

STATE OF MICHIGAN  
COURT OF APPEALS

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GEORGE EDWARD LYONS,

Plaintiff-Appellant,

v

PATRICIA ANN LYONS,

Defendant-Appellee.

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UNPUBLISHED

April 9, 2013

No. 311087

Livingston Circuit Court

LC No. 11-025871-CZ

Before: BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the May 17, 2012 trial court order that granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) (failure to state a claim) and awarded defendant costs and attorney fees of \$4,075.00. We affirm.

On March 9, 2011, plaintiff sued defendant in circuit court, alleging: (1) violation of the Americans with Disabilities Act (ADA), 42 USC 12101, *et seq.*; (2) violation of the Civil Rights Act (CRA), 42 USC 1981, *et seq.*; (3) suppression and fabrication of evidence; (4) extortion, and; (5) perjury. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), and the trial court granted the motion. After the trial court denied plaintiff's motion for reconsideration, plaintiff appealed by right.

We review a trial court's granting of summary disposition *de novo*. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Id.* at 119. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the plaintiff. *Id.* "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (quotations omitted). [*Wilson v King*, 298 Mich App 378, 381; \_\_\_ NW2d \_\_\_ (2012).]

Plaintiff first argues that the trial court erred by dismissing his case based on a "new issue" not raised by defendant, specifically plaintiff's failure to pay fees assessed in unrelated litigation. Plaintiff misinterprets the trial court's ruling. The trial court granted summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) because plaintiff's complaint was "clear on its face that it's devoid of any legal merit." The trial court mentioned plaintiff's failure

to pay fees only in awarding defendant sanctions, not in dismissing plaintiff's claims: "Further, because Plaintiff's complaint is devoid of legal merit and Plaintiff has previously been warned by this Court . . . in 2008 about filing frivolous action, this Court will award Defendant sanctions pursuant to MCR 2.114, MCR 2.625 and MCL 600.2591(3)(a)(iii)." Plaintiff does not challenge that award of costs and fees on appeal.

Plaintiff next argues that defendant violated the ADA. "To establish a prima facie case under the ADA, a plaintiff must demonstrate that (1) [h]e was disabled, (2) [h]e was qualified to perform the essential functions of the job, and (3) [h]is employer subjected [h]im to discriminatory treatment solely because of [h]is disability." *Collins v Blue Cross Blue Shield of Mich*, 228 Mich App 560, 568-569; 579 NW2d 435 (1998); 42 USC 12112. Here, plaintiff alleges that he is mentally disabled, suffering from paranoia and depression. However, he makes no assertion that defendant was ever his "employer," or that, as his employer, defendant discriminated against him because of his alleged mental disability. Plaintiff appears to assert that the Livingston Circuit Court violated the ADA by failing to provide him "aid or assistance" in previous litigation. There is no allegation that defendant is an employee or agent of the Livingston Circuit Court. If accepted as true and viewed in the light most favorable to plaintiff, plaintiff's factual allegations fall far short of establishing the necessary elements of a prima facie case of discrimination under the ADA.

Plaintiff next alleges that defendant violated the CRA, specifically 42 USC 1983. This Court has stated that

[a]ny person who, under color of state law, deprives another of rights protected by the constitution or laws of the United States, is liable under 42 USC 1983. [T]o survive summary [disposition] in a 1983 action, [the plaintiff] must demonstrate a genuine issue of material fact as to the following two elements: 1) the deprivation of a right secured by the Constitution or laws of the United States and 2) the deprivation was caused by a person acting under color of state law. [*Morden v Grand Traverse Co*, 275 Mich App 325, 323; 738 NW2d 278 (2007) (quotation marks and citations omitted).]

"According to 42 USC 1983, any person who experiences 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' because of the actions of another person acting '*under color of any statute, ordinance, regulation, custom, or usage, of any State*' may file an action seeking relief against the party that caused the deprivation." *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 202; 755 NW2d 686 (2008) (emphasis in original). Plaintiff's complaint fails to allege any constitutional violation committed by defendant and does not even attempt to establish that defendant acted under the color of state law.

Plaintiff's claim that defendant or the trial court violated his constitutional right of access to the courts is similarly without merit. "The right of access to the courts is a facilitative right 'designed to ensure that a citizen has the opportunity to exercise his or her legal rights to present a cognizable claim to the appropriate court and, if that claim is meritorious, to have the court make a determination to that effect and order the appropriate relief.'" *In re ALZ*, 247 Mich App 264, 276; 636 NW2d 284 (2001), quoting *Foster v City of Lake Jackson*, 28 F3d 425, 430 (CA 5, 1994), quoting *Crowder v Sinyard*, 884 F2d 804, 813 (CA 5, 1989). Plaintiff was allowed to

present his claim to the circuit court, be heard at a hearing, and receive a court ruling. The trial court did not violate plaintiff's constitutional rights by dismissing his claim. "The right of access to the courts is implicated where the ability to file suit is delayed or blocked altogether." *ALZ*, 247 Mich App at 376. There is no evidence that plaintiff was delayed or blocked from filing his complaint. Further, there is no allegation that defendant somehow acted to deny plaintiff access to the courts.

