

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-002214-MR

JAMES D. LAWSON

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
CIVIL ACTION NO. 05-CI-00940

OFFICER JOHN HUNT; SGT. EDDIE SWORD;
PIKEVILLE POLICE DEPARTMENT

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, SENIOR JUDGE: James D. Lawson appeals from an order of the Pike Circuit Court granting a motion for summary judgment filed on behalf of Officer John Hunt, Sgt. Eddie Sword, and the Pikeville Police Department (the appellees).² Lawson

¹ Senior Judges Michael L. Henry and David C. Buckingham sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

² Lawson represented himself at the trial level and continues to represent himself on appeal.

argues that the trial court erred in failing to include findings of fact to support its order and abused its discretion in awarding the appellees summary judgment after finding that there were no genuine issues of material fact. We affirm in part, reverse in part, and remand for further proceedings.

Lawson was arrested by officers of the Pikeville Police Department, including Hunt and Sword, on November 16, 2003, near the Super America store in Pikeville. He was charged with driving under the influence, possession of marijuana, and possession of drug paraphernalia. On September 21, 2004, following a jury trial, Lawson was acquitted of all charges.

Believing that his arrest and prosecution were unwarranted, Lawson filed a civil complaint in the U.S. District Court for the Eastern District of Kentucky on September 28, 2004. He alleged that the appellees herein violated his civil rights. On November 23, 2004, the federal court dismissed his claim without prejudice, apparently because the complaint was confusing and failed to specify the exact nature of the claim.

On July 6, 2005, Lawson renewed his claim by filing a civil complaint in the Pike Circuit Court alleging violation of his civil rights. He alleged in his complaint that he had been subjected to harassment, criminal conversation, conspiracy, false arrest, illegal search, and malicious prosecution.

Following their answer denying the allegations, the appellees moved the court to award them summary judgment, arguing that Lawson's claims were barred by the statute of limitations and that the officers had probable cause to arrest him. Lawson brought a cross-motion for summary judgment. On September 30, 2005, the trial court

entered an order denying Lawson's cross-motion and granting the appellees' motion. The court did not make any findings of fact in its order.³ This appeal by Lawson followed.

The standard of review of a trial court's grant of summary judgment is “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.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky.App. 1996). Summary judgment is proper when it appears that it would be impossible for the adverse party to produce evidence at trial supporting a judgment in his favor. *James Graham Brown Foundation, Inc. v. St. Paul Fire Marine Ins. Co.*, 814 S.W.2d 273, 276 (Ky. 1991). An appellate court must review the record in a light most favorable to the party opposing the motion and must resolve all doubts in its favor. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

Lawson first argues that the trial court erred when it failed to provide written findings of fact and conclusions of law supporting its order. CR⁴ 52.01 provides that “[f]indings of fact and conclusions of law are unnecessary on decisions on motions under Rules 12 or 56 ...” A summary judgment motion is a motion under CR 56. Therefore, the court here was not required to state findings of fact or conclusions of law to support its decision. Thus, Lawson's argument in this regard is without merit.

Lawson next contends that the trial court abused its discretion in granting the motion for summary judgment because there were genuine issues of material fact.

³ It would have been helpful to our review of this case if the trial court had more specifically explained its reasons for granting the summary judgment motion of the appellees.

⁴ Kentucky Rules of Civil Procedure.

We agree in part. However, most of the causes of action alleged in Lawson's complaint were barred by the applicable statute of limitations.

The incident giving rise to Lawson's claims was his November 16, 2003, arrest. Lawson argues that the statute of limitations does not bar his complaint because he filed his original complaint in U.S. District Court for the Eastern District Court of Kentucky on September 28, 2004, well within the one-year period for bringing such claims. *See* KRS 413.140(1)(a) and (c), which provide that claims for personal injury, malicious prosecution, conspiracy, arrest, and criminal conversation must be filed within one year of when the cause of action accrued. *See also Collard v. Kentucky Bd. Of Nursing*, 896 F.2d 179 (6th Cir. 1990) (providing that civil rights actions brought in Kentucky pursuant to 42 U.S.C. § 1983 are limited by the one-year statute of limitations of KRS 413.140(1)(a)). Because Lawson's complaint was confusing and failed to specify the nature of his claims, the federal court dismissed it without prejudice on November 23, 2004, allowing Lawson the option to re-file the lawsuit. Lawson did not appeal the order or re-file the complaint in federal court, but he instead filed his claim anew in the Pike Circuit Court on July 6, 2005.

Based on our review of the record, most causes of action within Lawson's complaint were barred by the statute of limitations. In cases, such as this one, where the federal courts have supplemental jurisdiction with the state courts, 28 U.S.C. § 1367(d) requires that the period of limitations for a claim be tolled while it is pending in federal court “and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.”

Here, Lawson filed his claim first in federal court on September 28, 2004, approximately 10 months after the arrest. Thus, he filed within the one-year statute of limitations period with slightly less than two months to spare. The period of limitations for his claim was then tolled during the entire time it was pending in federal court, plus 30 days. The federal court dismissed his claim on November 23, 2004. Consequently, the tolling period lasted until December 23, 2004. Following that, the clock began to run again, and Lawson was required to re-file his claim no later than slightly less than two months after that date. However, Lawson did not file his claim in Pike Circuit Court until July 2005, well outside the statute of limitations period.

