[Cite as *Vagas v. Hudson*, 2009-Ohio-6794.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

WILLIAM VAGAS, et al.	C. A. No. 24713
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
CITY OF HUDSON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2008-02-1460

DECISION AND JOURNAL ENTRY

Dated: December 23, 2009

BELFANCE, Judge.

{¶1} Appellants, William and Debra Vagas, appeal the judgment of the Summit County Court of Common Pleas that dismissed their complaint against Appellee, the City of Hudson, Ohio. For the reasons that follow, we affirm.

I.

{¶2} William and Debra Vagas ("the Vagases") reside in Hudson, Ohio. The water line servicing the Vagases' house is tied into the water line and meter servicing their neighbor's house rather than being tied into the main water line at the street. The Vagases' water line also passes to their home under the home of their neighbors, Brian and Raija Daley ("the Daleys"). The City of Hudson ("Hudson") discovered these facts and informed the Vagases that their water line was in violation of certain city rules. Hudson ordered the Vagases to discontinue use of the water line. The Vagases did not discontinue their use of the water line and Hudson filed a complaint for declaratory judgment on November 14, 2006 ("the 2006 complaint"). The 2006

complaint sought to enforce Hudson's rules with respect to water service, enjoin the Vagases from using the water line in violation of those rules, and require the Vagases to construct a complying water line. Hudson's claim against the Vagases was settled and dismissed without prejudice in 2009.

{¶3} On February 19, 2008, the Vagases filed a complaint against Hudson alleging malicious prosecution, violations of Civ.R. 11 and R.C. 2323.51, and a cause of action pursuant to Section 1983, Title 42, U.S. Code ("Section 1983"). Hudson did not answer the complaint, instead, it filed a motion to dismiss the complaint for failure to state a claim pursuant to Civ.R. 12(B)(6).

{¶4} The Vagases amended their complaint multiple times, eventually filing their third amended complaint. In count one of their third amended complaint, the Vagases allege that Hudson lacked any factual or legal basis to file the 2006 complaint and that it was only filed on behalf of the neighbor with whom the Vagases shared a water line. Count two alleged a violation of Section 1983.

{¶5} Hudson responded with its renewed motion to dismiss for failure to state a claim in which it contended that the Vagases did not properly plead a Section 1983 claim.

{¶6} On April 3, 2009, the trial court granted Hudson's motion to dismiss. The trial court determined that the Vagases had set forth legal conclusions in their complaint rather than specific facts that could meet the elements of their various causes of action. The instant appeal followed.

II.

STANDARD OF REVIEW ON A MOTION TO DISMISS

{¶7} In their sole assignment of error, the Vagases contend that the trial court erred when it granted Hudson's motion to dismiss the Vagases' complaint. We review de novo a trial court's decision granting a motion to dismiss pursuant to Civ.R. 12(B)(6). *Hopper v. City of Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517, at ¶5. In ruling on a Civ.R. 12(B)(6) motion to dismiss, the trial court must only grant the motion "if it appears beyond a doubt that the petitioner can prove no set of facts that would entitle him [or her] to relief." Id. The trial court is strictly limited to the complaint and may not review any materials outside of the complaint in making its determination. *Braden v. Sinar*, 9th Dist. No. 2356, 2007-Ohio-4527, at ¶23. The trial court is required to accept all factual allegations in the complaint as true and "mak[e] every reasonable inference in favor of the nonmoving party." Id. However, unsupported conclusions made in the complaint are not accepted as true. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 193.

COUNT ONE

{¶8} In the first count of the Vagases' third amended complaint, they describe the factual background of the litigation, also incorporating by reference the claim filed by Hudson in 2006. Specifically, the Vagases state: (1) in 2006, Hudson brought a declaratory judgment action seeking a declaration that the Vagases had their water line tied in and fed from the water line serving the Daley's home; (2) Hudson alleged that the line was improperly traversing under the Daley's home; (3) Hudson had no legal or factual basis for the claims; and (4) Hudson's actions were taken on behalf of and at the behest of the Daleys.

{¶9} As an initial matter, we note in their merit brief on appeal, the Vagases discuss at length the deposition testimony of Douglas Elliott, former City Manager of Hudson. The testimony is offered in support of the Vagases' claims against Hudson. However, the trial court in the first instance, and this Court in review, may not consider documents outside of the pleadings in ruling on a motion to dismiss pursuant to Civ.R. 12(B)(6). *Braden* at ¶23. Elliott's testimony was not incorporated into the Vagases' complaint or any of the amended complaints in support of their claims. Nor was the deposition in part or in whole attached to any of the complaints. See Civ.R. 10(C) ("A copy of any written instrument attached to a pleading is a part of the pleading for all purposes."). Thus, for Civ.R. 12(B)(6) purposes, the facts presented in the deposition are beyond our consideration. Furthermore, the Vagases have not developed any legal argument that the trial court erroneously declined to consider the deposition testimony when ruling on the motion to dismiss pursuant to Civ.R. 12(B)(6).