Plaintiff appears to argue that he was entitled to court-appointed counsel in previous civil litigation due to his indigence and mental illness. The Sixth Amendment<sup>1</sup> provides that an indigent defendant is entitled to court-appointed counsel in criminal case. See *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). However, "the Sixth Amendment does not govern civil cases." *Turner v Rogers*, \_\_\_ US \_\_; 131 S Ct 2507, 2516; 180 L Ed 2d 452 (2011). In certain proceedings, the right to counsel has been expanded beyond criminal prosecutions. See, e.g., *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001) (right to counsel extends to child protective proceedings). However, no authority suggests that plaintiff was entitled to court-appointed counsel in his previous civil litigation. Further, plaintiff's claim applies to previous cases not presently before this Court. Lastly, plaintiff fails to assert any theory about how defendant is liable for the allegedly improper denial of appointed counsel.

Plaintiff's remaining three claims allege violations of criminal law. "The authority to prosecute for violations of [] offenses [against the state] is vested solely and exclusively with the prosecuting attorney." *People v Williams*, 244 Mich App 249, 253; 625 NW2d 132 (2001), citing Const 1963, art 7, § 4; MCL 49.153. Plaintiff is not a prosecutor but the victim of the alleged offenses. "[N]owhere in the laws of this state have crime victims been given authority to determine whether the [criminal] code has been violated or whether the prosecution of a crime should go forward or be dismissed." *Williams*, 244 Mich App at 254. Thus, plaintiff is not legally entitled to bring criminal charges against defendant.

Plaintiff argues that he may recover civil damages for his criminal allegations based on theories of common law and statutory conversion. Plaintiff did not plead common law or statutory conversion in his complaint. The common law tort of conversion "is 'any distinct act of domain wrongfully exerted over another's *personal property* in denial of or inconsistent with the rights therein.'" *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 111; 593 NW2d 595 (1999), quoting *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992) (emphasis added). Plaintiff cannot prevail on his theory of common law conversion because the allegedly converted property is real estate.<sup>2</sup> Real estate constitutes real property, not personal property. See *People v Fox*, 232 Mich App 541, 553-554; 591 NW2d 384 (1998).

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<sup>1</sup>US Const, Am VI.

<sup>2</sup> We note that much of plaintiff's brief on appeal recites arguments that he previously made before this Court regarding real property located in Pinckney, Michigan, which were already considered and rejected. *Lyons v Brady*, unpublished opinion per curiam of the Court of Appeals, issued March 2, 2010 (Docket No. 289567).

Because common law conversion applies only to personal property, *Head*, 234 Mich App at 111, plaintiff's claim must fail.

“Statutory conversion, by contrast, consists of knowingly ‘buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property.’” *Id.*, quoting MCL 600.2919a. Plaintiff has provided no authority in support of his claim that statutory conversion may apply to real property. See generally *Sarver v Detroit Edison Co*, 225 Mich App 580, 585; 571 NW2d 759 (1997), quoting Prosser & Keeton, Torts (5th ed), § 15, p 102 (“What property may be the subject of an action for conversion was at first determined on the basis of the fiction of losing and finding. Any tangible chattel could be lost and found, and so could be converted . . .”). In any event, plaintiff failed to plead statutory conversion. Plaintiff alleges that defendant suppressed and fabricated evidence, extorted plaintiff, and committed perjury. Even if taken as true, plaintiff's criminal accusations would not necessarily prove that defendant engaged in the “concealment of [] stolen, embezzled, or converted property.” *Id.*

Finally, plaintiff argues that the trial court should have granted him the opportunity to amend his complaint. It is true that, when granting a motion for summary disposition pursuant to MCR 2.116(C)(8), leave to amend should be freely given unless the amendment would not be justified. MCR 2.116(I)(5). However, an amendment would not be justified if it would be futile. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). Here, the trial court did not err in failing to grant plaintiff leave to amend his complaint, because any amendment would be futile. Plaintiff's complaint utterly fails to establish claims against the defendant, and contains primarily allegations against nonparties. It additionally seeks to criminally prosecute defendant without the authority to do so, and fails to allege any colorable conversion claim.

For the foregoing reasons, we find that the trial court did not err in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8).

Affirmed.

/s/ Mark T. Boonstra  
/s/ Henry William Saad  
/s/ Joel P. Hoekstra