

STATE OF MICHIGAN
COURT OF APPEALS

DAVID GURK,

Plaintiff-Appellant,

v

DORI BLACK ELK and SHERRY PARKS,

Defendants-Appellees.

UNPUBLISHED
October 26, 1999

No. 208135
Washtenaw Circuit Court
LC No. 97-003855 NZ

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants summary disposition with respect to plaintiff's claims of intentional infliction of emotional distress (Count I), intentional interference with contractual relations (Count II), and slander (Count III). We affirm in part, reverse in part and remand.

At the time plaintiff filed his complaint, the parties all resided in the same Ann Arbor apartment complex. From September or October 1996 through December 1996, defendants, who are friends, allegedly harassed plaintiff as follows: (1) by directing false complaints regarding plaintiff to the apartment complex management; (2) by falsely reporting to the local humane society that plaintiff had abused his cat; (3) by falsely reporting to Ann Arbor police that plaintiff had illegally entered Elk's and another resident's apartments, that plaintiff had engaged in voyeuristic activities within the complex, and that plaintiff had indecently exposed himself; and (4) by kidnapping plaintiff's cat and sabotaging his efforts to locate and recover the cat. The apartment complex management ultimately evicted plaintiff. Subsequent to plaintiff's filing of his complaint, both defendants sought and obtained personal protection orders against plaintiff, alleging that plaintiff engaged in various, continued stalking activities. After defendants obtained these personal protection orders, Elk reported to the police that plaintiff had on one occasion sexually assaulted both her and her two year-old son.¹ The parties later stipulated the dismissal of the personal protection orders.

Plaintiff now challenges the trial courts grant of summary disposition to defendants. This Court reviews summary disposition decisions de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendants moved for summary disposition pursuant to MCR

2.116(C)(8) and (10). The trial court did not specify pursuant to which subrule it had determined to grant defendants summary disposition. MCR 2.116(C)(8) tests 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, supra*. Because the parties presented affidavits and other documentary evidence in support of their respective positions concerning defendant's motion, however, we will review the trial court's decision under the standards applicable to a (C)(10) motion.

A motion for summary disposition under MCR 2.116(C)(10) tests a claim's factual support. In reviewing a motion brought under MCR 2.116(C)(10), we consider in the light most favorable to the nonmoving party the affidavits, pleadings, depositions, admissions, and other documentary evidence. Summary disposition pursuant to this subrule is appropriate when the documentary evidence reveals no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

I

Plaintiff first contends that the trial court prematurely granted defendants summary disposition because the period for discovery had not expired and he had not yet deposed defendant Elk or a certain employee of his former landlord. Summary disposition is generally considered premature if granted before discovery on a disputed issue has completed. Summary disposition is not premature, however, if further discovery does not stand a fair chance of uncovering factual support for opposing the summary disposition motion. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996).

The original cutoff date for discovery in this case was October 1, 1997. During the discovery period, plaintiff's attempts to depose defendant Elk were unsuccessful, due to the following circumstances: (1) the death of defendant Parks' mother, (2) defendants' motion for a protective order forbidding plaintiff from attending defendants' depositions, among other restrictions, and (3) a doctor opined that due to Elk's medical condition, including her pregnancy, she could not endure a deposition. The trial court therefore ordered on October 8, 1997 that the "discovery cut-off date . . . is changed to January 30, 1998." While the order did not specifically restrict discovery during the extended period, it clearly stated that the "revisions to the original Scheduling Order are being made because Defendant Dori Black Elk's physician has recommended that Defendant Dori Black Elk, for health reasons, refrain from participating in this litigation for an indefinite period of time." The trial court's November 24, 1997 grant of summary disposition to defendants occurred prior to the January 30, 1998 discovery deadline.

