

[Cite as *Rieger v. Podeweltz*, 2010-Ohio-2509.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

JOSEPH M. RIEGER	:	
Plaintiff-Appellant	:	C.A. CASE NO. 23520
vs.	:	T.C. CASE NO. 08CV1707
ANGELIA R. PODEWELTZ, et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	

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O P I N I O N

Rendered on the 4th day of June, 2010.

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Joseph Rieger, 443 McGuerin Street, Dayton, OH 45431
Plaintiff-Appellant, Pro Se

Angelia Podeweltz, Nicholas Podeweltz, 1920 Hazel Avenue, Dayton,
OH 45429
Defendants-Appellees, Pro Se

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GRADY, J.:

{¶ 1} Joseph M. Rieger appeals from a final order of the court of common pleas that dismissed Rieger’s action against Angelia R. Podeweltz and others pursuant to Civ.R. 12(B)(6), for failing to state a claim upon which relief can be granted. We find no error in the trial court’s order, and therefore will affirm.

{¶ 2} On February 19, 2008, Rieger commenced an action against Angelia Podeweltz, Jason Kosater, and Nicholas Podeweltz on claims for relief for fraud. (Dkt. 1). Rieger's complaint alleged that the Defendants had complained to the Kettering police concerning Rieger, who was then subject to a civil protection order obtained by Angelia Podeweltz. Rieger's complaint states:

{¶ 3} "Angie (Angelia) Podeweltz, Nicholas Podeweltz and Jason Kosater all claimed that Rieger had driven by Podeweltz home 1920 Hazel Ave Kettering, Ohio 45420 at 10:40 P.M. Allegedly, Nicholas was walking to Dot's to pick up some groceries (Dot's Closes daily at 10PM 365 days a year per phone call to store mgmt.) And allegedly saw Rieger's car and called home on his cell phone (660-0685) to Jason's cell phone (231-7391) at around 10:40 P.M. Nicholas allegedly alerted them that Rieger would soon be driving by (mental telepathy). And thus, Angelia Podeweltz and Jason Kosater were simultaneously ready to allegedly see Rieger drive by. As a result of the conspiracy to committing Fraud and actual additional committing of further Fraud by filing a Fraudulent Police Report and also communicating Fraudulent information in their witness statements and sworn affidavits [,] Mr. Rieger was arrested and imprisoned."

{¶ 4} Rieger's complaint further alleges that his attorney lied to him concerning the contents of a police report of the

complaint Defendants had made, in connection with the time of Nicholas Podeweltz's cell phone call to Jason Kosater, and that as a result Rieger eventually entered a plea of guilty to the offense of disorderly conduct that terminated the criminal charges against him. Rieger further alleged that the prosecutor committed fraud on the court in suppressing evidence showing that Nicholas Podeweltz had not placed a cell phone call to Jason Kosater at the time stated in the police report.

{¶ 5} The three Defendants filed a motion to dismiss the action against them pursuant to Civ.R. 12(B)(6). (Dkt. 26). The trial court granted the motion on June 19, 2009. (Dkt. 38). Rieger filed a timely notice of appeal. (Dkt. 40).

{¶ 6} The function of a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of a claim for relief alleged in the complaint. Generally, the defense of failure to state a claim upon which relief can be granted asserts that the pleader has failed to plead operative facts demonstrating the right to relief alleged.

Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190; *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242.

{¶ 7} In *Citizens Banking & Savings Co. v. Spitzes, Rorick & Co., et al.* (1938), 65 Ohio App.309, at paragraph two of the

syllabus, this court, sitting as the Court of Appeals of Franklin County, held:

{¶ 8} "To constitute fraud the following elements must appear: that a false representation was made; that such misrepresentation related to a material existing fact and was not a mere statement of opinion or future promise; that the person making the misrepresentation could have ascertained its falsity; that the misrepresentation was intended to be relied on; that the misrepresentation was relied on; and that the party relying on the misrepresentation was damaged as a direct result thereof."

