STATE OF MICHIGAN

COURT OF APPEALS

LEE ROY TEMROWSKI, JR.,

Plaintiff-Appellant,

v

ROBERT KENT and VALERIE LONG,

Defendants-Appellees.

UNPUBLISHED
September 9, 2021

No. 352207
Ingham Circuit Court
LC No. 19-000484-NO

Before: RONAYNE KRAUSE, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. (*concurring in part, dissenting in part*).

I agree with the majority that summary disposition of several of plaintiff's claims was warranted under MCR 2.116(C)(8), but I disagree that plaintiff failed to state a claim of malicious prosecution. Further, I conclude that the trial court erred by limiting discovery and, based on the limited record before us, erred by granting defendants summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity.

I. BACKGROUND

Plaintiff is an attorney who successfully secured payment of no-fault insurance benefits for his client in a first-party claim with Allstate Insurance Company. Plaintiff asserted an attorney's lien on the proceeds of the no-fault insurance claims. Plaintiff's client had received medical treatment from Michigan State University for injuries resulting from the auto accident.

On three occasions Allstate sent plaintiff a check jointly issued to his law firm and MSU for payment of services rendered by MSU. Each time plaintiff returned the check to Allstate, requesting that the insurance company make the checks payable to his law firm and his client.

Plaintiff received a fourth check from Allstate that was again jointly issued to plaintiff's law firm and MSU. Plaintiff asserts that he intended to send this check back to Allstate, but he received a phone call from defendant Valerie Long, a medical biller for MSU. Per her affidavit, Long has discretion to contact a patient's attorney regarding outstanding claims. According to plaintiff, he and Long had a long discussion about the check issue. Plaintiff maintains that he and Long reached an agreement where he would endorse the check on MSU's behalf, take 20% of the

check as opposed to his agreed upon fee of 33%, and that he would send the balance of the proceeds to MSU. Long, however, denies that she and plaintiff reached an agreement and asserts that she told him that she needed to consult her supervisor and that after doing so she left plaintiff a voice mail instructing him to endorse the checks on his law firm's behalf and then send the check to MSU.

There is no dispute that plaintiff thereafter endorsed the check on behalf of himself and MSU, retained $68.40 (20%) and sent a check for the balance to Allstate for distribution to MSU. Sometime thereafter defendant Robert Kent became involved. According to plaintiff's complaint, Kent, who is an attorney in MSU's Office of General Counsel, left a voice mail for plaintiff on September 27, 2017, inquiring about the $68.40 still owed on the client's account after MSU received payment from Allstate. In a reply e-mail, plaintiff explained the history of the case, Allstate's repeated issuance of joint checks to plaintiff's law firm and MSU, plaintiff's rejection and return of those checks, and the agreement he claims he reached with Long[1] that he would accept only 20% of the fee and send MSU a check for the remaining 80%. Plaintiff ended the e-mail by suggesting that, if MSU was unhappy with the agreement, that all of the proceeds be returned to Allstate and "we can continue to battle it out in court over the payment of your bills."

In response, Kent characterized plaintiff's explanation about the oral agreement he reached with Long as "unreasonable." He explained that the Office of General Counsel handles all legal matters for MSU and that it was irresponsible or negligent for plaintiff to believe that he could call an MSU employee and enter into an oral agreement to provide MSU with legal services. Kent's e-mail concluded, "If you do not agree to pay to the University the remainder of the amount due, I will contact the appropriate authorities."

Plaintiff responded in an e-mail in which he made several assertions. First, he stated that he was contacted by Long, not the other way around as Kent had indicated. Moreover, he argued, if no agreement had been reached between plaintiff and Long, why would he take only 20% as opposed to his agreed-upon fee of 33%? And why would he not send the check back to Allstate and request a check jointly issued to his law firm and his client, as he had done on multiple prior occasions? Plaintiff denied any wrongdoing and again suggested that all funds be returned to Allstate.

In reply, Kent informed plaintiff that he spoke with Long and that she denied reaching any agreement with plaintiff regarding the check. Kent reiterated that plaintiff was not representing MSU and stated that plaintiff's attempt to enforce an attorney lien on the check from Allstate was "improper"; that plaintiff's "unauthorized endorsement" of MSU on the check "creates serious ethical concerns"; and that he had "an ethical obligation" to report plaintiff's conduct and "plan[ned] to do so."

In the final e-mail between plaintiff and Kent that is part of the record, plaintiff reiterated that he and Long had reached an agreement but that given the continued dispute, all funds should be returned to Allstate and the matter resolved in civil litigation. Kent then reported plaintiff to

[1] At the time, plaintiff and Kent did not know Long's identity, but there is now no dispute that Long is who plaintiff spoke to on the phone.

the MSU Police Department, which eventually led to a criminal complaint being issued for two counts of uttering and publishing and one count of misdemeanor larceny. At his arraignment, plaintiff pleaded not guilty and while he was initially bound over following a preliminary examination, the circuit court promptly quashed the bindover and all charges were dismissed.

