COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-0836 **Cir. Ct. No. 01CV8624**

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

VLADIMIR M. GOROKHOVSKY,

PLAINTIFF-APPELLANT,

V.

JAN EDWARDS, ELITE PROPERTIES, INC., AND DANIEL J. MISKE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: THOMAS P. DONEGAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Vladimir M. Gorokhovsky appeals, *pro se*, from the judgment of the trial court dismissing all claims against the defendants, Jan

Edwards, Attorney Daniel J. Miske and Elite Properties, Inc.[1] He also appeals from the trial court's award of $14,151.50 to the defendants in costs and attorney fees, pursuant to WIS. STAT. § 814.025(1999-2000),[2] for commencing and continuing a frivolous lawsuit. Gorokhovsky contends: (1) the trial court erred in dismissing his claims; and (2) the trial court erred in awarding costs and attorney fees. We disagree with Gorokhovsky and affirm.

I. BACKGROUND.

¶2 Gorokhovsky owns a condominium in Cherrywood Village, a condominium association in Brown Deer, Wisconsin, where he lives with his mother. The original dispute arose between Gorokhovsky and his next-door neighbor, Vagran Gregoryan. Gorokhovsky accused Gregoryan of smoking cigarettes in front of their unit, aggravating his mother's asthma, and commandeering the use of an outdoor water spigot that was intended for their common use. On September 17, 2001, Gorokhovsky filed suit against Gregoryan. These and other claims against Gregoryan were settled and are not a subject of this appeal.

¶3 However, on September 20, 2001, Gorokhovsky filed a first and second amended complaint joining Jan Edwards, the condominium association's president, and Elite Properties, Inc., the condominium's management company, as indispensable defendants pursuant to WIS. STAT. § 803.04(1). On September 24,

[1] Gorokhovsky filed his lawsuit on September 17, 2001. However, during the pendency of this appeal, Gorokhovsky graduated from John Marshall School of Law, located in Chicago, Illinois, in 2001 and was admitted to practice law in Wisconsin on June 11, 2002.

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

2001, Gorokhovsky filed a third amended complaint also joining Attorney Daniel J. Miske and the law firm of Petrie & Stocking, S.C., as defendants.[3] Attorney Miske and his firm, Petrie & Stocking, S.C, represented the condominium association. The complaints against Edwards, Miske and Elite Properties alleged various claims including negligence, gross negligence, conspiracy, violations of both state and federal housing laws, discrimination, a violation of the Civil Rights Act, punitive damages, and "the tort of oppression." However, the third amended complaint failed to allege any claims against Edwards or Elite Properties and did not incorporate any of the previous claims against Edwards or Elite Properties.

¶4 On December 10, 2001, the trial court heard the motion to dismiss filed on behalf of Edwards, Elite Properties, Miske and Petrie & Stocking, S.C. Gorokhovsky maintained that all of his claims against each defendant survived his three amended complaints. However, because the third amended complaint failed to incorporate the allegations of his previous complaints against Edwards and Elite Properties, the trial court dismissed all claims against Edwards and Elite Properties. At the hearing on the defendants' motion to dismiss, Gorokhovsky also agreed to dismiss all claims against Petrie & Stocking, S.C., and any derivative claims against Miske.

¶5 Therefore, absent the claims against Edwards and Elite, which were not incorporated by the third amended complaint, as well as the claims against the law firm and the derivative claims against Miske, which were dismissed by stipulation, the following claims remained against Miske, personally: (1) gross

[3] Gorokhovsky incorrectly captioned the third amended complaint as "Second Amended Complaint."

and willful negligence; (2) common law conspiracy; (3) punitive damages, WIS. STAT. § 895.85(3); (4) violations of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*; (5) violations of the Wisconsin Fair Housing Act, WIS. STAT. § 106.04(2)(g);[4] and (6) civil rights violations, 42 U.S.C. §§ 1982, 1985(3) and 1986. Gorokhovsky's allegations of discrimination were based on his belief that Miske discriminated against him and denied him equal rights because he was of Russian and Jewish descent.

¶6 On December 28, 2001, the trial court dismissed these remaining claims against Miske. Additionally, the trial court ordered Gorokhovsky to pay the defendants' costs and reasonable attorney fees.