This summary disposition determination that occurred approximately two months prior to the discovery deadline does not qualify as premature, however, unless further discovery offered a fair chance of uncovering factual support that plaintiff could use to oppose defendants' motion. *State Treasurer, supra*. Whether defendants' accusations and complaints concerning plaintiff were made in bad faith or malice represents a common element in the intentional infliction of emotional distress (Count I) and tortious interference (Count II) counts of plaintiff's complaint. While defendants denied complaining to the humane society that plaintiff abused his cat, defendants admitted alleging plaintiff's indecent exposure, voyeurism, illegal entry, and sexual assault and child molestation.² Defendants also

acknowledged having made to the apartment complex manager occasional verbal complaints regarding plaintiff. A question therefore exists concerning these admitted allegations whether they were made in bad faith. Elk is a defendant in this case directly responsible for making several allegations against plaintiff. In granting defendants' motion, the trial court did not explain that it found no likelihood plaintiff would successfully obtain from Elk's deposition some relevant evidence. We find that a fair chance exists that plaintiff's deposition of Elk might shed some light on the extent of her knowledge concerning the truth of her allegations against plaintiff, and likely would produce for plaintiff some relevant evidence of Elk's state of mind. Plaintiff's interrogation of Elk represents his best opportunity to obtain evidence of this nature. We therefore conclude that the trial court did prematurely grant defendants summary disposition concerning Counts I and II when the discovery deadline had not passed and plaintiff had not yet deposed Elk.³ Compare *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1995) (Summary disposition, argued two weeks prior to an extended discovery deadline and granted on the discovery deadline, was not premature when the plaintiff failed to disclose what additional discovery had been contemplated or what could have been discovered by the plaintiff during the last two weeks of discovery.).

Furthermore, the purpose of summary disposition is to avoid extensive discovery and an evidentiary hearing when a case can be quickly resolved on an issue of law. *American Community Mut Ins Co v Comm'r of Ins*, 195 Mich App 351, 362; 491 NW2d 597 (1992). Summary disposition is hardly ever appropriate in cases involving questions of intent, credibility or state of mind. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994); *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744-745; 419 NW2d 746 (1988). Because, as we have mentioned and as we will further discuss below, Counts I and II of plaintiff's complaint involve questions of defendants' states of mind, we conclude that the trial court inappropriately granted defendants summary disposition.

II

Plaintiff also argues that material issues of fact existed with respect to all three counts of his complaint that precluded summary disposition pursuant to MCR 2.116(C)(10).

A

With respect to Count I, the elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. Liability will only attach where the plaintiff shows conduct so outrageous in character, and so extreme in degree that it goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized society. *Haverbush v Powelson*, 217 Mich App 228, 233-234; 551 NW2d 206 (1996).

Plaintiff argued that defendants' conduct of making numerous false complaints and accusations to the police and others as a tool of harassment constituted extreme and outrageous behavior. As mentioned previously, plaintiff in his complaint alleged that defendants falsely accused him of abusing his cat,⁴ entering Elk's apartment, exposing himself to Parks, and looking inside other people's apartment

windows. In response to defendants' motion for summary disposition, plaintiff produced his own affidavit. He recounted, with specific dates, defendants' police reports concerning his alleged entry into Elk's apartment and indecent exposure, in addition to a new, post-complaint allegation by Elk that defendant on March 15, 1997 had sexually assaulted Elk and her two year-old son. Plaintiff denied ever entering Elk's apartment and explained that the police interviewed him but never charged him. Plaintiff also denied exposing himself to Parks and sexually assaulting Elk and her son. Plaintiff averred that the police interviewed him regarding these incidents, that he underwent and passed polygraph examinations, and that the police had not charged him with any crimes connected to these allegations. For their part, defendants' affidavits stated that they had "reported [plaintiff]'s actions to the police department of the City of Ann Arbor when [they] believed criminal activity had occurred." The trial court ultimately found that defendants' alleged acts, even if proven, did not meet the extreme and outrageous threshold.

Viewing in the light most favorable to plaintiff the serious nature of and number of defendants' allegedly false complaints to police, we find that a genuine issue of fact exists whether defendants' alleged conduct qualifies as extreme and outrageous.⁵ *Johnson v Wayne Co*, 213 Mich App 143, 160-162; 540 NW2d 66 (1995). Accordingly, we conclude that the trial court's grant of summary disposition in favor of defendants on Count I was improper.⁶

B

One who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another. *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990). Thus, to avoid summary disposition with respect to this claim, plaintiff had to bring forth some evidence that defendants' complaints to FHC Management, the apartment complex operator, unjustifiably caused his eviction.