Lawson acknowledges the tardiness of his complaint in his brief, but he claims the lapse of five months over the one-year time limitation was due to his not having had access to an adequate law library while incarcerated. Thus, he argues that he should not be bound by the applicable statute of limitations. Lawson cites no authority that would allow this as a defense to the enforcement of the statute of limitations, and we know of none. Thus, Lawson's claim was time-barred, and the circuit court did not err in granting summary judgment to the appellees on those parts of Lawson's claims upon which the statute of limitations had run.

While most of Lawson's claims were required to be filed within one year of when the incident occurred, Lawson contends that his claim for malicious prosecution was not time-barred because that cause of action did not accrue until his acquittal at trial on September 21, 2004. Thus, Lawson argues that because he filed his action in Pike

Circuit Court on July 6, 2005, the statute of limitations does not bar it. The appellees do not contest the statute of limitations issue in their brief. We agree with Lawson.

The elements necessary to maintain an action for malicious prosecution are set forth in *Raine v. Drasin*, 621 S.W.2d 895 (Ky. 1981), as follows:

(1) the institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings, (2) by, or at the instance, of the plaintiff, (3) the termination of such proceedings in defendant's favor, (4) malice in the institution of such proceeding, (5) want or lack of probable cause for the proceeding, and (6) the suffering of damage as a result of the proceeding.

Id. at 899. Because the termination of the case against Lawson in his favor occurred when he was acquitted by the jury, his cause of action for malicious prosecution did not accrue until that time.

Rather than address Lawson's statute of limitations argument in its brief, the appellees contend that summary judgment in their favor was proper because “the undisputed facts support the conclusion that Officer Hunt had probable cause to arrest [Lawson] for operating a motor vehicle under the influence of alcohol and drugs, possession of marijuana and possession of drug paraphernalia.”⁵ They rely on the affidavits of Officer Hunt and Sgt. Sword that were submitted to the circuit court in support of their summary judgment motion.⁶ Further, citing *Hubble v. Johnson*, 841

⁵ “Malice and want of probable cause are the essentials in an action for malicious prosecution.” *Smith v. Stokes*, 54 S.W.3d 565, 567 (Ky.App. 2001). In a malicious prosecution action, malice “may be inferred from a lack of probable cause.” *Massey v. McKinley*, 690 S.W.2d 131, 133 (Ky.App. 1985).

⁶ The appellees had apparently not deposed Lawson or otherwise sought discovery from him.

S.W.2d 169, 171 (Ky. 1992), they note that a party opposing a properly supported motion for summary judgment cannot defeat it without presenting some affirmative evidence demonstrating that there is a genuine issue of material fact. They contend that Lawson failed to present such evidence and that he was required to do so by counter-affidavit. Thus, the appellees contend that the evidence is “undisputed” and that they were entitled to summary judgment.

In *Neal v. Welker*, 426 S.W.2d 476 (Ky. 1968), the court stated that “[w]hen the moving party has presented evidence showing that despite the allegations of the pleadings there is no genuine issue of any material fact, it becomes incumbent upon the adverse party to counter that evidentiary showing by some form of evidentiary material reflecting that there is a genuine issue pertaining to a material fact.” *Id.* at 479.

CR 56.03 allows for the filing of affidavits in opposition to summary judgment motions. But, while a party opposing a motion for summary judgment may file opposing affidavits, it is not under a duty to do so. *Davis v. Dever*, 617 S.W.2d 56, 57 (Ky.App. 1981).

Further, the failure of a party to present evidence contradicting evidence presented by a party in support of a summary motion “is not in itself sufficient to justify summary judgment.” *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 631 (Ky.App. 1979). The court in the *Hartford* case further stated that “[e]ven though there may be an absence of controverting evidence, the evidence presented by the moving party must be of such a nature that no genuine issue of fact

remains to be resolved.” *Id.* See also *Carter v. Jim Walter Homes, Inc.*, 731 S.W.2d 12, 14 (Ky.App. 1987).

In this case, the appellees disputed the allegations in Lawson's complaint with their affidavits. However, merely because a party makes statements or disputes allegations in a sworn affidavit, that does not make those statements true or even “undisputed”. The statements made in the affidavits are not “evidence of such a nature that no genuine issue of fact remains to be resolved.” See *Hartford, supra*. The affidavits merely contradicted the allegations in Lawson's complaint; they did not show the absence of a genuine issue of material fact. Thus, Lawson was not required to file a counter-affidavit.⁷

The appellees also argue that the issue of probable cause is subject to determination by the trial court. In support of that argument, they cite *Jeffers v. Heavrin*, 10 F.3d 380 (6th Cir. 1993). If the facts were not in dispute, we would agree. Here, however, the facts as alleged by the appellees support a finding that there was probable cause, but the facts as alleged by Lawson clearly do not. The court may not decide the facts and may not render summary judgment unless there is no genuine issue of material fact. See Kentucky Rules of Civil Procedure (CR 56.03). At this point in the litigation, the facts remain in dispute.

In short, as the statute of limitations had not run on the malicious prosecution claim and as there were fact issues remaining to be determined, we conclude

⁷ We also note that the allegations of a *pro se* litigant's complaint are held to less stringent standards than formal pleadings drafted by attorneys. *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

that the court erred in awarding summary judgment on that portion of Lawson's complaint.

The order of the Pike Circuit Court is affirmed in part, reversed in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Lawson
Beattyville, Kentucky

BRIEF FOR APPELLEE:

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