II. ANALYSIS.

A. The trial court did not erroneously dismiss the claims against Edwards and Elite Properties.

¶7 "The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of the claim." ***Weber v. City of Cedarburg***, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). Our review is confined to the face of the pleadings. ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 245, 255 N.W.2d 507 (1977). We will affirm the dismissal of a complaint for the failure to state a claim only if it appears certain that no relief can be granted under any set of facts that the plaintiff can prove in support of the allegations. ***Watts v. Watts***, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987). "In determining whether a plaintiff has sufficiently stated a claim for relief, the facts pleaded by the plaintiff

[4] Gorokhovsky claimed a violation of WIS. STAT. § 106.04 even though that section had renumbered as WIS. STAT. §§ 106.50 and 106.52, effective May 6, 2000.

and all reasonable inferences arising from the factual allegations made by the plaintiff are accepted as true." ***Farr v. Alternative Living Servs., Inc.***, 2002 WI App 88, ¶8, 253 Wis. 2d 790, 643 N.W.2d 841. Evaluating the legal sufficiency of a complaint presents a question of law, which we review de novo. ***Williams v. Security Sav. & Loan Ass'n***, 120 Wis. 2d 480, 482, 355 N.W.2d 370 (Ct. App. 1984).

¶8 "As a general rule, an amended complaint supersedes any prior complaints." ***Ness v. Digital Dial Communications, Inc.***, 222 Wis. 2d 374, 380, 588 N.W.2d 63 (Ct. App. 1998). When an amended complaint supersedes a prior complaint, the amended complaint becomes the only live, operative complaint in the case. *See* ***Holman v. Family Health Plan***, 227 Wis. 2d 478, 484, 596 N.W.2d 358 (1999). Moreover, when the amended complaint makes no reference to the original complaint and incorporates by reference no part of the original complaint, no part of the original complaint survives. *See* ***id.*** at 487.

¶9 In the instant case, the third amended complaint failed to incorporate by reference any part of the previous three complaints. Thus, because the third amended complaint is the only operative complaint and makes no independent claims against Edwards or Elite Properties, the trial court properly dismissed said parties from the lawsuit.

B. The trial court did not erroneously dismiss the personal claims against Miske.

¶10 "Wisconsin, like the federal system, has 'notice pleading' so that legal disputes are resolved on the merits of the case rather than on the technical niceties of pleading." *See* ***Hlavinka v. Blunt, Ellis & Loewi, Inc.***, 174 Wis. 2d 381, 403, 497 N.W.2d 756 (Ct. App. 1993) (citation omitted). However, "[i]f 'notice pleading' is to have any efficacy at all, a pleading must give the defending

party fair notice of not only the plaintiff's claim but the grounds upon which it rests as well." ***Id.*** (citation omitted). Therefore, "it is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for recovery." ***Id.*** at 403-04 (citations omitted). The same standard of "notice pleading" applies to Gorokhovsky's federal law claims. *See* FED. R. CIV. P. 8(a); *see also* ***Nance v. Vieregge***, 147 F.3d 589, 590-91 (7th Cir. 1998).

¶11 Review of the third amended complaint filed by Gorokhovsky reveals inadequate pleading to sufficiently notify the respondent of the claims against him. The third amended complaint is best described by the respondents: "Instead of pleading facts, the [p]laintiff invokes an impressive arsenal of adjectives and adverbs which do not modify or describe any act committed by the defendant." For example, Gorokhovsky accused Miske of

> acting in bad faith and being motivated by his personal animus and his racial and ethnic hatred of [p]laintiff, the defendant **DANIEL J. MISKE** was and still is engaged in egregious, extremely adversarial and vindictive course of conduct of harassing, intimidating and oppressing the [p]laintiff, denying him his housing benefits and interfering with his property rights.

In fact, Gorokhovsky's third amended complaint stretches over fifty-seven pages, containing 178 numbered paragraphs, but fails to get past these bald-faced assertions. When asked to clarify his claims at the dismissal hearing, Gorokhovsky was unable to provide relevant factual bases for his claims; leading the trial court to comment:

> I hear allegations of conspiracy, of racial discrimination, of Fair Housing Act violations, of gross negligence. And, searching through this [c]omplaint, to find one concrete allegation that rises to the level of specificity that would

> support any of those claims stretches this Court's ability to imagine.
>
> ….
>
> To bring in a conspiracy or a discrimination claim when really there is a disagreement among members of a condominium association … is a distortion of the proper use of the civil system. If every plaintiff acted as you are acting, [the] system would be grinded to a halt. Four complaints, 178 paragraphs average per [c]omplaint, and I have yet to find any fact that I think is worth more than a reasonable discussion at a condominium [a]ssociation meeting to try to resolve something. Period.
>
> And I am not going to allow you to abuse the system through this Court.

