S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JOSEPH OZORMOOR,

Plaintiff-Appellant/Cross-Appellee,

v

HSBC RETAIL SERVICES USA, INC.,

Defendant-Appellee/Cross-Appellant,

and

ART VAN FURNITURE,

Defendant-Appellee.

UNPUBLISHED
December 13, 2007

No. 274151
Wayne Circuit Court
LC No. 05-529761-CZ

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendants Art Van Furniture (Art Van) and HSBC Retail Services USA, Inc. (HSBC), under MCR 2.116(C)(8) and (C)(10). HSBC cross appeals from the circuit court's denial of its motion for case evaluation sanctions. We affirm in the principal appeal, and in the cross appeal we remand for proceedings consistent with this opinion.

Plaintiff first argues that the circuit court erred in finding that his libel claim was barred by the statute of limitations. We disagree.

A circuit court's decision on a motion for summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999); *Guerra v Garratt*, 222 Mich App 285, 288; 564 NW2d 121 (1997). Although the circuit court granted defendants' motion on this issue under MCR 2.116(C)(8) (failure to state a claim), the proper subrule to apply was MCR 2.116(C)(7) ("claim is barred because of . . . statute of limitations"). When a motion for summary disposition is brought under the wrong subrule, a court may proceed under the appropriate subrule where, as here, as the parties were not misled. *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). Accordingly, we review this issue under MCR 2.116(C)(7).

When reviewing a dismissal on the basis that a claim is barred under MCR 2.116(C)(7), this Court must accept all well pleaded allegations as true, unless contradicted by other evidence, and construe them in favor of the nonmoving party. *Maiden*, *supra* at 119; *Guerra*, *supra* at 289. The court must consider any affidavits, depositions, admissions, and other documentary evidence submitted by the parties to determine whether there is a genuine issue of material fact. MCR 2.116(G)(5); *Maiden*, *supra* at 119; *Guerra*, *supra* at 289. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred is an issue of law. *Id*.

The statute of limitations for libel actions is one year. MCL 600.5805(9). The parties agree that HSBC's initial negative reporting of plaintiff's account to consumer credit reporting agencies took place in March 2002, and that the last time HSBC reported information concerning the account was August 2004, when the account was transferred or sold by HSBC. Plaintiff did not file this action until October 2005. Nonetheless, plaintiff relies on *Nichols v Moore*, 334 F Supp 2d 944, 951-952 (ED Mich, 2004), to argue that the credit bureaus' republication of HSBC's statements restarted the limitations period. We disagree. In *Mitan v Campbell*, 474 Mich 21, 24-25; 706 NW2d 420 (2005), our Supreme Court held that the statute of limitations for a libel action begins to run on the original date of publication. See also *Hawkins v Justin*, 109 Mich App 743, 746; 311 NW2d 465 (1981). The *Mitan* Court further explained that "[t]he statute [of limitations] does not contemplate extending the accrual of the claim on the basis of republication, regardless of whether the republication was intended by the speaker." *Mitan*, *supra* at 25. To the extent that *Nichols* conflicts with *Mitan*, we are bound to follow *Mitan* on this issue of state law. *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992).

Plaintiff has failed to provide any legal or factual support for his unpreserved claim that defendants are responsible for statements made by collection agencies, which plaintiff alleges are defendants' agents. Therefore, apart from being unpreserved, this issue is deemed abandoned. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). In any event, republications made by collection agencies, like republications made by credit bureaus, do not restart the running of the statute of limitations. Accordingly, plaintiff has failed to show a plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

Plaintiff next argues that the circuit court erred in dismissing his claim for intentional infliction of emotional distress. We disagree.

The circuit court dismissed this claim under MCR 2.116(C)(8). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim. *Maiden*, *supra* at 119; *Stopera v DiMarco*, 218 Mich App 565, 567; 554 NW2d 379 (1996). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *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.'" *Maiden*, *supra* at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992).

