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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-002233-MR

GLORIA JEAN GEORGE

APPELLANT

v.

APPEAL FROM MARION CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 01-CI-00088

THEODORE H. LAVIT and STEVE
MASTERTSON

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; KNOPF,¹ SENIOR JUDGE.

ABRAMSON, JUDGE: In 1996, Appellee Steve Masterson, represented by Appellee Theodore H. Lavit, filed a breach of contract suit against Appellant Gloria Jean George in the Marion Circuit Court. During the course of an April, 2000 jury trial of the case, Lavit repeatedly engaged in disruptive conduct, violated procedural rules, and disregarded instructions from the trial

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

court, resulting in a mistrial. On June 1, 2000, the trial court entered an order outlining Lavit's misconduct which led to the mistrial. Ultimately, a second trial was held on October 2005, this time resulting in a directed verdict in George's favor.

On April 5, 2001, George filed a complaint against Lavit and Masterson based on Lavit's improper conduct in the first trial of the breach of contract action. Specifically, George alleged:

Mr. Lavit has acknowledged in his advertising, his experience and therefore awareness of what the Rules of Evidence and Supreme Court Rules provide, namely that he owed a duty to all parties, including Gloria George, to conduct himself in a manner which was fair and to promote efficiency during litigation. To gain an unfair advantage over Gloria George, the Defendant Lavit made a mockery of the judicial process and breached the duty he owed to Gloria George in the following respects:

- (a) Repeatedly alluding to statements which were not admissible,
- (b) Improper conduct resulting in incessant delays.

Before any discovery was undertaken by the parties, Lavit and Masterson moved to dismiss George's complaint for failing to state a claim for which relief may be granted. In her response opposing the motion, George characterized her claim not as one based on violation of a duty (as expressly stated in her

complaint), but rather as one for abuse of process. Apparently accepting this, the trial court granted the motion to dismiss on the ground that George had offered no proof of ulterior motive, a necessary element in an abuse of process claim. This appeal followed, and we now affirm.

A dismissal pursuant to Kentucky Rule of Civil Procedure (CR) 12.02(f) is appropriate only if it appears the pleading party could not prove any set of facts in support of her claim that would entitle her to relief. Wood v. Wyeth-Ayerst Laboratories, Division of American Home Products, 82 S.W.3d 849, 851 (Ky. 2002) (citing Pari-Mutuel Clerks' Union v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977)). In determining whether a complaint should be dismissed under this rule, the question is a matter of law. James v. Wilson, 95 S.W.3d 875, 884 (Ky. App. 2002). Thus, our review is *de novo*.

In her complaint, George references breach of a duty owed by Lavit (and Masterson through his counsel) that arises from Lavit's knowledge of the "Rules of Evidence adopted by Kentucky and the Supreme Court Rules governing conduct for lawyers." However, Kentucky law does not recognize such a duty as the basis for a cause of action against an attorney. In Hill v. Willmott, 561 S.W.2d 331, 334 (Ky. App. 1978), we held that the American Bar Association's Code of Professional

Responsibility establishes standards of conduct but does not provide a private right of action.

Nowhere does the Code of Professional Responsibility or the Rules [of Appellate Procedure] attempt to establish standards for civil liability of attorneys for their professional negligence. This is not to say that a cause of action cannot be asserted for negligence on the part of an attorney. All we are holding is that the duty set forth in the Code and the Rules establishes the minimum level of competence for the protection of the public and a violation thereof does not necessarily give rise to a cause of action.

Similarly, other than a claim for attorney negligence, we know of no private right of action conferred on a third party by the Kentucky Rules of Evidence or our Supreme Court rules. Rather, "[a]n attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity." . . . We believe this to be a proper statement of the law in this Commonwealth." Hill, *supra* at 334 (citing Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971)).

Because Lavit was counsel for the party who brought suit *against* George, it is clear that George was not, and could not have been, "a person intended to be benefited by [Lavit's] performance." *Id.* As Lavit was neither in privity with George nor providing services for which she was an intended beneficiary, he owed George no duty of legal competence. Thus,

even when viewed in a light most favorable to her, George's complaint alleging Lavit's violation of this phantom duty fails to state a claim that is recognized under Kentucky law. Accordingly, the trial court did not err in dismissing the complaint as pled.

Despite the plain language in her complaint to the contrary, George insists that her claim is not based on Lavit's alleged violation of a duty to exercise legal competence but rather is premised on abuse of process. Assuming George's complaint was amended to assert such a claim, dismissal would still be appropriate given the requirements of that particular cause of action.

Abuse of process differs from malicious prosecution in that malicious prosecution consists of commencing an action or causing process to issue maliciously or without justification. Abuse of process, however, consists of "the employment of legal process for some other purpose than that which it was intended by law to effect." *Raine v. Drasin*, Ky., 621 S.W.2d 895 (1981); *Flynn v. Songer*, Ky., 399 S.W.2d 491 (1966).

Simpson v. Laytart, 962 S.W.2d 392, 394 (Ky. 1998). The essential elements for abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. Bonnie Braes Farms, Inc. v. Robinson, 598 S.W.2d 765 (Ky. App. 1980).

George contends that Lavit's misconduct during the April 2000 trial was orchestrated to "avoid a fair and judicious conclusion of the matter" and to ensure "that the matter would never proceed to the jury room at that trial." Even if George is correct that Lavit's misconduct was undertaken for the express purpose of securing a mistrial, George has not alleged an "ulterior purpose" sufficient to sustain an abuse of process claim.

In Kentucky, even though a party acts with malevolent intentions, if he has done nothing more than carry out the legal process to its authorized conclusion an abuse of process claim will not lie. Simpson, *supra* at 394-95. In the present matter, Lavit repeatedly and apparently intentionally violated evidentiary rules and perhaps ethical standards, but he did not pervert the judicial process to some ulterior purpose. At worst, Lavit's conduct during the 2000 trial was an effort to achieve a favorable result for his client through questionable means. However, advancing a client's interest is a legitimate, recognized goal within the overall judicial process, not an "ulterior purpose." Thus, the trial court did not err in dismissing the abuse of process claim alleged in George's response to the motion to dismiss.

To the extent George was damaged by Lavit's trial misconduct, she had two possible avenues of relief. CR 41.02

allows a party to move for involuntary dismissal for "failure of the plaintiff . . . to comply with these (civil) rules or any order of the court. . . ." A dismissal would have ended the matter and avoided a second trial. Alternatively, George could have moved the trial court to hold Lavit in civil contempt and award compensatory damages. See White v. Sullivan, 667 S.W.2d 385 (Ky. App. 1983) (trial court can award compensatory damage to party who has suffered financial injury as a result of the contemnor's action).

In summary, while Lavit's conduct at the April 2000 trial may have been unprofessional, it cannot sustain a claim for abuse of process. Even if George were allowed to undertake discovery in this matter and were able to produce irrefutable proof that Lavit acted with a questionable or malevolent motive, the result herein would be the same. For these reasons, we affirm the Marion Circuit Court's final judgment dismissing the complaint.

ALL CONCUR.

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