim referred to in the third cause of action is solely based on the replevin action, not the criminal charges. The statute of limitations did not begin to accrue on the civil malicious prosecution claim until after the underlying matter was resolved in Fourtounis's favor on May 1, 2014, almost two months before Fourtounis filed the instant complaint.

{¶27} Taking Fourtounis's allegations as true, as we are obligated to do, Verginis filed a successful emergency motion for prejudgment possession of the property, knowing that there was no basis for the motion. Based on those facts, Fourtounis set forth valid third-party malpractice and malicious civil prosecution claims that should not have been dismissed.

3) Intentional Infliction of Emotional Distress

{¶28} Generally, the applicable statute of limitations for a claim of intentional infliction of emotional distress is four years. *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983). However, when the acts underlying the claim would support another tort, the

statute of limitations for that other tort governs the claim for intentional infliction of emotional distress. *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 629 N.E.2d 402 (1994). In order to determine the applicable statute of limitations for a particular claim, courts must look to the actual nature or subject matter of the acts giving rise to the complaint, rather than the form in which the action is pleaded. *Id.*; *Love v. Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988). A party cannot transform one cause of action into another through clever pleading or an alternate theory of law in order to avail itself of a more satisfactory statute of limitations. *Callaway v. Nu-Cor Automotive Corp.*, 166 Ohio App.3d 56, 2006- Ohio-1343, 849 N.E.2d 62 (10th Dist.), ¶ 14.

{¶29} Fourtounis's claim for intentional infliction of emotional distress is based in part on his allegations that Verginis filed false criminal charges against him for criminal trespass, assault, and menacing. Thus, the underlying claim is for malicious prosecution, which has a one year statute of limitations. R.C. 2305.11(A). In a malicious criminal prosecution claim, the one-year statute of limitations begins to toll when the prosecution is terminated in favor of the accused. *Froehlich v. Ohio Dept. of Mental Health*, 114 Ohio St.3d 286, 2007-Ohio-4161, 871 N.E.2d 1159, ¶ 16, 23. "'[T]he usual method by which a public prosecutor signifies the formal abandonment of criminal proceedings is by the entry of a nolle prosequi, either with or without the leave of the court.'" *Id.* at ¶ 21, quoting Restatement of the Law 2d, Torts, Section 659 (1977). In the complaint, Fourtounis states that the charges were nolled on

November 21, 2012. Therefore, by the time the complaint was filed on June 27, 2014, the statute of limitations had expired. Because the expiration of the statute of limitations is apparent on the face of the complaint, the trial court did not err by dismissing this claim as to the intentional infliction of emotional distress related to the malicious prosecution claim. *See Harris v. Pro-Lawn Landscaping, Inc.*, 8th Dist. Cuyahoga No. 97302, 2012-Ohio-498, ¶ 7, citing *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814 (a complaint maybe dismissed under Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations if the complaint on its face conclusively indicates that the action is time-barred).

{¶30} Fourtounis also based his intentional infliction of emotional distress claim on his allegations that Verginis informed Fourtounis's probation officer that he had filed criminal charges against Fourtounis. Fourtounis claimed this caused him to be in fear of being imprisoned or deported. However, if indeed Verginis's statements to the probation officer were false, the underlying claim would be slander, which has a one-year statute of limitations. *Cromartie v. Goolsby*, 8th Dist. Cuyahoga No. 93438, 2010-Ohio-2604. The alleged statements were made in August 2012; therefore, the statute of limitations would have expired in August 2013, far before Fourtounis filed his complaint on June 27, 2014. Accordingly, because Fourtounis's intentional infliction of emotional distress claim can support other torts on which the statute of limitations has expired, the trial court did not err in dismissing the claim.

4) Conspiracy

{¶31} "A claim for civil conspiracy requires proof of 'a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damage.'" *Kimmel v. Lowe's, Inc.*, 2d Dist. Montgomery No. 23982, 2011-Ohio-28, ¶ 20, quoting *Kenty v. Transamerica Premium Ins. Co.*, 72 Ohio St.3d 415, 419, 650 N.E.2d 863 (1995). "'An underlying unlawful act is required before a civil conspiracy claim can succeed.'" *Id.*, quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998).

{¶32} Because Fourtounis presented a valid claim for malicious prosecution, his claim for conspiracy should not have been dismissed. Fourtounis alleged that Stamatopoulos and Verginis acted maliciously by seizing the equipment prior to judgment. Fourtounis claimed that the wrongful seizure resulted in him losing over $700,000 in profits. Taking Fourtounis's factual assertions as true, Fourtounis has set forth a valid claim for conspiracy. Thus, the trial court erred by dismissing Fourtounis's conspiracy claim.

5) Vicarious Liability

{¶33} In his complaint, Fourtounis sought to hold Verginis's firm vicariously liable for Verginis's actions. "A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, at paragraph two of the syllabus.

{¶34} We have concluded that Fourtounis sufficiently pled his claim for malicious civil prosecution and third-party malpractice. Fourtounis alleges that Verginis filed the baseless motion for possession while he was a partner at the firm and within the scope of his employment. Accordingly, taking these assertions as true, Fourtounis set forth a valid vicarious liability claim and the trial court erred by dismissing the claim.

{¶35} Accordingly, Fourtounis's errors are sustained as to his claims for malicious prosecution, third-party malpractice, conspiracy, and vicarious liability. Fourtounis's claims for the violation of Section 1983 and intentional infliction of emotional distress are overruled.

{¶36} Judgment affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

It is ordered that appellants and appellees share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

PATRICIA ANN BLACKMON, JUDGE

KATHLEEN ANN KEOUGH., P.J., and
MELODY J. STEWART, J., CONCUR