COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1218 **Cir. Ct. No. 2007CV15050**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

NORMAN R. TORRES,

PLAINTIFF-APPELLANT,

V.

ROUNDY'S SUPERMARKETS, INC., A/K/A PICK 'N SAVE AND BRIAN MARKS,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DiMOTTO, Judge. *Affirmed*.

Before Curley, P.J., Fine and Kessler, JJ.

¶1 FINE, J. Norman R. Torres appeals a judgment dismissing his complaint against his former employer, Roundy's Supermarkets, Inc., also known

as Pick 'N Save, and a former co-employee, Brian Marks.[1] Torres claims that the circuit court erred when it: (1) dismissed his claims, either as barred by the Wisconsin Worker's Compensation Act, *see* WIS. STAT. § 102.03(2), or because they did not state a claim; and (2) precluded him from amending his complaint. We affirm.

I.

¶2 Torres was seventeen years old when he worked as a utility clerk at a Roundy's affiliated grocery store.[2] He was fired for allegedly stealing a bag of chips. The following facts are from Torres's complaint, which, for the purposes of this appeal, we accept as true. *See* ***Northridge Co. v. W.R. Grace & Co.***, 162 Wis. 2d 918, 923, 471 N.W.2d 179, 180–181 (1991) (facts in complaint must be taken as true in deciding whether it states legally cognizable claims).

¶3 Torres's complaint alleges that on January 16, 2006, he "approached a cash register" at the store where he worked with the "intent to purchase" a bag of chips for $2.19 and dipping sauce for $2.49. Torres gave $5.00 to the cashier. The cashier took the $5.00 and gave Torres a sales receipt. The receipt showed that the cashier charged Torres for the chips and dipping sauce. The cashier

[1] Torres's notice of appeal was filed on May 12, 2008. The final judgment was entered on June 4, 2008. We have jurisdiction nevertheless. *See* WIS. STAT. § 808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry.").

[2] Torres apparently worked for Mega Marts, Inc., doing business as Pick 'N Save. Mega Marts is an affiliate of Roundy's. For the purposes of this appeal, we generally refer to Torres's employer as "Roundy's."

simultaneously credited Torres for the chips. As a result, Torres was only charged $2.49 for the dipping sauce and received $2.51 in change.

¶4 On January 24, 2006, Marks, a security guard at the store, asked Torres to admit that he stole the chips. Marks told Torres that if he did not, he would be terminated immediately. Marks then "dictate[d]" a "Voluntary Statement" to Torres, in which Torres admitted that he took the chips without paying for them:

> I was purchasing a bag of chips and salsa, and then the cashier said "Dude I'll hook you up." I gave him the money[,] then he gave me the change. I then left and ate the chips in the break room. I knew that he had taken the chips off, so he didn't charge me for them.

Torres's complaint alleged that he signed the statement "unwillingly." Marks "[i]mmediately" told Torres that he was fired and gave him a termination notice.

¶5 Marks then reported the theft to the Milwaukee Police Department, which issued a municipal citation to Torres. The citation was later dismissed without prejudice by the City Attorney's Office. Roundy's also reported Torres's mother to a collection agency. The collection agency sent a letter to Torres's mother seeking $216.57 in damages for the theft. According to the complaint, the collection agency "gave up" its collection efforts after Torres's mother reported it to the State Bar of Wisconsin for engaging in the unauthorized practice of law.

¶6 Torres brought this action against Roundy's and Marks for defamation, malicious prosecution/abuse of process, intentional infliction of

emotional distress, and conspiracy. Torres also sued Marks for tortious interference with a contractual relationship.[3]

¶7 Roundy's and Marks moved to dismiss Torres's complaint. *See* WIS. STAT. RULE 802.06(2)(a)6 (failure to state a claim upon which relief can be granted). The circuit court held a hearing on the motion and orally dismissed all of Torres's claims because it concluded that they were either pre-empted by the Worker's Compensation Act, *see* WIS. STAT. § 102.03(2), or that Torres failed to state a cognizable claim.

II.

¶8 A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint. ***Wausau Tile, Inc. v. County Concrete Corp.***, 226 Wis. 2d 235, 245, 593 N.W.2d 445, 450 (1999). As noted, the facts in the complaint must be taken as true and the complaint dismissed only if it appears certain that no relief can be granted under any set of facts the plaintiff might prove in support of the allegations. ***Northridge Co.***, 162 Wis. 2d at 923, 471 N.W.2d at 180–181. Whether a complaint states a claim for relief is a question of law that we review *de novo*. ***Wausau Tile, Inc.***, 226 Wis. 2d at 245, 593 N.W.2d at 450. With these standards in mind, we turn to Torres's claims.

