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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000024-MR

RLB PROPERTIES, LTD APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 16-CI-002522

SEILLER WATERMAN, LLC; PAMELA M. GREENWELL;
GORDON C. ROSE; AND PAUL J. HERSHBERG APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; SMALLWOOD AND TAYLOR, JUDGES.

SMALLWOOD, JUDGE: RLB Properties, LTD appeals from an Opinion and Order of the Jefferson Circuit Court which dismissed RLB's claims against Seiller Waterman, LLC, and Pamela Greenwell, Gordon Rose, and Paul Hershberg, lawyers employed by Seiller Waterman, LLC. We find that the trial court erred in

dismissing the claims surrounding the filing of a mechanic's lien and civil conspiracy, but affirm all other aspects of the trial court's judgment.

The Jefferson Circuit Court's recitation of facts set forth in the order dismissing is thorough and will be adopted by this Court.

> This case has its genesis in prior litigation between Plaintiff, RLB Properties, LTD., (hereinafter, "RLB"), owner of the Marmaduke Building on the 4th Street Live strip of Louisville, Jefferson County, Kentucky, and Skyshield Roof & Restoration, L.L.C. (hereinafter, "Skyshield"), a company in the business of roofing and restoration. In January 2014, RLB and its tenant, Sol Azteca's Mexican Restaurant (hereinafter, "Sol Azteca's") contracted with Skyshield for the performance of repairs on Sol Azteca's restaurant premises. Disputes between the parties soon emerged, and Sol Azteca's sued Skyshield for failure to perform the agreed upon repairs.
>
> Skyshield and its principal, Jacob Blanton[1], then retained Seiller Waterman to represent it[sic] in the litigation. On or about August 5, 2014, Skyshield filed a mechanic's lien on the Marmaduke Building, alleging it was owed $1,500,000.00 for labor rendered and materials furnished under its contract with RLB and Sol Azteca's. On or about August 12, 2014, Skyshield filed a Third-Party Complaint against RLB, alleging failure to pay for labor and materials furnished. RLB promptly counterclaimed against Skyshield for breach of contract. On January 29, 2015, RLB, through counsel, sent Seiller Waterman a letter demanding Skyshield release its mechanic's lien, which it alleged was satisfied and facially invalid. Neither Skyshield nor Seiller Waterman responded to this letter.

[1] Skyshield and Blanton shall be referred to collectively as Skyshield throughout the remainder of this Opinion and Order.

During this time, Seiller Waterman employed Greenwell, Hershberg, and Rose as attorneys. Greenwell and Hershberg filed the claim on Skyshield's behalf. Greenwell also filed Skyshield's Certificate of Authority with the Kentucky Secretary of State and listed herself as its service of process agent. Rose served as the scrivener for the mechanic's lien lodged against the Marmaduke Building.

On March 16, 2015, Jefferson Circuit Court, Division Four, the Hon. Charles Cunningham presiding, granted Defendants' motion to withdraw as counsel for Skyshield, based upon the cited irreconcilable differences and allowed Skyshield 30 days to obtain new counsel. Skyshield never obtained substitute counsel. On May 29, 2015, the Court entered RLB's tendered order dissolving the mechanic's lien. On July 31, 2015, the Court entered default judgment against Skyshield and awarded RLB $924,767.39 in compensatory damages, $2,000,000.00 in punitive damages, $68,257.29 in attorney fees, and $63,400.00 in statutory penalties for failure to release a mechanic's lien in a timely manner.

On May 31, 2016, RLB filed suit against Defendants for negligence, negligent supervision, wrongful use of civil proceedings (hereinafter, "WUCP"), abuse of process, slander of title, filing an illegal lien, and civil conspiracy. The basis, essentially, for all RLB's claims was its assertion that Defendants knew or should have known that Skyshield was not owed any payment from RLB, and that the mechanic's lien and counterclaim they prepared were "completely devoid" of any factual basis or legal support. On June 27, 2016, Defendants moved to dismiss. Defendants argued the claims for negligence and WUCP failed to state a claim upon which relief could be granted. Regarding RLB's other claims, Defendants argued they were barred by the applicable statute of limitations.

Appellees moved for a judgment on the pleadings and to dismiss the cause of action pursuant to Kentucky Rule of Civil Procedure (CR) 12.03.