{¶ 9} Civ.R. 8(A) provides that a complaint or other pleading that sets forth a claim for relief "shall contain a short and plain statement of the claim showing that the party is entitled to relief." Rieger's complaint stated a claim for relief for fraud.

Civ.R. 9(B) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Failure to specifically plead the operative facts constituting an alleged fraud presents a defective claim that may be dismissed. *Universal Coach, Inc. v. New York Transit Authority, Inc.* (1993), 90 Ohio App.3d 284. The "particularity" requirement of Civ.R. 9(B) means that the pleading must contain allegations of fact which tend to show each and every element of a cause of action for fraud.

{¶ 10} The trial court found that the allegations in Rieger's complaint in support of his claim for relief against the three Defendants for fraud failed for a lack of particularity, and we agree. Rieger alleges that the Defendants "claimed that Rieger had driven by (the) Podeweltz home (at) 1920 Hazel Avenue, Kettering, Ohio at 10:40 P.M.," and that those representations were fraudulent. In order to be fraudulent, a representation must be false. *Citizens Banking & Savings Co., Inc. v. Spitzes, Rorick & Co., Inc., supra*. Rieger does not allege operative facts showing that the Defendant's representation was false because, in fact, he did not drive by the Podeweltz home. Rieger merely attacks the time of the event the Defendants allegedly reported, which is not material to whether that event in fact occurred.

{¶ 11} Neither does Rieger's complaint allege operative facts showing "that the party relying on the misrepresentation was damaged as a direct result thereof." *Id.* In other words, the person to whom the representation was made and the person who was damaged as a result must be one and the same. Rieger's complaint alleges that he was damaged, but that the representations the Defendant made which were fraudulent were made to the Kettering police department. The necessary convergence of representation and damage is not shown. Rieger cannot avoid that defect by alleging, as he does, that his attorney misrepresented to him the

contents of the report of the complaint the Defendants had made.

We agree with the trial court that Rieger's complaint is defective in that respect.

{¶ 12} After finding that Rieger's complaint for fraud failed to satisfy Civ.R. 9(B), the trial court considered whether the claims for relief the complaint alleged could constitute a claim for malicious prosecution. A claim for malicious prosecution would not be subject to the particularity requirement of Civ.R. 9(B).

{¶ 13} To prove a claim for malicious prosecution, which involves a misuse of criminal actions or proceedings, a plaintiff must establish (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. *Trussel v. General Motors Corp.* (1990), 53 Ohio St.3d 142. "A private person who institutes or procures institution of criminal proceedings against another is not subject to liability unless the person against whom the criminal proceedings were initiated proves all three elements." *Ash v. Ash* (1995), 72 Ohio St.3d 520, 522.

{¶ 14} A criminal prosecution terminated by a defendant's compromise plea of guilty or no contest to an offense different from the offense for which a criminal charge was brought indicates that the question of guilt or innocence on the original charge

is left open. "Having bought peace, the accused may not thereafter assert that the proceedings have terminated in his favor." *Id.*, at 523.

{¶ 15} Rieger alleged in his complaint that the criminal charge against him, which was brought on the basis of the complaint to police the Defendants made, was terminated by his plea of guilty to the offense of disorderly conduct. That termination may have been a compromise of the charges that were brought. Nevertheless, Rieger's allegation of his conviction is a judicial admission made on the face of his complaint that necessarily prevents a finding that the prosecution which arose from the complaint Defendants made had terminated in Rieger's favor. The trial court so found, and we agree.

{¶ 16} Rieger's assignments of error are overruled. The judgment of the trial court will be affirmed.

DONOVAN, P.J. And BROGAN, J. concur.

Copies mailed to:

Joseph Rieger
Angelia Podeweltz
Nicholas Podeweltz
Jason Kosater
Hon. Sumner E. Walters