A. *Defamation/intentional infliction of emotional distress/conspiracy.*

¶9 The circuit court dismissed Torres's claims for defamation, intentional infliction of emotional distress, and conspiracy because it concluded

[3] Torres also sued Roundy's for wrongful discharge. This claim was dismissed by stipulation of the parties.

that they were pre-empted by the Act. *See* ***Jenson v. Employers Mut. Cas. Co.***, 161 Wis. 2d 253, 266–269, 468 N.W.2d 1, 6–8 (1991) (intentional infliction of emotional distress); ***Wolf v. F & M Banks***, 193 Wis. 2d 439, 455–456, 534 N.W.2d 877, 883 (Ct. App. 1995) (defamation); ***Messner v. Briggs & Stratton Corp.***, 120 Wis. 2d 127, 137–139, 353 N.W.2d 363, 368 (Ct. App. 1984) (conspiracy).

¶10 If an injury is covered by the Act, "the right to the recovery of compensation under [the Act] shall be the exclusive remedy against the employer, any other employee of the same employer and the worker's compensation insurance carrier." WIS. STAT. § 102.03(2). Several conditions must be met for this "exclusivity" provision to apply including, as relevant here, that "the accident or disease causing injury arises out of the employee's employment." Sec. 102.03(1)(e).

¶11 Torres does not dispute the general rule of exclusivity. He contends, however, that his claims are not pre-empted by the Act because what he calls the "key act" underlying his claims—that Roundy's and Marks told the police that Torres stole a bag of chips—happened after he was fired. Torres thus argues that his claims are not pre-empted because they are distinct in time and place from his employment. We disagree.

¶12 The precipitating factor—that Torres allegedly stole a bag of chips—happened while Torres was still employed with Roundy's. The events that followed, including that Roundy's and Marks told the police that Torres stole a bag of chips, arose out of Torres's employment with Roundy's. Thus, Torres's claims for defamation, intentional infliction of emotional distress, and conspiracy are barred by the Act. *See* ***Weiss v. City of Milwaukee***, 208 Wis. 2d 95, 107, 559

N.W.2d 588, 593 (1997) ("'arising out of' language of § 102.03(1)(e) refers to the causal origin of an employee's injury").

B. *Malicious prosecution/abuse of process.*

¶13 The elements of malicious prosecution are that: (1) there was a prior institution or continuation by the defendant of a regular judicial proceeding against the plaintiff; (2) the prior proceeding was terminated on the merits in favor of the plaintiff in the action for malicious prosecution; (3) the defendant instituted the prosecution with malice; (4) there was no probable cause to start the prosecution; and (5) the plaintiff was damaged as a result. ***Tower Special Facilities, Inc. v. Investment Club, Inc.***, 104 Wis. 2d 221, 227, 311 N.W.2d 225, 228 (Ct. App. 1981).

¶14 Torres's complaint characterized Roundy's and Marks's report of the theft to the police as acts done with malice and without probable cause. The circuit court dismissed this claim because these legal conclusions were not supported by allegations of fact. As explained below, we agree.

¶15 The facts alleged in the complaint do not support two of the elements for malicious prosecution. First, the theft charge was not terminated in Torres's favor *on the merits. See* ***id.***, 104 Wis. 2d at 228, 311 N.W.2d at 229 ("'It is generally held that where the original proceeding has been terminated without regard to its merits … there is no such termination as may be availed of for the purpose of an action for malicious prosecution.'") (quoted source omitted). As we have seen, the dismissal was without prejudice, and, indeed, Torres's brief asserts that the dismissal was because Roundy's decided not to prosecute. Second, the complaint indicates that Roundy's had sufficient probable cause to call the police, and Torres does not argue to the contrary. Thus, Torres's assertion that the circuit

court erred in dismissing his claim for malicious prosecution fails. We turn to Torres's claim for abuse of process.

¶16 The elements of abuse of process are: (1) use of the process for "a purpose other than that which the process was designed to accomplish"; and (2) "a subsequent misuse of the process, even though the process was properly instituted." ***Thompson v. Beecham***, 72 Wis. 2d 356, 362, 241 N.W.2d 163, 166 (1976).

> In order to maintain an action for abuse of process, the process must be used for something more than a proper use with a bad motive. The plaintiff must allege and prove that something was done under the process which was not warranted by its terms. The existence of an improper purpose alone is not enough, for this improper purpose must also culminate in an actual misuse of the process to obtain some ulterior advantage.http://web2.westlaw.com/result/documenttext.aspx?method=TNC&fn=_top&scxt=WL&mt=Wisconsin&db=595&ss=CNT&n=1&nstartlistitem=1&cxt=DC&vr=2.0&sv=Split&cnt=DOC&ifm=NotSet&ordoc=1983115001&rs=WLW8.11&service=Find&rlt=CLID_FQRLT376555422173012&serialnum=1976108704&rp=%2fFind%2fdefault.wl&findtype=Y&rlti=1 - B00881976108704

Id., 72 Wis. 2d at 363, 241 N.W.2d at 166.