> [A] judgment on the pleadings can be granted only if, on the admitted material facts, the movant is clearly entitled to a judgment. Relief must be denied if there is a material issue of fact . . . When a party moves for judgment on the pleadings, he admits for the purposes of his motion not only the truth of all of his adversary's well-pleaded allegations of fact and fair inferences therefrom, but also the untruth of all of his own allegations which have been denied by his adversary. The question thus presented is one of law and requires an examination of the pleadings.

Archer v. Citizens Fidelity Bank & Trust Co., 365 S.W.2d 727, 729 (Ky. 1962) (citations omitted). The trial court agreed with Appellees' arguments and granted the motion to dismiss. This appeal followed.

> The purpose of [CR 12.03] is to expedite the termination of a controversy where the ultimate and controlling facts are not in dispute. It is designed to provide a method of disposing of cases where the allegations of the pleadings are admitted and only a question of law is to be decided. . . . The basis of the motion is to test the legal sufficiency of a claim or defense in view of all the adverse pleadings.

City of Pioneer Village v. Bullitt Cty. ex rel. Bullitt Fiscal Court, 104 S.W.3d 757, 759 (Ky. 2003). Our standard of review for appeals concerning CR 12.03 is *de novo*. *Scott v. Forcht Bank, NA*, 521 S.W.3d 591, 594 (Ky. App. 2017).

RLB's first argument on appeal is that the trial court erred in dismissing its negligence claim against Appellees. The trial court dismissed the

negligence claims because RLB was not a client of Appellees nor was it a third-party beneficiary to Appellees' legal work. We agree with the trial court.

An attorney can only be liable for a claim of negligence brought by a client or a "person intended to be benefited by his performance irrespective of any lack of privity[.]" *Baker v. Coombs*, 219 S.W.3d 204, 208-09 (Ky. App. 2007) (citation and internal quotation marks omitted). Here, RLB was neither a client nor a third-party beneficiary of Appellees' legal work. As the relationship between RLB and Appellees was adversarial, RLB could have no expectation to benefit from Appellees' services. The trial court correctly dismissed this claim.

RLB's second argument on appeal is that the trial court erred in dismissing its WUCP claim.[2] The elements of a WUCP claim are: "(1) lack of probable cause, (2) improper purpose, and (3) what type of injury is compensable. This cause of action requires that in the prior lawsuit the tortfeasor acted 'without probable cause, and primarily for a purpose other than that of securing the proper adjudication of the [prior] claim.'" *Prewitt v. Sexton*, 777 S.W.2d 891, 894 (Ky. 1989) (citation omitted). The trial court dismissed Appellant's claim because it believed RLB failed to meet the improper purpose element. We agree.

RLB argues that Appellees' improper purpose in filing the third-party complaint against it was to enrich themselves in the form of attorney fees and to

[2] A WUCP claim is brought by litigants who believe they are victims of a baseless lawsuit.

enrich their clients. Appellees argue that their purpose in filing the claim was not improper because all attorneys seek payment for their services and damages for their clients.

An improper purpose can be defined as "bringing the prior lawsuit primarily for a purpose other than that of securing the proper adjudication of the claim." *Id.* (citation and internal quotation marks omitted). As the trial court correctly pointed out, there is no Kentucky case law indicating whether instigating judicial proceedings solely to earn legal fees or damages qualifies as an improper purpose. The trial court relied on secondary sources and foreign authority to support its dismissal of the WUCP claim. The court cited to commentary in the Restatement (Third) of the Law Governing Lawyers. We believe this citation is beneficial to our analysis.

> [R]egardless of the client's purpose, even if a lawyer "has no probable cause and is convinced that his client's claim is unfounded, he is still not liable [for wrongful use of civil proceedings] if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his claim". A desire to earn a contingent or other fee does not constitute an improper motive. But if a lawyer acts without probable cause "and for an improper purpose, as, for example, to put pressure upon the person proceeded against in order to compel payment of another claim of his own or solely to harass the person proceeded against by bringing a claim known to be invalid, he is subject to the same liability as any other person". . . . The lawyer's motive is assessed separately from that of the client. However, the client's motives, if known to a

> lawyer, may constitute evidence bearing on the lawyer's motives.

Restatement (Third) of the Law Governing Lawyers § 57 cmt. d (2000) (citations omitted). The trial court found that RLB did not plead facts which would indicate, either directly or inferentially, that Appellees' participation in the underlying litigation was motivated by malice toward RLB.

