INDEX OF EXHIBITS

(Unpublished Cases)

Exh. 1 *Childress v. Michalke,* No. 4:10-CV-11008, 2012 WL 762663 (E.D. Mich. Mar. 9, 2012) (Goldsmith, J.)

Exh. 2 *Swain v. Morse*, No. 346850, 2020 WL 3107696 (Mich. Ct. App. June 11, 2020)

Exh. 3 *Edwards Publications, Inc. v. Kasdorf,* No. 293617, 2011 WL 1687622 (Mich. Ct. App. May 3, 2011)

Exh. 4 *Ellis v. Chase Home Fin., LLC*, No. 14-11186, 2014 WL 7184457, (E.D. Mich. Dec. 16, 2014) (Michaelson, J.)

Exh. 5 *Dickinson v. Limp Bizkit,* No. 244021, 2004 WL 1459357 (Mich. App. Jun. 29, 2004)

EXHIBIT 1

2012 WL 762663
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

Robert Lee CHILDRESS, Plaintiff,
v.
Michael MICHALKE, et al., Defendants.

No. 4:10–CV–11008.
|
March 9, 2012.

Attorneys and Law Firms

Robert Lee Childress, Muskegon Heights, MI, pro se.

James S. Meyerand, Mt. Clemens, MI, John A. Dolan, York, Dolan, Clinton Township, MI, Keith J. Lerminiaux, Pontiac, MI, Robert E. Packus, Jr., Moffett, Vitu, Birmingham, MI, Anthony P. Polce, Polce & Associates, P.C., Timothy W. Mizerowski, Mizerowski Smith, P.C., Plymouth, MI, Jonathan B. Frank, Jackier, Gould, Bloomfield Hills, MI, Anthony A. Agosta, Clark Hill, Detroit, MI, Jennie Santos–Bourne, Michael G. Brady, Warner, Norcross, Southfield, MI, for Defendants.

OPINION AND ORDER ACCEPTING AND ADOPTING, IN PART, THE MAGISTRATE JUDGE'S REPORT & RECOMMENDATION, GRANTING CERTAIN MOTIONS (DKTS.28, 39, 62, 68, 77), DENYING CERTAIN MOTIONS (DKTS.22, 42, 46, 48, 54, 84, 86, 93), AND DISMISSING COMPLAINT

MARK A. GOLDSMITH, District Judge.

***1** Plaintiff Robert Lee Childress, Jr.—a Michigan prisoner serving multiple sentences for crimes of dishonesty—claims that he is the victim of a vast conspiracy designed to maliciously prosecute him. Plaintiff has filed the instant *pro se* complaint against 34 parties, including both corporate entities and individuals. Defendants include police officers, automotive financial institutions, a pawn shop, and representatives of those organizations, among others.

This matter is before the Court on several dispositive motions: Defendant Jim Hertel's motion for summary judgment (Dkt.28); Defendants Motor City Pawn Brokers II and Tony Aubrey, Sr.'s motion for summary judgment (Dkt.39); Defendant Toyota Credit–Lexus Financial's motion to dismiss (Dkt.62); Defendants Mercedes–Benz Financial Services USA LLC and Thomas Maier's motion to dismiss (Dkt.68); and Defendant Wells Fargo Financial's motion to dismiss (Dkt.77). In addition, before the Court are a motion to strike by Toyota Credit–Lexus Financial (Dkt.86) and several motions filed by Plaintiff, including a motion to amend the complaint (Dkt.22); a motion for "access to the Court and equal legal research material" (Dkt.42); a motion demanding a jury trial (Dkt.54); a motion for leave to file excess pages (Dkt.84); a motion for sanctions (Dkt.93), and two motions for extensions of time (Dkts.46, 48).[1]

On September 1, 2011, Magistrate Judge Mark A. Randon issued a Report & Recommendation ("R & R") recommending that Plaintiff's complaint be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b) for failure to state a claim on which relief can be granted. Specifically, the Magistrate Judge concluded that a judgment in Plaintiff's favor would necessarily imply the invalidity of at least one of his convictions, none of which has been reversed on appeal or invalidated. Plaintiff has filed objections to the R & R (Dkt.91). For the reasons that follow, the Court accepts and adopts the R & R, in part, and dismisses Plaintiff's complaint for insufficient pleading.

I. Background

Plaintiff has been investigated and convicted of engaging in fraudulent schemes in which he traded-in vehicles claiming to hold clear title when, in fact, either he was not the owner or the security interest had not been extinguished. One such criminal episode culminated in Plaintiff's arrest on January 4, 2008 when he arrived at a Ford dealership to pick up a rebate check from a transaction made on December 28, 2007, in which

Plaintiff traded-in a 2004 Range Rover for a Ford Fusion. Complaint (Dkt.1). At a bench trial in Macomb County Circuit Court, *People v. Childress*, No. 09–003052–FH, Plaintiff was prosecuted for false pretenses, stolen property, larceny by conversion, and intent to pass false title. Amended Judgment of Sentence (Dkt.91–2). The court convicted Plaintiff of false pretenses of $20,000 or more; however, Plaintiff was not convicted of the other charges. *Id.* For a similar scheme, involving a 2007 Lexus, Plaintiff was convicted in Oakland County Circuit Court of intent to pass false title and larceny by conversion of $20,000. *People v. Childress*, No. 08–219884–FH. Plaintiff is currently in custody at the West Shoreline Correctional Facility serving sentences for the convictions in 09–003052–FH ("the Macomb case") and 08–219884–FH ("the Oakland case").