Plaintiff brought the instant suit, alleging various torts, including malicious prosecution and abuse of process, against Kent and Long. In lieu of an answer, defendants moved for summary disposition under MCR 2.116(C)(7) (governmental immunity) and (C)(8) (failure to state a claim). After granting defendants' motion to limit discovery, the trial court granted summary disposition on the basis of governmental immunity.

II. ANALYSIS

A. MCR 2.117(C)(7) & DISCOVERY

When reviewing a motion brought under MCR 2.116(C)(7), "the contents of the complaint must be accepted as true unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant." *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). "If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate." *Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010) (citation omitted).

Governmental employees are entitled to the affirmative defense of governmental immunity for intentional torts if they establish all of the following:

> (a) The acts were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority,
>
> (b) the acts were undertaken in good faith, or were not undertaken with malice, and
>
> (c) the acts were discretionary, as opposed to ministerial. [*Odom v Wayne Co*, 482 Mich 459, 464-465; 760 NW2d 217 (2008).[2]]

"[T]here is no immunity when the governmental employee acts maliciously or with a wanton or reckless disregard of the rights of another." *Id*. at 474 (emphasis removed). In making this determination, courts may consider whether the governmental employee's "conduct or a failure to act . . . shows such indifference to whether harm will result as to be equal to a willingness that harm will result." *Id*. at 475 (quotation marks and citation omitted).

[2] I agree with the majority that the trial court properly found that defendants were acting within the scope of their employment and that their actions were discretionary.

Beginning with Kent, I conclude that there is sufficient evidence of bad faith to preclude summary disposition at this very early stage of the litigation. Plaintiff repeatedly suggested that all funds be returned to Allstate, and that the parties could then litigate their dispute. Kent rejected that suggestion, stating that MSU "accepted your partial payment on your client's behalf and will continue to collect [the balance] from your client." Kent's final e-mail threatened to report plaintiff to "the appropriate authorities" if he did not turn over the $68.40, using the threat of criminal prosecution to compel payment of a disputed *de minimis* amount. That Kent chose to file a criminal complaint over $68.40, when plaintiff repeatedly suggested that all funds be returned to Allstate and that the matter be resolved through civil litigation, allows for the inference that Kent was not acting in good faith.

As to Long, a question of material fact is even clearer. Long asserts that she and plaintiff did not reach an agreement, while plaintiff insists that they did. If plaintiff is correct, then Long's statements to the police and others denying such an agreement were false. It goes without saying that if Long has been falsely denying the existence of an agreement with plaintiff, she has been acting in bad faith. Accordingly, factual development is required to determine whether Long is entitled to immunity.

I also conclude that the trial court's discovery order constituted an abuse of discretion. A motion for summary disposition is generally premature if granted before discovery is complete. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). "It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case." *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011).

After filing their motion for summary disposition in lieu of an answer to the complaint, defendants moved to stay discovery. Defendants had moved for summary disposition under MCR 2.116(C)(8), asking to dismiss the complaint solely on the pleadings, but also moved for summary disposition under MCR 2.116(C)(7), and submitted documentary evidence and affidavits in support of that request. At the hearing on the motion to stay, the trial court repeatedly noted that defendants' motion for summary disposition was to be decided solely on the pleadings, questioning the need for discovery. Plaintiff's counsel reminded the court that defendants also moved for summary disposition under MCR 2.116(C)(7) and that discovery was needed to in order to challenge the conclusory statements made in defendants' affidavits that they were acting in good faith. Counsel also informed the court that there were numerous outstanding discovery requests and that four depositions had been noticed. Despite the fact that no answer to the complaint had been filed and defendants relied on their affidavits in seeking dismissal, the court advised plaintiff's counsel that depositions would not be permitted, stating, "[I]f you think you need a deposition, you're not getting it now but you can have documents." The court further ruled that no new written discovery could be sought and that defendants need not answer any pending written

discovery requests unless plaintiff's counsel sent a letter narrowing the requests and explaining why the request was relevant to the pending motion.[3]

The trial court's ruling failed to give plaintiff a meaningful opportunity to respond to defendants' motion for summary disposition and therefore constitutes an abuse of discretion. An affidavit from plaintiff could not have meaningfully contradicted defendants' assertions that they were not acting in bad faith and had no ill toward plaintiff.[4] Plaintiff was entitled to discovery regarding defendants' understanding of the law and the communications relevant to this case, particularly given defendants' decision to move for summary disposition in lieu of filing an answer to the complaint, i.e., defendants never admitted or denied the allegations, let alone provided discovery. Depositions were plainly in order and they were precluded by the trial court's statements from the bench and its vague discovery order. It would have been appropriate to stay discovery and decide the motion for summary disposition solely on the pleadings pursuant to MCR 2.116(C)(8). But it was an abuse of discretion to limit discovery and decide the motion under MCR 2.116(C)(7) based on the documentary evidence submitted by defendants.