{¶10} With respect to count one of the complaint, the Vagases do not identify the type of claim sought. The trial court construed count one as a claim for malicious prosecution. On appeal, the Vagases also contend that their complaint properly states a claim for malicious prosecution. The elements of malicious civil prosecution are:

> "(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, Inc.* (1996), 75 Ohio St.3d 264, 269, quoting *Crawford v. Euclid Natl. Bank* (1985), 19 Ohio St.3d 135, 139.

Although Ohio only requires notice pleading, meaning that the complaint "* * * shall contain * * * a short and plain statement of the claim showing that the party is entitled to relief[,]" Civ.R. 8(A), the complaint must still set forth operative facts to give the opposing party "fair notice of the nature of the action." (Internal quotations and citations omitted.) *Mogus v. Scottsdale Ins.*

Co., 9th Dist. Nos. 03CA0074, 04CA0002, 2004-Ohio-5177, at ¶15. Moreover, "a complaint must be more than 'bare assertions of legal conclusions.'" *Copeland v. Summit Cty. Probate Court*, 9th Dist. No. 24648, 2009-Ohio-4860, at ¶10, quoting, *Bratton v. Adkins* (Aug. 6, 1997), 9th Dist. No. 18136, at *1.

{¶11} In examining the factual allegations set forth in the complaint, we do not discern any factual allegation that the prior proceeding was terminated in favor of the Vagases. Although we are mindful that we must accept as true the allegations set forth in the Vagases' complaint as well as all items properly incorporated into the complaint, *Braden* at ¶23, there are no allegations that address this element of a cause of action for malicious prosecution. We also note that the Vagases incorporated by reference into count one all allegations in the prior 2006 complaint. However, this prior complaint was not attached to the instant complaint, nor is the 2006 complaint available in the record before us. Thus, although there may have been additional facts that could have stated a claim for malicious prosecution, those additional factual allegations are not before us. Accordingly, we conclude the Vagases could not prove any set of facts entitling them to recovery on a claim for malicious prosecution.

COUNT TWO

{¶12} In count two of the complaint, the Vagases seek to assert their right to pursue a claim against Hudson pursuant to Section 1983. Section 1983 provides that a person acting "under color of law" will be liable if that person's actions deprive another of his or her federal rights. See *Cooperman v. Univ. Surgical Assoc., Inc.* (1987), 32 Ohio St.3d 191, 199 (superseded by statute on other grounds), citing *Gomez v. Toledo* (1980), 446 U.S. 635, 640; Section 1983, Title 42, U.S.Code.

> "By the plain terms of § 1983, two-and only two-allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that

> some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez*, 446 U.S. at 640.

{¶13} We reiterate that Civ.R. 8(A) requires a complaint to contain "a short and plain statement" of operative facts demonstrating "that the party is entitled to relief[.]" A complaint will survive a motion to dismiss if, after accepting the factual allegations in the complaint as true, and making reasonable inferences in favor of the complainant, the complaint sets forth adequate facts demonstrating a claim for relief. *Hopper* at ¶5. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action * * *." *Bell Atlantic Corp. v. Twombly* (2007), 550 U.S. 544, 555, quoting Fed.R.Civ.P. 8(a).[1] Moreover, conclusory statements in the complaint, not supported by facts are not afforded the presumption of veracity. *Mitchell*, 40 Ohio St.3d at 193. Thus, the focus of our inquiry must be the *facts* alleged in the Vagases' complaint.

{¶14} Count two incorporates the statements of count one of the complaint that summarize the factual background of the water line dispute, allege that Hudson lacked a basis to file the 2006 complaint and did so only on behalf of the Daleys. Next, the Vagases state that Hudson "violated § 1983 of Title 42 of the United States Code[]" "[b]y interfering in a private dispute" and that Hudson deprived the Vagases of their property rights. The remainder of the statements of count two are legal conclusions rather than factual allegations.

{¶15} The Vagases have failed to provide factual statements to clearly delineate the federally protected property right Hudson violated. From the minimal facts contained in the

[1] Although *Twombly* refers to the Federal Rules and the Ohio Rules are applicable here, the pleading requirements under Fed.R.Civ.P. 8(a) and Civ.R. 8(A) are virtually identical.

Vagases' complaint, we are not able to discern whether Hudson allegedly interfered with putative rights to the water lines, use of the water lines, or some right related to the Vagases' real property. Although the Vagases allege that Hudson intervened in a private dispute between the Vagases and the Daleys, and instructed the Vagases to discontinue use of their water line, the Vagases have not met the threshold requirement of a Section 1983 claim to factually allege the deprivation of a federal right. Although we accept the factual allegations of the complaint as true, in light of the paucity of facts, the Vagases have not set forth a claim for relief. See *Hopper* at ¶5.

{¶16} Upon review of count two of the Vagases' third amended complaint, we hold that the trial court did not err in granting Hudson's motion to dismiss count two of the complaint. The Vagases have not alleged sufficient facts in count two of the complaint to support their alleged Section 1983 claim.

III.

{¶17} In light of the above, the Vagases' sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

Additionally, the Ohio Rule was based on the Federal Rule. See the 1970 Staff Notes to Civ.R. 8.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

THOMAS C. LOEPP, Attorney at Law, for Appellants.

CHARLES T. RIEHL, City Solicitor, R. TODD HUNT, Assistant City Solicitor, and AIMEE W. LANE, Attorney at Law, for Appellee.