***2** In the instant complaint, Plaintiff alleges that Defendants—who include law enforcement personnel, automotive financial institutions, an automobile dealership, its employees and others—"conspired to illegally search and seize me, and maliciously prosecute me for property which belonged to me, without the due process of law." *Id.* Plaintiff alleges that, at the time of his January 4, 2008 arrest, his Mercedes G500 SUV was unlawfully seized. Plaintiff alleges that, over January and February 2008, several more of his vehicles were illegally seized and/or the subjects of improper "stop orders" and investigations, including (i) the Ford Fusion, (ii) two Ford F–350s, (iii) several Range Rovers, (iv) a 2007 Lexus LX470,[2] and (v) a Mercedes CLK convertible. *Id.* Plaintiff also claims that Defendants committed a laundry list of other illegal acts including: tortious conversion, tortious interference of contractual relations, unjust enrichment, slander and defamation. He seeks $50,000,000.00 in damages.[3]

Five dispositive motions have been filed on behalf of 7 out of 34 Defendants in this case (Dkts. 28, 39, 62, 68, and 77), and Plaintiff has filed responses. The Magistrate Judge found that Plaintiff's complaint failed to state a claim based on *Heck v. Humphrey*, 512 U.S. 477, 486–487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), which holds that a prisoner may not maintain a § 1983 claim based on constitutional violations that would invalidate his conviction if his conviction has not yet been invalidated in another proceeding. Furthermore, the Magistrate Judge recommended that Plaintiff's state law claims be dismissed once the federal claims are dismissed. *See Harper v. AutoAlliance Intern., Inc.*, 392 F.3d 195, 210 (6th Cir.2004) ("Generally, if the federal claims are dismissed before trial, ... the state claims should be dismissed as well.") (internal quotations omitted). Finally, the Magistrate Judge recommended that the Court dismiss Plaintiff's claims alleging mental and/or emotional injury because Plaintiff has not demonstrated he suffered any physical injury as a result of Defendants' conduct. Plaintiff has filed objections, and some of the Defendants have filed responses to Plaintiff's objections.

II. Analysis

A claim under 42 U.S.C. § 1983 is appropriate remedy where a state prisoner challenges a condition of his confinement, *Preiser v. Rodriguez*, 411 U.S. 475, 499, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), or when an individual seeks money damages for a previously invalidated sentence. *Heck v. Humphrey*, 512 U.S. 477, 486–487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). A prisoner may not, however, sue under § 1983 to challenge the validity of a sentence; rather, "habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement." *Heck*, 512 U.S. 477, 481, 114 S.Ct. 2364, 129 L.Ed.2d 383. Accordingly, *Heck* and its progeny "indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005).

***3** While Plaintiff's complaint did not explicitly reference § 1983, the Magistrate Judge construed the complaint as a prisoner civil rights action brought under this statute. In so reading the complaint, the Magistrate Judge recommended that the complaint be dismissed because a judgment in Plaintiff's favor "would necessarily demonstrate the invalidity of confinement or its duration." *Id.*

Plaintiff agrees that his complaint is brought under § 1983, but objects to the Magistrate Judge's conclusion that his claim is barred. Plaintiff argues that while he was charged in the Macomb case with seven counts, he was

only convicted of one charge, a count of false pretenses of $20,000 or more. Amended Judgment of Sentence (Dkt.91–2). Plaintiff argues that for the six counts for which he was found not guilty, claims for money damages under § 1983 are not barred by *Heck*. Plaintiff further objects to the Magistrate Judge's reference to his convictions arising from other incidents, arguing that they have different case numbers and are not the basis for this lawsuit, and do not bar his § 1983 action. Objections at 11–12 (Dkt 91). In short, Plaintiff contends that his claims against Defendants were only for conspiratorial actions that resulted in his arrest for the charges that *did not* lead to the convictions for which he is currently incarcerated. Plaintiff asserts that "[a]ll of the matters being sued for have been adjudicated in favor of the Plaintiff or were never part of the criminal process." Objections at 14.

