

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001225-MR

THE GETTY LAW GROUP, PLLC, F/K/A
GETTY, KEYSER & MAYO, LLP; AND
RICHARD A. GETTY

APPELLANTS

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 08-CI-01105

BOWLES, RICE, MCDAVID,
GRAFF & LOVE, PLLC

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: This appeal arises from a summary judgment by the Pike Circuit Court dismissing an action for wrongful use of civil proceedings brought by Appellants, The Getty Law Group, PLLC, (“Getty”), against the Appellee, Bowles, Rice, McDavid, Graff, & Love, PLLC (“Bowles”). The trial court found that it

would be impossible for Getty to prove that Bowles lacked probable cause in bringing an earlier defamation action. Finding that there were no genuine issues of material fact, we affirm.

Background

These two parties have an extensive and lengthy trial record. What follows is a condensed factual statement of the most relevant facts in this case. Getty filed an action for contingent fees which arose when several clients followed an attorney from Bowles to Getty. During that action, Bowles filed an action in West Virginia (Bowles is a West Virginia law firm) against Getty for defamation. The West Virginia action was stayed pending resolution of the fee litigation action in Pike County. Bowles, therefore, filed a counterclaim in the Pike County litigation action for defamation. The contingent fee case was resolved by final appeal to this court. *The Getty Law Group, PLLC v. Bowles Rice McDavid Graff & Love, PLLC.*, No. 2011-CA-001393-MR, 2012 WL 6061732 (Ky. App. 2012).

The defamation claim was eventually dismissed by the trial court for lack of prosecution. In response to the defamation claim, Getty filed a malicious prosecution action against Bowles. The trial court then correctly converted the action to a wrongful use of civil proceedings action. *Prewitt v. Sexton*, 777 S.W.2d 891, 894 (Ky. 1989). In support of the wrongful use of civil proceedings action, Getty asserted that Bowles did not have a factual or legal basis to support a claim for defamation. Getty propounded interrogatory requests upon Bowles inquiring into Bowles's factual basis for the defamation claim. Many, if not all, of the

discovery requests were not answered to Getty's satisfaction. Some of the interrogatories were objected to on relevancy grounds. Getty filed a motion to compel proper responses, which was never ruled on by the trial court. In support of their defamation action, Bowles referenced complaints filed in the underlying action and an affidavit from the underlying action. Bowles also attempted to use this Court's language in the prior appeal as confirmation of defamation.

Ultimately, Bowles filed two summary judgment motions to have the wrongful use of civil proceedings action dismissed. The first was based on the fact that in order to meet all of the elements of the claim, Getty must prove that it received a favorable termination on the merits of the underlying litigation. That summary judgment motion was denied. Bowles then filed a second summary judgment motion claiming that Getty could not show Bowles lacked probable cause in filing the defamation claim. The trial court granted that summary judgment motion, finding that "it would be impossible for [Getty] to prove [Bowles's] lack of probable cause in bringing the underlying defamation claims." This appeal followed.

Standard of Review

The standard of review governing an appeal of a summary judgment is well-settled. Because a summary judgment involves no fact finding, this Court's review is *de novo*, in the sense that we owe no deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

“[T]he proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). In essence, for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). Therefore, we will find summary judgment appropriate only “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR¹ 56.03.

Analysis

On appeal, Getty contends that the trial court erred in granting summary judgment in Bowles's favor. Getty states that Bowles did not have probable cause to bring the defamation action. In support of this, Getty states that Bowles did not believe in the existence of facts to base a defamation claim.

¹ Kentucky Rules of Civil Procedure.

Additionally, Bowles did not have a legal basis to base a defamation claim because any defamatory statements were privileged as a matter of law. Lastly, Getty contends that Bowles's failure to prosecute the defamation claim is further evidence of a lack of probable cause.