To state a claim for intentional infliction of emotional distress, a plaintiff must allege (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Manuel v Gill*, 270 Mich App 355, 381; 716 NW2d 291 (2006). "Liability 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*. (citation omitted). "The test to determine whether a person's conduct was [sufficiently] extreme and outrageous is whether recitation of the facts of the case to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous!" *Lewis v LeGrow*, 258 Mich App 175, 196; 670 NW2d 675 (2003) (citation and internal quotations omitted). "A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id*. (citation and internal quotations omitted).

"[W]hether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery" is a question for the trial court. *Id*. at 197. But "[w]hen reasonable minds may differ, whether a defendant's conduct is so extreme and outrageous as to impose liability is a question for the jury." *Id*.

The present case involves a commercial dispute concerning the terms of plaintiff's purchase of goods on credit. Defendants acted to enforce the terms of the credit application in assessing plaintiff late fees and finance charges when he failed to timely pay the amounts due. The circuit court did not err in determining that defendant's alleged conduct cannot reasonably be regarded as so extreme and outrageous to support a claim of intentional infliction of emotional distress. Therefore, this claim was properly dismissed.

Next, plaintiff argues that the circuit court erred in dismissing his claim for violation of the Michigan Consumer Protection Act (CPA), MCL 445.901 *et seq*. We disagree.

The CPA prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce." MCL 445.903(1). A plaintiff injured as a result of a CPA violation is entitled to damages and attorney fees under MCL 445.911(2). However, MCL 445.904(1)(a) provides that the CPA does not apply to

> [a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States.

Although plaintiff attempts to characterize the transaction at issue as the sale of furniture on advertised terms, our Supreme Court held in *Smith v Globe Life Ins Co*, 460 Mich 446, 465; 597 NW2d 28 (1999), that in determining whether the exemption applies, "the relevant inquiry is not whether the specific misconduct alleged by the plaintiff is 'specifically authorized.'" "Rather, it is whether the *general transaction* is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Id*. (emphasis added). The Court observed that in adopting this exemption, the Legislature "intended to include conduct the legality of which is in dispute." *Id.*

In this case, the general transaction that gave rise to plaintiff's claim was the purchase of consumer goods on credit, defendants' enforcement of their interpretation of the terms of the sale and the terms of the credit agreement, and defendants' reporting of plaintiff's payment history to consumer credit agencies. The Consumer Credit Protection Act, 15 USC 1601 *et seq*., of which the United States Fair Credit Reporting Act (FCRA), 15 USC 1681 *et seq*., is part, regulates the disclosures that must be made upon extending credit to a consumer and how credit disputes must

be handled, including disputes concerning the accuracy of reports made to consumer credit reporting agencies, among other things. Chapter 41 is administered by the Board of Governors of the Federal Reserve System, 15 USC 1602(b), and by the Federal Trade Commission, 15 USC 1607(c), among others. Thus, the general transaction at issue in this case is specifically authorized under laws administered by a regulatory board or officer, acting under statutory authority. Therefore, the circuit court did not err in determining that the regulated industries exemption applies and properly dismissed plaintiff's CPA claim.

Plaintiff also argues that the circuit court erred in holding that his claim for negligent infliction of emotional distress was preempted by the FCRA. We disagree.

As an initial matter, we conclude that dismissal of plaintiff's negligent infliction of emotional distress claim was appropriate under MCR 2.116(C)(8), because plaintiff's complaint failed to state a cognizable claim for relief. Plaintiff's complaint alleged that defendants negligently failed to apply the proper promotional terms to plaintiff's account, resulting in the account being subject to late fees and finance charges, and in the filing of groundless and false delinquency reports with the credit bureaus. These allegations, accepted as true, do not state a cognizable claim for negligent infliction of emotional distress. See *Taylor v Kurapati*, 236 Mich App 315, 360; 600 NW2d 670 (1999); see also *Duran v The Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1993).

Further, even if plaintiff's complaint were construed as asserting an ordinary negligence claim based on defendants' allegedly negligent performance of the parties' contract,[1] it would be preempted by the FCRA because there is no allegation or evidence that defendants reported false information to consumer credit reporting agencies with malice or an intent to injure. 15 USC 1681h(e).

