

RENDERED: FEBRUARY 6, 2015; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2013-CA-000412-MR

ROBERT L. MCAULIFFE

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT  
HONORABLE KAREN A. CONRAD, JUDGE  
ACTION NO. 10-CI-00187

SLEEPY HOLLOW, INC.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

CLAYTON, JUDGE: This is an appeal from the granting of a summary judgment motion dismissing the Appellant Robert McAuliffe's counterclaim for wrongful initiation of civil proceedings. Based upon the following, we affirm the decision of the trial court.

## BACKGROUND INFORMATION

The Appellee, Sleepy Hollow, Inc. (hereinafter “Sleepy Hollow”), is a registered corporation in Kentucky. It is comprised of shareholders and owns approximately 90 acres in Oldham County, Kentucky. On March 3, 2009, at the annual shareholders meeting, McAuliffe requested to be allowed to transfer his share of the Sleepy Hollow property to RLM Properties, LLC (“RLM”). In fact, McAuliffe had already transferred his property and, on December 28, 2009, RLM transferred the property back to McAuliffe. Sleepy Hollow was not aware of either of these transfers of the property.

In February of 2010, Sleepy Hollow filed a Complaint in Oldham Circuit Court asserting that McAuliffe and RLM had committed a fraudulent real estate transaction, had violated their restrictive covenants, had failed to pay dues and assessments for 2008, and had listed individuals on the internet as residents of Sleepy Hollow. McAuliffe and RLM then filed a counterclaim asserting claims for unjust enrichment, wrongful initiation of civil proceedings, abuse of process, infliction of emotional distress, and punitive damages, and asked for sanctions. McAuliffe and RLM also sought to disqualify Sleepy Hollow’s counsel and moved to dismiss the case.

On March 31, 2010, Sleepy Hollow filed an Amended Complaint asking for damages for annoyance and mental suffering as well as punitive damages, sanctions, and a Deed of Correction on the property. On October 15, 2010, the trial court granted McAuliffe and RLM’s motion to dismiss Sleepy

Hollow's claims, but did not rule on the motion to abate communications or to disqualify Sleepy Hollow's counsel. The counterclaims brought by McAuliffe and RLM also remained. Sleepy Hollow filed an appeal of that ruling with our Court. A panel of our Court affirmed the decision of the trial court.

On November 26, 2012, the trial court ruled on Sleepy Hollow's Motion for Summary Judgment regarding the remaining counterclaims against it. The trial court granted a dismissal of the counterclaim for wrongful initiation of civil proceedings finding that Sleepy Hollow had no notice of the transfer of property to RLM at the time it filed suit and that notice was required by the Bylaws. The trial court held as follows:

The Court, after careful consideration of the record and applicable law, determines that under the entirety of the circumstances, it was not unreasonable for Sleepy Hollow to file suit for enforcement of its Bylaws. The investigation McAuliffe suggests would have resolved one of the issues involved in Sleepy Hollow's claims prior to filing. It is unclear to the Court why counsel chose to pursue a search at PVA rather than the County Clerk's office, the location where transfers are routinely recorded. However, PVA maintains records that indicate ownership of real estate parcels. Given that no written notice was ever received, such search cannot be said to be unreasonable.

Even if counsel had discovered the transfer, the remaining issues would have remained unresolved and the subject of dispute. Ultimately, the choice to file suit was not unreasonable under the facts. The effect of the investigation impacted the jurisdiction of the Court and remedies available, but does not undermine the legitimacy of the claims.

The trial court then granted Sleepy Hollow’s Motion for Summary Judgment on the counterclaim of wrongful initiation of civil proceedings, reserving ruling on sanctions. McAuliffe then brought this appeal.

#### STANDARD OF REVIEW

A motion for judgment on the pleadings was filed with the trial court; however, since the trial court relied on factual assertions outside the scope of the pleadings, it treated the motion as one for summary judgment. In reviewing the granting of summary judgment by the trial court, an appellate court must determine whether the trial court correctly found “that there [were] no genuine issues as to any material fact and that the moving party [was] entitled to judgment as a matter of law.” Kentucky Rules of Civil Procedure (CR) 56.03.

“[A] trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only [when] it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. [While] [t]he moving party bears the initial burden of [proving] that no genuine issue of material fact exists, . . . the burden shifts to the party opposing summary judgment to present ‘at least some affirmative evidence showing that there is a genuine issue of material fact for trial.’” *Community Trust Bancorp, Inc. v. Mussetter*, 242 S.W.3d 690, 692 (Ky. App. 2007).

Since summary judgment deals only with legal questions as there are no genuine issues of material fact, we need not defer to the trial court’s decision and

must review the issue *de novo*. *Lewis v. B&R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). With this standard in mind, we will review the issues before us.

## DISCUSSION

McAuliffe asserts that the trial court erred in granting summary judgment because there were material issues of fact. He argues that Sleepy Hollow's submission of affidavits and references to the deposition testimony do nothing to demonstrate the non-existence of factual issues, but instead show that there are numerous factual issues. McAuliffe does not, however, point to any specific facts which are at issue regarding their claim. Affidavits and references to deposition testimony are not an indication of facts in dispute. It may be only a setting forth of specific facts which are germane and are not in dispute. Thus, we find no error on this issue.

McAuliffe also asserts that there was sufficient evidence to create material issues of fact and permit his counterclaim to be decided by a jury. In *Mapother and Mapother, P.S.C. v. Douglas*, 750 S.W.2d 430, 431 (Ky. 1988), the Kentucky Supreme Court cited the Restatement (Second) of Torts, § 674-76 (1977), regarding wrongful initiation of civil proceedings as follows:

§674. General Principle

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for the purpose other than that of securing the proper

adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

§ 675. Existence of Probable Cause

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

(a) correctly or reasonably believes that under these facts the claim may be valid under the applicable law, or

(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

§676. Propriety of Purpose

To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.

The trial court found there was no probable cause for the reasons recited above. We agree with the conclusion of the trial court. Article VI of the Bylaws for Sleepy Hollow require thirty days' written notice of sales. In this case, McAuliffe did not give notice. Thus, we affirm the decision of the trial court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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