The probable cause element of a wrongful use of civil proceedings action “exists when the person who initiates civil proceedings ‘reasonably believes in the existence of the facts upon which the claim is based, and . . . that under those facts the claim may be valid under the applicable law.’” *Prewitt v. Sexton*, 777 S.W.2d 891, 894 (Ky. 1989) (internal citations omitted). Probable cause “covers both a mistake of law and a mistake of fact.” *Id.* The plaintiff, who is claiming wrongful use of civil proceedings, has the burden “to prove lack of probable cause.” *Id.* at 895-96. “The question of probable cause is related not to whether the facts exist to prove a lawsuit . . . [i]t may flow from a belief that turns out to be unfounded as long as it is not unreasonable.” *Id.* at 896, (quoting *Ammerman v. Newman*, 384 A.2d 637, 640 (D.C. 1978)). “A view of the law that is arguably correct cannot be the basis upon which to charge lack of probable cause. As with the attorney’s understanding of facts, all that is required to establish probable cause is that the attorney’s view of the law is a tenable position.” *Id.* at 897.

Here, Bowles relied on defamatory statements in complaints from the legal proceedings in the prior action to support their defamation claim as giving them a reasonable belief that defamation had occurred. Bowles also pointed to this Court’s discussion in the prior appeal, stating that, “Tokarz, the attorney who

performed the pretrial work in other matters and whom Getty Group has *unceremoniously disparaged*” *Getty Law Group*, 2012 WL 6061732 at *5.

Additionally, Bowles relied on the fact that it was Getty’s responsibility to prove that Bowles did not have probable cause, and essentially that Getty could not prove that. The trial court ruled in Bowles’s favor and ordered that,

[t]here is no issue of fact that Getty made these statements and similar statements and that these statements are defamatory. The Plaintiffs [Getty] argue that the defendant did not have probable cause to file the underlying claim because the only statements that it could prove are privileged having been made in the course of litigation or in anticipation of litigation. However, the issue before the [c]ourt is not whether the Defendant could have proven its defamation claim, but whether it reasonably believed in the existence of facts upon which the claim is based. This inquiry of probable cause, covers both a mistake of law and a mistake of fact, and it exists where the person who initiates civil proceedings ‘reasonably believes in the existence of the facts upon which the claim is based, and . . . that under those facts the claim may be valid under applicable law.’ *Prewitt v. Sexton*, 777 S.W.2d 891, 895 (Ky. 1989). This [c]ourt concludes that it would be impossible for the Plaintiffs to prove the Defendant’s lack of probable cause in bringing the underlying defamation action.

We agree with the trial court’s interpretation of *Prewitt*. *Prewitt* requires that the individual initiating a claim, in this case for defamation, must reasonably believe that their claim is supported by both facts and law. Though Bowles was basing the action on privileged statements, they had a reasonable belief that there was a legal basis for their claim.

It is well settled that pleadings are absolutely privileged. *See Schmitt*, 163 S.W.2d 281. However, all that is required to defeat an action for wrongful use of civil proceedings is that the plaintiff in the original action had a reasonable belief that the action was valid. There were, therefore, sufficient facts to support the idea that Bowles reasonably believed they had facts to support a defamation claim. Whether they actually did have facts outside the pleadings to support the claim is irrelevant.

However, Bowles's attempt to rely on this court's statement in the previous appeal is misguided. The language Bowles is referring to was not a "finding," as purported. It was at best dicta, and has no bearing on the current case.

The last issue raised by Getty is whether Bowles's failure to prosecute the defamation action is further proof of a lack of probable cause. Failure to prosecute an action "may or may not be evidence of lack of probable cause depending upon the circumstances under which the proceedings were withdrawn or dismissed." Restatement (Second) of Torts Section § 675, cmt. B. (1977). Here, Bowles based their decision to not prosecute the claim on financial reasons. That is a reasonable basis and we find that here it is not evidence of lacking probable cause.

Conclusion

For the reasons stated herein, we affirm.

ALL CONCUR.

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