Defendants attached in support of their summary disposition motion the affidavit of Randy Schulz, the resident apartment complex manager, who stated that neither he nor FHC Management had any record of complaints by defendants concerning plaintiff. Schulz further stated that plaintiff's lease termination notices were not issued based on any requests, actions or complaints by defendants, but solely because management wished to reclaim plaintiff's apartment. The deposition testimony of Olive Joslin, residential account administrator for FHC Management, however, established that defendants' complaints may have been a factor in plaintiff's eviction. Although Joslin indicated that no written record existed of other tenants' complaints concerning plaintiff, she recalled several specific tenant complaints regarding plaintiff. These complaints matched some of the specific charges alleged by defendants. Joslin testified that she was present during management discussions regarding whether to evict plaintiff, and that she believed the complaints by other tenants represented a big factor in FHC's decision to terminate plaintiff's lease. In light of Joslin's deposition testimony, we disagree with the trial court's finding that plaintiff failed to support his tortious interference claim with any evidence beyond his own suppositions. Viewing the statements of Schulz and Joslin in the light most favorable to plaintiff, we find that their testimony created a genuine issue of fact with respect to whether defendants' alleged

complaints concerning plaintiff played a role in his eviction, and raised an issue of credibility, thus making summary disposition improper. *Michigan Nat'l Bank-Oakland, supra.*⁷

The only apparent, remaining basis for summary disposition of Count II is that plaintiff failed to produce evidence that defendants' complaints were intentional and wrongful or malicious and unjustified. *Stanton, supra.* As discussed above, however, plaintiff never had the opportunity to depose Elk to establish support for his contention that the complaints were made in bad faith or for improper purposes. Moreover, as with issues of credibility, summary disposition is rarely appropriate in cases involving questions of intent or state of mind. *Michigan Nat'l Bank-Oakland, supra.* We therefore conclude that the trial court improperly granted defendants summary disposition concerning Count II of plaintiff's complaint.

C

Next, with respect to Count III, slander, the trial court found as a matter of law that defendants' statements were subject to a qualified privilege, which could only be overcome by showing that defendants made their statements in bad faith or with malice.

The only record evidence supporting plaintiff's slander claim represented defendants' statements to the police. Information given to police officers regarding criminal activity is absolutely privileged. *Shinglemeyer v Wright*, 124 Mich 230, 239-240; 82 NW 887 (1900); *Rouch v Enquirer & News of Battle Creek, Michigan*, 137 Mich App 39, 54; 357 NW2d 794 (1984), affirmed 427 Mich 157; 398 NW2d 245 (1986). If the privilege in uttering slanderous words is absolute, the questions of good faith and absence of malice are immaterial. *Powers v Vaughan*, 312 Mich 297, 305-306; 20 NW2d 196 (1945). Therefore, even assuming that defendants acted in bad faith or maliciously in reporting plaintiff to the police, the absolute privilege protecting defendants' statements to the police precludes plaintiff from basing a claim of slander on these statements. Thus, although the trial court incorrectly applied only a qualified privilege, the court correctly granted defendants summary disposition with respect to Count III of plaintiff's complaint.

III

Lastly, regarding plaintiff's claim that the trial court misunderstood the factual basis of his intentional infliction of emotional distress count, and that summary dismissal was therefore error requiring reversal, plaintiff cites no authority for his contentions on this issue. A mere assertion without supporting authority precludes appellate review of an issue. *Impullitti v Impullitti*, 163 Mich App 507, 512; 415 NW2d 261 (1987). Regardless, we find this claim without merit. The trial court prefaced its findings by stating that it had read the briefs of the parties, including the supplemental briefs produced after oral argument. Based on these briefs and the parties' statements at the hearing before the court, it is manifest that the court was aware of the issues and resolved them. *People v Shields*, 200 Mich App 554, 559; 504 NW2d 711 (1993).