Next, plaintiff argues that the circuit court erred in denying his motion to amend his complaint. We disagree.

A trial court's decision on a motion for leave to amend will not be reversed unless it constituted an abuse of discretion resulting in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995). An abuse of discretion occurs when the trial court's decision is outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

"Leave [to amend] shall be freely given when justice so requires." MCR 2.118(A)(2). An amendment is generally a matter of right rather than of grace. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 659; 213 NW2d 134 (1973). Leave to amend should ordinarily be denied only for particularized reasons such as undue delay, bad faith or dilatory motive, repeated failures to cure by amendments previously allowed, or futility. *Id*. at 656, 659.

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[1] Contrary to what plaintiff argues on appeal, his complaint does not assert that defendants were negligent in their performance of their duties under the FCRA.

"An amendment would be futile if (1) ignoring the substantive merits of the claim, it is legally insufficient on its face, (2) it merely restates allegations already made; or (3) it adds a claim over which the court lacks jurisdiction." *PT Today, Inc v Comm'r of the Office of Financial & Ins Services*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

Mere delay alone, unaccompanied by prejudice to the opposing party's right to a fair trial, is not sufficient reason to deny a motion for leave to amend. *Ben P Fyke & Sons*, *supra* at 657-658, 663-664. "However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Weymers v Khera*, 454 Mich 639, 659; 563 NW2d 647 (1997). The parties' and the public's interest in the speedy resolution of disputes must be weighed against the moving party's interest in pursuing the amendment. *Id*. at 660.

Regarding plaintiff's request to add an allegation concerning Best Buy's denial of credit, the circuit court considered other denials of credit that occurred within the limitations period and correctly ruled that such republications did not restart the running of the limitations period. Thus, amending the complaint to add an allegation that plaintiff was also denied credit by Best Buy in January 2005, would have been futile.

Regarding plaintiff's request to add a breach of contract claim, we note that defendants conducted discovery, participated in case evaluation, and prevailed in their motion for summary disposition of plaintiff's several non-contract claims before plaintiff moved to amend. Allowing plaintiff to add a breach of contract claim at this late stage would have required defendants to revisit all of these matters. Defendants had no notice that plaintiff would seek to pursue a breach of contract claim. Further, plaintiff made a knowing and conscious strategic decision not to pursue a breach of contract claim in his original complaint. In light of these factors, the circuit court did not abuse its discretion in concluding that plaintiff's proposed amendment was untimely and would have prejudiced defendants. See *Weymers*, *supra* at 659-660. Therefore, plaintiff's motion to amend was properly denied.

On cross appeal, HSBC argues that the circuit court erred in denying its motion for case evaluation sanctions. MCR 2.403(O)(1) states:

> If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs[2] unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

Under MCR 2.403(O)(2)(c), a verdict includes "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation." However, MCR 2.403(O)(11) provides:

> If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

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[2] Actual costs are taxable costs plus a reasonable attorney fee. MCR 2.403(O)(6).

Because defendants prevailed as a result of a ruling on a motion for summary disposition, the circuit court had discretion to refuse to order case evaluation sanctions; sanctions were not mandatory. *Haliw v City of Sterling Heights (On Remand)*, 266 Mich App 444, 446-447; 702 NW2d 637 (2005).

In this case, the circuit court recognized on the record at the hearing on defendant's motion that it had the discretion to decline to award defendant actual costs. The court stated little on the record regarding its reasoning for denying HSBC's motion for case evaluation sanctions, stating only that "I typically don't impose case evaluation sanctions when I decide cases on summary judgment unless it's really a very frivolous case, and I already put his case—." At that point, defense counsel interrupted the court, and after a short colloquy, the hearing ended. Under *Haliw*, the circuit court's reasoning as stated on the record is insufficient to justify invoking the interest of justice exception, MCR 2.403(O)(11). We therefore remand to the circuit court for reconsideration of defendant's motion under the standards articulated in *Haliw, supra.*

We affirm in the principal appeal. In the cross-appeal, we remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra