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DISTRICT IV

July 12, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1820

The Estate of Thomas Smith v. Delores Jean Agne
Delores Jean Agne v. The Estate of Thomas Smith
(L.C. # 2012CV20)

Before Kloppenburg, P.J., Sherman and Blanchard, JJ.

Delores Jean Agne appeals an order dismissing her complaint against The Estate of Thomas Smith and the personal representative, Cary Smith, in his individual capacity. Thomas Smith, the decedent, was Cary Smith's father and Delores Agne's brother. Agne argues that her right to notice and the opportunity to be heard was violated when the circuit court dismissed the complaint. After reviewing the record, we conclude at conference that this case is

appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).¹ For the reasons discussed below, we summarily affirm.

The procedural facts underlying this appeal are not in dispute. In the course of the Estate's lawsuit against her, Agne sought leave to amend to bring a counterclaim and third-party claim against the Estate and Cary Smith for abuse of process. The parties briefed the issues and the circuit court conducted a hearing on the motion, but did not rule at the hearing. Because Agne had not received the circuit court's decision and was concerned that she may be running into statute of limitations problems, she filed an independent lawsuit against the Estate and Smith alleging essentially the same claims as those she sought to bring via amendment of the pleadings in the underlying case. The parties stipulated that the new lawsuit and the old lawsuit should be consolidated, *see* WIS. STAT. § 805.05(1), and the circuit court so ordered. Approximately a month later, the circuit court rendered its oral decision denying Agne's motion to amend the pleadings. Neither the parties nor the circuit court made any mention of Agne's independent abuse of process action during the oral decision proceedings. Following the oral decision, the Estate's counsel drafted the proposed order memorializing the circuit court's oral decision, and included a provision dismissing Agne's consolidated complaint alleging abuse of process. Despite Agne's written objections and request for a supplemental hearing, the circuit court entered the order dismissing Agne's lawsuit, as well as denying permission to amend the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

pleadings to add the abuse of process claims in the underlying case.² Agne appeals only the dismissal of her separate lawsuit.³

For purposes of this appeal, we assume without deciding that the circuit court erred in providing Agne no technical notice that her separate lawsuit might or would be dismissed.⁴ Reviewing the record before us, we conclude that any error is harmless and does not affect Agne's substantial rights. WIS. STAT. § 805.18(2). In so concluding, we consider whether the complaint states a claim upon which relief may be granted, a question of law we review *de novo*. See *John Doe 67C v. Archdiocese of Milwaukee*, 2005 WI 123, ¶19, 284 Wis. 2d 307, 700 N.W.2d 180.

When reviewing the sufficiency of the complaint, we accept all facts pleaded as true and draw all reasonable inferences in favor of stating a claim. *Meyer v. Laser Vision Inst., LLC*, 2006 WI App 70, ¶3, 290 Wis. 2d 764, 714 N.W.2d 223. Further, we liberally construe the complaint and affirm dismissal only if it is clear that there are no conditions under which the plaintiff can prevail. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 311, 529 N.W.2d 245 (Ct. App. 1995). Wisconsin is a “notice pleading” state; the plaintiff is required only to “notify the

² The record indicates that the circuit court explained its reasons for dismissing the separate action at a status conference subsequently held; however, the status conference was not conducted on the record, leaving us with nothing to review.

³ The notice of appeal indicates Agne also intended to raise an issue related to waiver of her attorney-client privilege; however, her brief addresses only the dismissal issue.