Keeping in mind that Appellees' motivation for participating in the Skyshield action must be assessed separately from Skyshield itself, we agree with the trial court that RLB did not assert facts in its complaint that would allow the WUCP claim to move forward. Appellees acted on behalf of their client and not for any reason that would benefit them outside the normal course of the judicial proceedings.

RLB's third argument on appeal is that the trial court erred in dismissing its abuse of process claim. RLB alleges Appellees committed the act of abuse of process when they filed the third-party complaint on behalf of Skyshield. Kentucky Supreme Court has stated that

> an action for abuse of process is "the irregular or wrongful employment of a judicial proceeding[,]" and has two essential elements: 1) an ulterior purpose, and 2) a willful act in the use of the process not proper in the regular conduct of the proceeding. We emphasized, again citing W. Prosser, *Handbook of the Law of Torts,* § 121 (4th ed. 1971), that some definite act or threat not authorized by the process, or aimed at an objective which is not a legitimate use of the process was required. The

> act or threat usually manifested by some "form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property on the payment of money" using the process as a threat or a club. The process is used as a form of extortion, and "it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort." Notably, our analysis . . . incorporates the concept that "there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion even though with bad intentions."

Sprint Commc'ns Co., L.P. v. Leggett, 307 S.W.3d 109, 114 (Ky. 2010) (citations omitted).

The trial court dismissed this cause of action because it believed it was barred by the statute of limitations. "[A]n action for abuse of process will not lie unless there has been an injury to the person or his property." *Raine v. Drasin,* 621 S.W.2d 895, 902 (Ky. 1981) (abrogated on other grounds by *Martin v. O'Daniel*, 507 S.W.3d 1 (Ky. 2016)). In Kentucky, a personal injury claim must be brought within one year after the cause of action accrues unless otherwise specifically provided by statute. Kentucky Revised Statute (KRS) 413.140(1)(a). Here, the trial court held that the statute of limitations for abuse of process began to run when the third-party complaint was filed by Appellees on August 12, 2014. The abuse of process claim was not filed until May 31, 2016, well outside the one-year statute of limitations.

RLB argues that the statute of limitations did not begin to run until the trial court entered a judgment against Skyshield. RLB believes it is impossible to know an opposing party's ulterior purpose until after the cause of action concludes. This is a different argument than alleged in RLB's complaint. In its complaint, RLB did not allege any continuing acts of abuse of process during the pendency of the Skyshield case or after its conclusion, only the filing of the third-party complaint. However, because RLB raised the issue in its response to Appellees' motion to dismiss, we will address it.

We agree with the trial court that the abuse of process cause of action accrued when the complaint was filed in August 2014. In making its decision, the trial court relied on the unpublished case of *DeMoisey v. Ostermiller*, No. 2014-CA-001827-MR, 2016 WL 2609321, (Ky. App. May 6, 2016), and we, too, find the reasons in that case persuasive.

In *DeMoisey*, another panel of this Court, as a matter of first impression, determined when the statute of limitations for abuse of process claims begins to run. Therein, the Court held that "while the determination in a malicious prosecution centers on the legal justification for the action, which cannot be resolved until the termination of the action, abuse of process centers on the motivation behind the action, which is capable of ascertaining before conclusion of the action." *Id.* at 14. Further, the Court stated that "the rule is virtually universal

that the statute of limitations for an abuse of process claim commences 'to run[] from the termination of the acts which constitute the abuse complained of, and not from the completion of the action in which the process issued.'" *Id.* (citation omitted).

Unlike malicious prosecution claims, an abuse of process claim does not require a successful outcome in the original action. "Rather, the focus of [an abuse of process] claim is whether there was a willful act in the use of the process, which was not proper in the regular conduct of the proceeding. Thus, the claim rises or falls on the conduct occurring 'at the time the [underlying] action was filed.'" *Id.* (footnote and citation omitted). As we agree with the trial court, and the reasoning in *DeMoisey*, we find that RLB's claim for abuse of process is barred by the one-year statute of limitations.