Reversed and remanded for a reasonable time to complete discovery, including specifically the deposition of Elk and any additional discovery the trial court in its discretion deems necessary, and for any further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

¹ On June 20, 1997, plaintiff moved for leave to file an amended complaint containing the following new allegations: (1) defendants lied about plaintiff in obtaining personal protection orders against him; (2) Elk falsely reported to police that on March 15, 1997 plaintiff had “anally raped her and then without permission inserted one of his fingers into her 2-year-old son’s rectum;” (3) Elk falsely reported to police that plaintiff raped her numerous times during 1996 and 1997, and that plaintiff also had fondled Elk’s son’s genitals several times; (4) defendants falsely accused plaintiff of violating terms of the personal protection orders; (5) Elk lied to the police, telling them that plaintiff had threatened to kill her and had urinated in her mouth. The trial court denied plaintiff’s motion to file this amended complaint, but noted at the hearing on plaintiff’s motion its belief that “due to the nature of the complaint that it would be [sic] by its very nature include, could include continuing activity continuing conduct that is being [sic] by the Plaintiff.” The court instructed plaintiff, “I’m saying if you can add to your evidence and affidavits of anything that you would be putting in your supplemental complaint, as to further conduct, that solves your problem in terms of addressing issues of material fact for purposes of summary disposition.”

² Because these sexual assault and child molestation allegations never appeared in a supplemental complaint, Elk did not expressly admit these allegations. In defendants’ supplemental brief in support of summary disposition, however, defendants acknowledged that Elk “spoke with the police during their investigation of criminal sexual conduct reported in March, 1997.” In arguing for summary disposition at the September 24, 1997 hearing, defense counsel also acknowledged that defendants “agree they made those police reports,” noting that “the content of some of the statements in the police report are very inflammatory, and they are very difficult, and they’re very bizarre.”

³ While plaintiff submits that the trial court acted prematurely in granting summary disposition prior to plaintiff’s deposition of other landlord employees, the trial court’s order extending discovery does not seem to support plaintiff’s assertion. As we indicated above, the order contemplates an extension of the discovery period solely for the purpose of obtaining Elk’s deposition. Also, the trial court noted at the September 24, 1997 summary disposition hearing that it would withhold ruling on plaintiff’s tortious interference claim until plaintiff had deposed Olive Joslin, an employee of plaintiff’s landlord: “I’m going to allow him [plaintiff] to take the deposition; and once he does that, if it’s still the case [that defendants’ reporting of any complaints to the management agency caused them to remove plaintiff] then I will grant your summary disposition motion on that issue.” We note that plaintiff offers no reason for his apparent delay in deposing the landlord’s employees. Ultimately we express no conclusion whether plaintiff is entitled to further discovery in the form of deposing employees of his former landlord company. As this opinion concludes, we are remanding this case for some specific further discovery. Generally, discovery issues remain within the trial court’s discretion, and we leave it to the trial court to determine whether to

permit plaintiff further discovery concerning his former landlord. *Harrison v Olde Financial Corp*, 225 Mich App 601, 614; 572 NW2d 679 (1997).

⁴ With respect to plaintiff's allegation that defendants falsely reported his cat abuse to the humane society and that defendants kidnapped his cat, we note that plaintiff has produced absolutely no evidence beyond his own complaint allegations that defendants engaged in this conduct.

⁵ Without deciding this issue as a matter of law, and assuming the veracity of plaintiff's affidavit, we note that defendants' series of complaints concerning plaintiff seems to extend beyond "mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985).

⁶ Moreover, assuming the existence of a genuine issue of fact concerning the outrageous nature of defendants' alleged conduct, plaintiff must show intent or recklessness. For this, plaintiff will have to depose Elk, which the trial court improperly precluded him from doing.

⁷ Technically, plaintiff did not produce the Joslin deposition transcript for the trial court, claiming that the transcript had not yet been made available. He did inform the court of the substance of the testimony, and indicated that he would provide the court the relevant transcript excerpts.