The majority notes that plaintiff never submitted a "narrowed-down discovery request," but it is difficult to imagine what such a request would look like. Governmental immunity in this case did not turn on a limited preliminary question, e.g., the proprietary-function exception to governmental immunity. Rather, defendants moved for summary disposition on the ground that they were acting in good faith, and there is substantial overlap between that question and the underlying causes of action. Thus, it is unclear how plaintiff could have submitted a narrow discovery request to address the broad question of whether defendants were acting in good faith.

Accordingly, I would vacate the trial court's order granting summary disposition under MCR 2.116(C)(7) and remand for discovery and further proceedings without prejudice to defendants thereafter seeking summary disposition on grounds of governmental immunity.

B. MCR 2.116(C)(8)

As noted, I agree with the majority that many of plaintiff's causes of actions fail to state a claim. However, I disagree that dismissal of the malicious-prosecution clam is appropriate.

A motion under MCR 2.116(C)(8) "test the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under this subrule is appropriate only when the claims are "so clearly unenforceable as a matter of law that

[3] The order entered by the court granted defendants' motion to stay discovery for the reasons stated on the record and allowed discovery "only for matters that pertain to Plaintiff responding to the pending motion for summary disposition."

[4] Several times the trial court incorrectly indicated that only affidavits could be submitted with respect to a motion under MCR 2.116(C)(7).

no factual development could possibly justify recovery." *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008) (quotation marks and citations omitted).

> In maintaining a claim of malicious prosecution, a plaintiff bears the burden of proving that (1) the defendant has initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. [*Walsh v Taylor*, 263 Mich App 618, 632-633; 689 NW2d 506 (2004).]

The majority asserts that plaintiff's malicious-prosecution claim fails because there was an independent exercise of discretion by the officers to bring criminal charges. The majority relies on *Matthews v Blue Cross and Blue Shield of Mich*, 456 Mich 365; 572 NW2d 603 (1998), in which the officer conducted "a three-month independent investigation" of the information provided to him by the insurance's company's financial investigator and afterward signed and swore the criminal complaint against the plaintiff. *Id*. at 372-374.

While there is language in *Matthews* to support the majority's broad reading of the case, precluding claims of malicious prosecution when the officer or prosecutor exercised some independent discretion "would effectively nullify the tort of malicious prosecution" as applied to criminal proceedings. *Radzinski v Doe*, 469 Mich 1037, 1040 (2004) (MARKMAN, J., concurring in part, dissenting in part). As former Justice Markman explained:

> It is virtually inconceivable that a prosecutor would not conduct at least some modicum of an independent investigation before initiating a criminal prosecution. It has never been the law of our state that the carrying out of an independent investigation by the police or the prosecutor immunizes a complainant from a malicious prosecution charge. The fact of such an investigation has no bearing on what is at the core of the malicious prosecution tort—the false and malicious reporting of a crime. [*Id*.]

Further, while *Matthews* relied on the Restatement Torts, 2d, § 653, comment g, p 409, for the proposition that "[t]he exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings," *Matthews*, 456 Mich at 385 n 27, it overlooked that comment g goes on to provide that "[i]f, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information." Restatement Torts, 2d, § 653, comment g, p 409.

Rather than read *Matthews* as essentially vitiating the long-standing common law claim of malicious prosecution of criminal proceedings, I would view the statements suggesting that an officer or prosecutor's exercise of discretion defeats a claim of malicious prosecution as nonbinding dicta. Those statements were not necessary to the resolution of the malicious prosecution claim in *Matthews* when the insurance company's agents did not provide false information; did not fail to disclose material information; and the charges were based on an extensive police investigation. See *Matthews*, 456 Mich at 387-391.

In contrast, it appears that the charges in this case were brought solely on information provided by defendants, and plaintiff alleges that defendants knew this information was false. Further, as noted, an e-mail by Kent suggests that his purpose was to recover payment of the money rather than a good-faith belief that the law had been broken. See *Matthews*, 456 Mich at 386 n 28, quoting *Hall v American Investment Co*, 241 Mich 349, 353; 217 NW2d 18 (1928) ("[I]f the criminal law is used for 'some collateral or private purpose, such as to compel the delivery of property or payment of a debt rather than to vindicate the law, he is guilty of a misuse of process and a fraud upon the law.' "). Perhaps summary disposition of the malicious-prosecution claim would be warranted after discovery, but I cannot conclude at this early stage that plaintiff failed to state a claim as a matter of law.

/s/ Douglas B. Shapiro