RLB's fourth argument on appeal is that the trial court erred in dismissing its slander of title claim. Slander of title "is an action for injury to real property rights resulting from disparagement of title to real estate." *Ballard v. 1400 Willow Council of Co-Owners, Inc.*, 430 S.W.3d 229, 236 (Ky. 2013). In its complaint, RLB claimed Appellees slandered the title of the Marmaduke Building when they filed the false and unjustified mechanic's lien on August 5, 2014. The trial court dismissed this claim finding that the statute of limitations had run.

Generally, the statute of limitations for slander of title is five years. KRS 413.120(6); *Ballard*, *supra*. However, the trial court herein relied on KRS 413.245 which states in relevant part:

> Notwithstanding any other prescribed limitation of actions which might otherwise appear applicable, except those provided in KRS 413.140, a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.

The trial court held that because the slander of title claim arose out of the services of a lawyer, then this specific one-year statute of limitations would apply instead of the more general five-year period.

The professional services of lawyers are governed by the one-year statute of limitations set forth in KRS 413.245. *Abel v. Austin*, 411 S.W.3d 728, 737-38 (Ky. 2013). The title of KRS 413.245 is "Actions for professional services malpractice" and the Kentucky Supreme Court has held that KRS 413.245 "is the *exclusive* statute of limitations governing claims of attorney malpractice." *Abel* at 738 (emphasis in original).

"[I]n construing a statute, our goal is to give effect to the intent of the General Assembly. 'To determine legislative intent, we look first to the language of the statute, giving the words their plain and ordinary meaning.'" *Id.* at 738

(citations omitted). In addition, "[t]he applicable rule of statutory construction where there is both a specific statute and a general statute seemingly applicable to the same subject is that the specific statute controls." *Id.* (citation and internal quotation marks omitted).

While we agree with Appellees and the trial court that KRS 413.245 is a more specific statute of limitations than KRS 413.120 and would seemingly apply to this case, we find its applicability questionable under the facts at hand. KRS 413.245 is specifically intended for professional service malpractice, in tort or contract. Here, RLB has alleged that the filing of the mechanic's lien was not based in fact, was done maliciously and in bad faith, and could have even been done to the detriment of a third party. To escape liability under the guise of attorney professional services would be unconscionable if the obligations surrounding the claims are true. Based on the allegations asserted, the slander of title claim is totally outside the scope of negligent performance of professional services, would not constitute negligent malpractice and would not fall under the one-year professional malpractice statute of limitations.

Since this case was dismissed on the pleadings, no discovery had taken place and we must take RLB's allegations as true. We find that RLB should be allowed to perform some discovery around the slander of title claim. If RLB cannot provide some evidence to suggest the mechanic's lien was filed for some

malicious purpose, then the one-year statute of limitations would apply and the claim could be dismissed pursuant to a motion for summary judgment. We therefore reverse and remand for additional proceedings as to this issue.

RLB's fifth argument on appeal is that the trial court erred in dismissing its claims based on KRS 434.155 and KRS 446.070. KRS 434.155 makes it illegal to file a lien when the filer knows the lien is groundless or false. KRS 446.070 states that "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." RLB asserts that when these two statutes are read together, it allows RLB to sue for damages if Appellees filed an unjustified lien.

RLB's claim brought pursuant to KRS 446.070 would normally be subject to a five-year statute of limitations. KRS 413.120(2). The trial court, however, subjected this cause of action to the one-year statute of limitations found in KRS 413.245. For the reasons set forth above, we agree that the one-year statute of limitations might apply in this case, but that additional discovery must be performed to determine if the lien was filed maliciously, thereby not falling under the one-year statute of limitations.

RLB's sixth and final argument on appeal is that the trial court erred in dismissing its civil conspiracy claim. One is subject to liability for civil conspiracy when

> he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct separately considered, constitutes a breach of duty to the third person.

James v. Wilson, 95 S.W.3d 875, 897 (Ky. App. 2002) (footnote omitted). If there is no tortious act, then there can be no civil conspiracy. *Id.* at 897-98.

Because we are reversing for additional discovery due to the mechanic's lien issue, this civil conspiracy claim could have merit; therefore, we reverse and remand as to this issue as well.

Based on the foregoing, we hold that the trial court erred in dismissing the claims revolving around the mechanic's lien and civil conspiracy, but correctly dismissed RLB's other claims. We therefore affirm in part, reverse in part, and remand for additional proceedings.

TAYLOR, JUDGE, CONCURS.

CLAYTON, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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