

STATE OF MICHIGAN
COURT OF APPEALS

SAAD BENNY,

Plaintiff-Appellant,

v

GOLLING CHRYSLER JEEP DODGE, INC.,

Defendant-Appellee.

UNPUBLISHED

June 21, 2012

No. 304327

Oakland Circuit Court

LC No. 2009-106435-NO

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm.

Plaintiff initiated this action against defendant for negligence/gross negligence, negligent infliction of emotional distress, and consumer fraud in 2009. According to plaintiff's theory of this case, when he turned in one of his leased vehicles to defendant, defendant made a clerical error that led to plaintiff's other leased vehicle being reported stolen from an auction lot, which ultimately led to the police detaining plaintiff on suspicion that he was driving a stolen vehicle. Plaintiff claimed he suffered physical, emotional and psychological damage as a result of defendant's actions. On defendant's motion for summary disposition, the trial court found that a simple clerical error did not rise to level of negligence, let alone gross negligence, and that plaintiff failed to state valid claim of negligent infliction of emotional distress.

Plaintiff argues on appeal that the trial court erred in granting defendant's motion for summary disposition with respect to his claims for negligence/gross negligence, and negligent infliction of emotional distress.¹ We disagree.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). "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."

¹Plaintiff does not challenge the dismissal of his consumer fraud claim.

Id. (citation and internal quotation marks omitted). Summary disposition may be granted under MCR 2.116(C)(10) when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.” This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Id.* at 118.

The tort of negligent infliction of emotional distress requires that the plaintiff must have witnessed a negligent injury to a third party. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 582 n 6; 603 NW2d 816 (1999), citing *Duran v The Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993). See also *Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999). Here, plaintiff made no such allegation and thus failed to state a claim for negligent infliction of emotional distress. Plaintiff’s reliance on *Lewis v LeGrow*, 258 Mich App 175; 670 NW2d 675 (2003), to support his claim of negligent infliction of emotional distress is misplaced because that case involved *intentional* or *reckless* infliction of emotional distress. Liability in such cases attaches only when a plaintiff can demonstrate that the defendant’s conduct is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” *Id.* at 196. Plaintiff in this matter merely alleged that defendant negligently recorded the wrong vehicle identification number (VIN) number when plaintiff returned his leased vehicle. Because plaintiff failed to allege that he witnessed an injury to a third party, he failed to state a claim for negligent infliction of emotional distress and defendant was entitled to summary disposition of that claim pursuant to MCR 2.116(C)(8).

In addition, defendant was entitled to summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff’s claims for negligence, gross negligence, and negligent infliction of emotional distress. Plaintiff’s theory is that defendant’s errors or omissions caused the VIN for the truck he retained to be submitted with the vehicle that he turned in, and that the error was perpetuated at the auction house. However, plaintiff did not provide any evidence to support his theory. There is no evidence explaining how the auction house acquired the VIN for the truck that plaintiff retained. Indeed, plaintiff does not even offer a theory as to how defendant would have had access to the VIN of the retained vehicle, which was leased from another dealership. Plaintiff’s contention that defendant mistakenly provided the auction house with the VIN for the retained vehicle is merely a theory, unsupported by any evidence. In opposing defendant’s motion for summary disposition, plaintiff was required to present more than conjecture and speculation to meet his burden of establishing a genuine issue of material fact. See *Bennett v Detroit Police Chief*, 274 Mich App 307, 318-319; 732 NW2d 164 (2006). Plaintiff failed to meet his burden. Therefore, defendant was entitled to summary disposition pursuant to MCR 2.116(C)(10) with respect to plaintiff’s claims.

Affirmed.

/s/ Deborah A. Servitto
/s/ Patrick M. Meter
/s/ Karen Fort Hood