⁴ The circuit court's oral ruling denying the motion to amend the pleadings includes the circuit court's analysis of the merits of the abuse of process claims Agne sought to bring. Near the end of the hearing Agne's counsel sought clarification of the court's ruling with regard to other pending motions then before the court. Counsel did not, however, raise the issue of the separate lawsuit at the time despite the circuit court's final invitation to raise additional issues.

opposing party of the pleader's position in the case.” *Farr v. Alternative Living Servs., Inc.*, 2002 WI App 88, ¶11, 253 Wis. 2d 790, 643 N.W.2d 841. Nonetheless, dismissal is proper if, “[u]nder the guise of notice pleading, the complaint before us requires the court to indulge in too much speculation leaving too much to the imagination of the court.” *John Doe*, 284 Wis. 2d 307, ¶36 (quoting *Wilson v. Continental Ins. Cos.*, 87 Wis. 2d 310, 326-27, 274 N.W.2d 679 (1979)). “Bare legal conclusions set out in a complaint provide no assistance in warding off a motion to dismiss.” *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶21, 356 Wis. 2d 665, 849 N.W.2d 693.

The complaint purports to state a claim for abuse of process against the Estate and the personal representative individually, but fails. The complaint is replete with conclusory allegations such as “[d]efendants committed the tort of abuse of process in connection with the lawsuits,” and “[t]he lawsuits were baseless and unsupported by facts...,” but includes very few factual allegations, which we would accept as true. WISCONSIN JI—CIVIL 2620 sets forth the proof elements for the tort of abuse of process: (1) Defendant had a purpose other than that which the process was designed to accomplish, and (2) Defendant subsequently misused the process to accomplish a purpose other than that it was designed to accomplish. The jury instruction explains: “the process must be used for something more than a proper use with a bad motive,” meaning that “[t]he 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.” See *Thompson v. Beecham*, 72 Wis. 2d 356, 362, 241 N.W.2d 163 (1976).

Agne claims that two lawsuits that the Estate filed against her constitute abuse of process, one seeking partition of land of which she and now the Estate are joint tenants, and the other seeking various damages for claims such as conversion and abuse of process by Agne against the

Estate. While Agne’s complaint is heavy on allegations of bad motive on the part of Smith and the Estate, it is bereft of factual allegations related to the second critical element. *Thompson* describes the second abuse of process element as requiring a “definite act or threat not authorized by the process,” and explains: “[i]n 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.” *Id.* at 263. For example, in *Maniaci v. Marquette University*, 50 Wis. 2d 287, 300, 184 N.W.2d 168 (1971), our supreme court concluded that an abuse of process claim could properly be brought in the situation in which Marquette University, seeking to prevent one of its students from withdrawing from school and leaving Milwaukee, filed a petition to have the student detained in a psychiatric facility under Chapter 51 to buy time in which to contact the student’s father. The court stated:

It is clear that the purpose of all the [University] was not essentially to have inquiry into [the student’s] mental condition Rather, the purpose ... was to detain her until such time as her parent had been notified To assure her non-release until that time, [a defendant] struck upon the idea of using the statute that permits the temporary detention of persons who demonstrate symptoms of dangerous mental illness.

Id.

Agne does not allege any facts that support a conclusion that the Estate and Cary Smith in any way misused the legal process designed to permit them to obtain damages for conversion and abuse of process and to partition the disputed property.⁵ Agne makes no allegations supporting the “actual misuse of the process” element, relying instead on “bare legal

⁵ Agne’s conclusory allegation in her complaint that the Estate’s and Smith’s decision to bring the lawsuits “w[as] done, not in an effort to reasonably secure appropriate court relief or damages, but rather to settle a score with Delores Jean Agne for perceived slights committed by Delores Jean Agne
(continued)

conclusions.” Thus, Agne fails to allege sufficient facts to support a claim for abuse of process. See *Data Key Partners*, 356 Wis. 2d 665, ¶¶19, 21. As a matter of law, the complaint must be dismissed. Further, since our de novo review concludes that the complaint must be dismissed as a matter of law, any technical violation of notice requirements by the circuit court constitutes harmless error.

Upon the foregoing reasons,

IT IS ORDERED that the order dismissing the complaint is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals

over the years...” is wholly inadequate to support the element showing a “definite act or threat not authorized by the process.” See *Thompson v. Beecham*, 72 Wis. 2d 356, 362, 241 N.W.2d 163 (1976).