¶17 Torres's complaint alleges that Roundy's abused process when it hired the collection agency because "the statements made to collect the unlawful debt were untrue, and the means used to accomplish the unlawful collection were unwarranted." The circuit court dismissed this claim because Torres did not satisfy the requisite elements. Again, we agree. Torres does not allege that Roundy's used the collection agency to obtain some unfair advantage or that the agency sent the letter to Torres's mother for any purpose other than to collect what Roundy's believed it was owed as a result of what Torres did. Accordingly,

Torres's assertion that the circuit court erred in dismissing his claim for abuse of process also fails.

C. *Tortious interference with contract.*

¶18 The elements of tortuous interference with a contract are: (1) a contractual relationship between the plaintiff and another; (2) the defendant's interference with the relationship; (3) the interference was intentional; (4) a causal connection between the interference and the plaintiff's damages; and (5) the defendant was not justified or privileged to "interfere" with the relationship. ***Dorr v. Sacred Heart Hosp.***, 228 Wis. 2d 425, 456, 597 N.W.2d 462, 478 (Ct. App. 1999).

¶19 Torres apparently claimed that Marks interfered with his employment contract when Marks required Torres to admit the theft, and that he was fired as a result.[4] The circuit court dismissed this claim because Torres's allegations did not satisfy the elements of tortious interference with a contract. We agree.

¶20 This claim falters on the last prong—that Marks was not justified or privileged to interfere. "[T]he transmission of truthful information is privileged, does not constitute improper interference with a contract, and cannot subject one to liability for tortious interference with a contract." ***Liebe v. City Fin. Co.***, 98 Wis. 2d 10, 13, 295 N.W.2d 16, 18 (Ct. App. 1980). Torres does not dispute

[4] Apparently, Torres's employment contract with Roundy's was a collective bargaining agreement between Mega Marts and the United Food and Commercial Workers Union.

anywhere in his complaint that he got the chips without paying for them. Indeed, Torres's lawyer admitted at the hearing on the motions to dismiss that Torres "did not pay for [the chips.]" Under these facts, any statements that Marks got Torres to make about taking the chips without paying for them were true. Marks's conduct was therefore privileged. Accordingly, Torres's assertion that the circuit court erred in dismissing his claim for tortious interference with a contract is also without merit.

D. *Amending complaint.*

¶21 Torres contends that the circuit court erred when it did not allow him to amend his complaint. *See* WIS. STAT. RULE 802.09(1). Under § 802.09(1), "[a] party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed."[5] Torres argues that he had the right to amend his complaint within the six-month deadline without leave of the court. This claim fails for two reasons.

¶22 First, the Record shows that Torres did not at any time before or after the final oral ruling of the circuit court move to amend his complaint. *See* ***Tietsworth v. Harley-Davidson, Inc.***, 2007 WI 97, ¶26, 303 Wis. 2d 94, 110, 735 N.W.2d 418, 425–426 ("[o]nce judgment has been entered, the presumption in

[5] WISCONSIN STAT. RULE 802.09(1) provides, as material:

> AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

favor of amendment disappears in order to protect the countervailing interests of the need for finality"). The only reference to an amendment occurred during the following exchange between the circuit court and Torres's lawyer at the hearing on the motions to dismiss, during which the circuit court orally indicated that it would dismiss Torres's complaint:

> [Torres's Lawyer]: [W]hat we have left are acts that happened after Torres was no longer employed after he was fired….
>
> [Circuit Court]: Based on what you have asserted [in] your complaint you've actually put your plaintiff right into employment itself, the employment situation or the personal comfort doctrine.
>
> [Torres's Lawyer]: Yeah, I realize that, and I think that's because however the -- Certainly the defamation is being accused of theft, and I think the remedy -- And I see that right now. Think the remedy would be to amend this because the defamation did occur --
>
> [Circuit Court]: Why didn't you amend it before now? I mean, you know, to say the remedy is amend it and then -- Well, to say the remedy is to amend it, you know, at a hearing where this could be dismissed, why didn't you?
>
> This is a little late. You are still within the 6-month period of, you know, automatic or without court permission. You said that in your response or reply papers or I think your response paper submitted to the court and you still haven't done it. This is serious business here.

To the extent that the colloquy can be considered an indication that Torres wanted to amend his complaint, the circuit court properly exercised its discretion when it rejected the request. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶12, 239 Wis. 2d 406, 415, 620 N.W.2d 463, 467 (decision whether to amend complaint within circuit court's discretion). Torres did not explain to the circuit court and does not explain on appeal why, despite having notice from the motion to dismiss of the significant and dispositive defects in the complaint, he waited

until after the circuit court said that it would dismiss the complaint. *See* ***id.***, 2000 WI App 240, ¶13, 239 Wis. 2d at 415–416, 620 N.W.2d at 467–468 (circuit court properly exercised discretion in denying motion to amend complaint where plaintiff failed to explain why amendment was justified late in proceedings). Moreover, other than general assertions, Torres did not tell the circuit court and does not tell us what amendments he would have made had the circuit court permitted him to amend. The circuit court did not erroneously exercise its discretion in not permitting Torres to amend his complaint. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) (appellate court can "decline to review issues inadequately" supported).

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.