Nor will we allow Gorokhovsky to abuse the appellate process in a shallow attempt to resuscitate his lifeless claims. Accordingly, we affirm the trial court's dismissal of Gorokhovsky's claims against Miske.

C. The trial court did not erroneously award costs and attorney fees.

¶12 The trial court concluded that Gorokhovsky's lawsuit was "frivolous," as that term is defined by WIS. STAT. § 814.025. Section 814.025 states, in relevant part:

> **(1)** If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.
>
> ….
>
> **(3)** In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

> (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> **(4)** To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

WISCONSIN STAT. § 802.05(1)(a) states, in relevant part:

> The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law….
>
> If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion, or upon its own initiative, impose an appropriate sanction on the person who signed the pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

¶13 Because neither the trial court nor any of the defendants raised the issue of bad faith, the question we must resolve is whether Gorokhovsky "knew, or should have known, that the action … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." WISCONSIN STAT. § 814.025(3)(b); *see also* ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 244, 517 N.W.2d 658

(1994) ("[A] claim cannot be made reasonably or in good faith … if there is no set of facts which could satisfy the elements of the claim, or if the party or attorney knows or should know that the needed facts do not exist or cannot be developed."). We must also keep in mind that, pursuant to WIS. STAT. § 802.05, Gorokhovsky certified that the third amended complaint was "well-grounded in fact and … warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." Section 802.05(1)(a).

¶14 "The question of whether a reasonable attorney and litigant would or should have concluded that a particular claim is without a reasonable basis in law or equity presents a mixed question of law and fact and not a question of fact alone." ***State v. State Farm Fire & Cas. Co.***, 100 Wis. 2d 582, 601, 302 N.W.2d 827 (1981). "When mixed questions of law and fact are presented to this court, there are really two component questions which must be answered. The first question is what, in fact, actually happened; the second question is whether those facts, as a matter of law, have meaning as a particular legal concept." ***DOR v. Exxon Corp.***, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979).

¶15 However, "if the claim was correctly adjudged to be frivolous in the trial court, it is frivolous *per se* on appeal." ***Riley v. Isaacson***, 156 Wis. 2d 249, 262, 456 N.W.2d 619 (Ct. App. 1990). Here, at the dismissal hearing on December 10, 2001, the trial court found that there were no facts that could satisfy the elements of Gorokhovsky's claims:

> I hear on the factual allegations that [Miske] has done things you don't like. He is representing his client. His client disagrees with you. That's what I have heard here. I have heard no other factual allegation.
>
> ….

> It seems to me that you are using the legal system for a purpose other than which it is intended. The legal system is intended to take legitimate claims by parties who have a reasonable dispute as to the merits of their claim and ask for a court of law to apply the rules of the law to help those parties resolve them.
>
> ….
>
> [W]hen you bring a claim, you are putting other people's reputations [on the] line, not only your own. You have labeled people. You have labeled a person … as a conspirer, as a discriminator, as somebody violating his duty as a lawyer…. Well there's a stop to these things. A stop when you cannot give any reasonable, factual, specific basis in support [of] what … are wild-eyed claims. Again, I am not going to allow this Court to be used in that way.

The trial court then proceeded to award the defendants their costs and reasonable attorney fees. At the post-judgment hearing held on March 6, 2002, in response to Gorokhovsky's request to vacate the judgment, the trial court commented:

> [W]hat I did was respond to a motion of [the] defendants and, on that motion, I made a good faith decision incorporating the principles in ***Stern v. Thompson***, which refer to the statute at Section 814.025(3)(b), which point out that a party is claimed to be found frivolous if you knew or should have known that the action was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.
>
> And then I went through the factual claims you were making and pointed out that, even though you wanted the Court to find constitutional violations and serious violations of your rights, no reasonable attorney could bring those claims and assert that they were violating the law.

¶16 We agree and conclude that Gorokhovsky – whether proceeding as a simple *pro se* litigant (as he presents himself) or as an individual with extensive legal training who was nearing the completion of his legal education and was soon to be admitted to the bar (as is the reality of the situation) – should have known

that the facts did not exist and could not have been developed to support his allegations. Accordingly, we affirm the trial court's award of costs and reasonable attorney fees.

¶17 Based upon the foregoing, the trial court is affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.