STATE OF MICHIGAN

COURT OF APPEALS

LARRY L. FAIRCHILD

Plaintiff-Appellant,

v

SAGINAW COUNTY MOSQUITO CONTROL and COUNTY OF SAGINAW,

Defendant-Appellee.

UNPUBLISHED
August 16, 1996

No. 184508
LC No. 94-912 CZ

Before: Murphy, P.J., and O'Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the circuit court granting summary disposition in favor of defendants. We affirm.

Defendants contracted with Bill's Tire Shredding, Inc. (Bill's Tire), to collect, shred and dispose of tires. Bill's Tire entered into a lease with plaintiff to provide space for the storage and shredding of the tires. When the lease expired it was not renewed. A number of tires were left on plaintiff's property. Plaintiff notified defendants, as opposed to Bill's Tire, that he would charge them a storage fee of $100 per day if the tires were not promptly removed. Defendants did not respond to the letter nor take any action with respect to the tires.

After Buena Vista Township took legal action against plaintiff, charging him with various code violations stemming from the tires remaining on his property, plaintiff brought suit against defendants. The circuit court granted summary disposition in favor of defendants, and plaintiff has appealed. Our review is de novo. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994).

Plaintiff raises ten allegations of error on appeal. First, he contends that the court erred in granting summary disposition with respect to his breach of contract claim. No evidence submitted below, documentary or testimonial, suggests that a contract ever existed between plaintiff and

* Circuit judge, sitting on the Court of Appeals by assignment.

defendants. We find no error in the court's dismissal pursuant to MCR 2.116(C)(10) where plaintiff failed to present evidence concerning the existence of the contract.

Second, plaintiff asserts that the circuit court erred in granting summary disposition with respect to his negligence claim. Plaintiff presented no evidence of any relationship whatsoever between himself and defendants. Thus, because plaintiff failed to allege facts sufficient to show a legal duty on the part of defendants, *Simko v Blake*, 448 Mich 648, 654-655; 532 NW2d 842 (1995), summary disposition pursuant to MCR 2.116(C)(8) was proper. Though the court granted summary disposition pursuant to MCR 2.116(C)(10), this Court customarily affirms where the correct result was reached for the wrong reason, *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 640; 534 NW2d 217 (1995), and we do so here.

Third, plaintiff argues that the court erred in ruling that a claim of nuisance would not lie. To prevail on a claim of trespass-nuisance, the plaintiff must show a particular "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988). Here, as evidenced by the contract between defendants and Bill's Tire, Bill's Tire had exclusive control concerning storage of the tires, which is to say, defendants retained no control themselves. Therefore, we find no error.

Fourth, plaintiff claims that the court erred in granting defendants' motion for summary disposition with respect to plaintiff's claim of account stated. "An account stated is an agreement, between parties who have had previous transactions of a monetary character, that all the items of the accounts representing such transactions are true and that the balance struck is correct, together with a promise, express or implied, for the payment of such balance." *Leonard Refineries, Inc v Gregory*, 295 Mich 432, 437; 295 NW2d 215 (1940). Obviously, plaintiff's act of billing defendants for storing tires, in the absence of previous similar transactions, does not establish an account stated. Again, we find no error.

Fifth, plaintiff submits that the court improperly granted summary disposition with respect to his intentional infliction of emotional distress claim because there existed disputed issues of material fact. One alleging intentional infliction of emotional distress must establish, among other things, "extreme or outrageous conduct." *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 657; 517 NW2d 864 (1994). Disregarding the other shortcomings in this particular claim, we are confident that the failure to remove tires from another's property does not constitute extreme or outrageous conduct.

Because of our resolution of the five substantive allegations of error raised on appeal, we need not address plaintiff's sixth and seventh contentions, namely, that the court erred in granting summary disposition of various claims on the grounds of expiration of the statute of limitations and governmental immunity. Because each of the claims fails for grounds other than or in addition to the statute of limitations and governmental immunity, we decline to address these issues.

Eighth, plaintiff avers that the court abused its discretion in failing to allow plaintiff to amend his complaint. As set forth in MCR 2.116(I)(I), under the circumstances of the present case, "the court

shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." This Court reviews the denial of a motion to amend a complaint for an abuse of discretion. *Froede v Holland Ladder Co*, 207 Mich App 127, 136, 137; 523 NW2d 849 (1994). Here, we find no abuse of discretion. As discussed above, all of plaintiff's claims were meritless; he at no point, either below or before this Court, has indicated what sustainable cause of action he could advance that would have been supported by the evidence offered below. Therefore, because plaintiff has articulated no cause of action that would be supported by the evidence, we agree that amendment would not be justified, and affirm.

Ninth, plaintiff asserts that the contract between defendants and Bill's Tire should not have been admitted into evidence. However, because plaintiff failed to object to its admission below, the issue is not preserved for review. *Id.*, p 137.

Finally, plaintiff draws attention to the fact that defendants' attorney, at the hearing on the motion for summary disposition, failed to state his appearance for the record, and was misidentified on the transcript for that hearing. This is alleged to constitute misconduct on the part of defense counsel. When reviewing alleged improper conduct by a party's attorney, the court must determine whether the attorney's action constituted error, and, if so, whether that error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). If any error occurred, we find no prejudice inhering to plaintiff as a result. Reversal is not warranted.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak