STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. HALL,

Plaintiff-Appellee,

v

BERNARD C. MITTELSTAEDT and BARBARA A. MITTELSTAEDT,

Defendants and Third-Party Plaintiffs, Appellants.

UNPUBLISHED
September 6, 1996

No. 155583
LC No. 89-171-CH

BERNARD C MITTELSTAEDT and BARBARA A. MITTELSTAEDT,

Plaintiff-Appellees,

v

MICHAEL J. HALL,

Defendant,

and

JOHN W. UJLAKY,

Defendant-Appellant.

No. 176872
LC No. 92-511-CH

Before: McDonald, P.J., and Markman and C. W. Johnson*, JJ.

PER CURIAM.

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

In case number 176872 defendant John W. Ujlaky appeals by leave granted from a June 17, l994, order denying his motion for summary disposition in this action involving plaintiffs Bernard C. Mittelstaedt and Barbara A. Mittelstaedt's claim defendants conspired to abuse process and to defraud them by filing a frivolous lawsuit against them. Defendant Michael J. Hall's five-count complaint had sought rescission of a land contract between the parties and restitution of monies paid under the contract based on a theory of unjust enrichment.

In case number 155583 Mittelstaedts appeal from a July 2, 1992, order denying their motion for sanctions brought pursuant to MCL 600.2591; MSA 27A.259l, following the dismissal of Hall's complaint. The complaint was dismissed with prejudice pursuant to a stipulation and agreement of dismissal signed by the parties.

We reverse in case number 176872 and affirm in case number 155583.

The trial court erred as a matter of law in denying Ujlaky's MCR 2.116(C)(8) motion for summary disposition of Mittelstaedts' claims of conspiracy to abuse process and to commit fraud. A motion for summary disposition on the theory of failure to state a claim tests the legal sufficiency of a claim by the pleading alone. *Patterson v Kleiman*, 447 Mich 429; 526 NW2d 879 (1994). All factual allegations in support of the claim are accepted as true, as well as any reasonable inferences or conclusions which can be drawn from the facts. *Simko v Blake*, 448 Mich 648; 532 NW2d 842 (1994). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action. *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392; 516 NW2d 498 (1994).

To state a claim on the tort theory of abuse of process, a party must plead facts sufficient to establish damages resulting from a party's ulterior purpose and an act in the use of process that is improper in the regular prosecution of the proceeding. *Young v Motor City Apts Ltd*, 133 Mich App 671; 350 NW2d 790 (1984). The latter requirement is satisfied only when the defendant does something in the use of process outside of the purpose for which it was intended and which amounts to a perversion of the process. *Id.* at 682. Here although the facts alleged by Mittelstaedts', if taken as true, could conceivably establish Hall had an improper ulterior motive either in defending Mittelstaedts' forfeiture action or in filing his suit, they are not sufficient to support the second element required for the cause of action; an act in the use of process that is improper in the regular prosecution of the proceeding.

To successfully state a cause of action for conspiracy to commit fraud Mittestaedts' were required to articulate factual allegations sufficient to support a finding Ujlaky and Hall acted in concert and that (l) a material representation was made; (2) it was false; (3) when it was made it was known to be false or made recklessly without any knowledge of its truth or falsity; (4) it was made with intent that it would be acted upon by the plaintiff; and (5) the plaintiff acted in reliance upon it and thereby suffered injury. *Temborius v Slatkin*, 157 Mich App 587; 403 NW2d 821 (1986). The facts alleged in Mittestaedts' complaint were insufficient to support these elements. Summary disposition should have been granted.

There was no clear error in the trial courts denial of Mittelstaedts' motion for sanctions and costs. MCL 600.2591; MSA 27A.2591 authorizes the court to award costs and sanctions to the party who prevailed on the entire record of a case, where the underlying lawsuit was frivolous. At the hearing on the motion, Mittelstaedts argued they were the prevailing parties in the underlying suit because they succeeded in getting Hall's complaint dismissed with prejudice and reserved the right to move for sanctions on grounds of frivolity. They also argued the stipulation and agreement for dismissal could not be considered as evidence by the court in making its determination whether they were or were not the "prevailing parties" in the underlying suit because the language of the agreement expressly prohibited its being considered as evidence of settlement. However, a stipulation of law by the parties to litigation does not bind a court. Parties may not by agreement supersede procedures and conditions of statutes or court rules. *In re Ford Estate,* 206 Mich App 705; 522 NW2d 729 (1994). Consideration of the terms of the stipulation was not improper. Moreover, the agreement itself was admissible since it was part of the record of the proceedings. The stipulated agreement provided for rescission of the land contract and payment by Mittelstaedts to Hall of $22,450.79 in exchange for execution and delivery of a quitclaim deed to the property from Hall to Mittelstaedts. The court correctly determined neither party was the prevailing party in the litigation.

Affirmed in part and reversed in part. In docket number 155583 costs awarded to plaintiff Michael Hall. In docket number 176872 costs awarded to defendant John Ujlaky.

/s/ Gary R. McDonald
/s/ Stephen J. Markman
/s/ Charles W. Johnson