Plaintiff's objections are correct, to the extent that they contend that *Heck* can only bar a § 1983 claim for conspiracy relative to seized property if the illegality of the seizure would be inconsistent with a prior, not-yet-vacated conviction. Based on the present record, it is impossible to say with any precision which vehicles formed the basis of any of Plaintiff's convictions, except for the Ford Fusion in the Macomb case and the 2007 Lexus LX470 in the Oakland case. And even as to those convictions, the record is unclear as to how the alleged illegality of the seizures would be inconsistent with the precise crimes for which Plaintiff has been convicted. For example, if the convictions were for falsely claiming to be the owner of the vehicle, Plaintiff might still have a claim for illegal search if the Defendants conspired to break into his garage. Moreover, Plaintiff's allegations concern a number of seizures and other acts that took place over several weeks. Neither Defendants' motion papers, nor the R & R, delineate the specific subject matter of the convictions and link those adjudications to the specific events or acts Plaintiff complains of in this action. Without such an analysis, this Court cannot say that a particular conviction would "necessarily" be invalidated by a finding of wrongful conduct in this case. Accordingly, the Court cannot accept that aspect of the Magistrate Judge's R & R recommending dismissal of Plaintiff's complaint on the basis of *Heck*.

***4** Nevertheless, the Court concludes that Plaintiff's complaint should be dismissed for failure to allege sufficient facts to support a plausible claim for relief. Although a court "must construe the complaint in the light most favorable to plaintiff," *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir.2007), a plaintiff still must "plead [ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). This standard "requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). In the instant complaint, Plaintiff's conclusory allegations that Defendants conspired "to maliciously prosecute, deprive me and seize my property in violation of the Constitution" do not satisfy the *Iqbal* standard. "[C]onspiracy claims must be pled with some degree of specificity ... vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1539 (6th Cir.1987). Here, Plaintiff does not identify how or when the conspiracy took place or what facts support the conclusion that there was a conspiracy at all. Nor does he allege any facts supporting the legal conclusion that the various searches, seizures and other actions violated the law, which Defendants characterize as legitimate repossessions initiated by bona fide title owners and/or lenders, lawfully executed by the Macomb County Sheriff's Department.[4] The state-law claims are similarly defective because of their entirely conclusory nature. Accordingly, Defendants' motions to dismiss and/or motions for summary judgment are granted over Plaintiff's objections.

With respect to the Magistrate Judge's determination that Plaintiff's claims for alleged mental and/or emotional injuries are not actionable without a showing of physical injuries, and the recommendation that the Court should dismiss Plaintiff's state-law claims, the Court finds that the Magistrate Judge has reached the correct result for the correct reasons. *See* 42 U.S.C. § 1997e(e) (a prisoner may not bring a federal civil action "for mental or emotional injury suffered while in custody without a prior showing of physical injury").

In his objections to the R & R, Plaintiff states that "[a]n amended complaint would eliminate any prejudice or confusion, and resolve the issues complained of by the Defendants in their motions to dismiss under Fed.R.Civ.P. 12(b)(6), 12(c)." Objections at 14. However, Plaintiff has not filed a motion to amend the complaint to cure the fundamental defects in his complaint. *See* *Desparois v. Perrysburg Exempted Village School Dist.*, No. 10–3158,

2012 WL 104532, at *7 (6th Cir. Jan.13, 2012) ("Where a plaintiff includes a bare request to amend in his written brief opposing summary judgment and does not make any argument regarding the particular grounds on which amendment is sought, the district court is not required to construe the plaintiff's request in its brief as a motion to amend, and it does not err in not doing so.") (internal quotation marks omitted).

***5** Because the Court's dismissal of the complaint is based on the insufficiency of the pleadings, the Court will allow Plaintiff until March 26, 2012 to file and serve a proper motion for leave to amend the complaint. As part of the motion, Plaintiff must identify any prior conviction that had, as part of its subject matter, any act (including the search and/or seizure of vehicles or other property) that forms the basis of any allegation in the proposed amended complaint; in addition, for all such convictions, Plaintiff must specify the particular criminal acts for which he was convicted. Further, Plaintiff shall submit a proposed amended complaint as an attachment to the motion, which shall contain all necessary allegations for stating a conspiracy claim and/or such other claims as Plaintiff may have against Defendants.

III. Conclusion

For the reasons stated, it is ordered that the R & R (Dkt.89) is accepted and adopted, in part, and Defendants' motions to dismiss and/or motions for summary judgment (Dkts. 28, 39, 62, 68, and 77) are granted on the basis stated above. All the other motions are denied as moot or lacking merit.[5] Plaintiff's complaint (Dkt.1) is dismissed without prejudice to his serving and filing a motion for leave to amend the complaint and proposed amended complaint on or before March 26, 2012, which motion and proposed pleading shall conform to the requirements set forth above. If Plaintiff does not serve and file a conforming motion for leave to amend the complaint and proposed amended complaint on or before March 26, 2012, the instant dismissal shall be converted to a dismissal with prejudice.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 762663

Footnotes

1 Plaintiff has also filed a number of documents entitled "motions to dismiss" the various dispositive motions (Dkts.71–74, 76–77), which the Court construes as responses to the defense motions.

2 The VIN of this vehicle, as stated in the complaint, reveals that this is the same 2007 Lexus that was the subject of the conviction in the Oakland case.

3 As the Magistrate Judge noted in his R & R, Plaintiff is a prodigious filer of federal cases, having filed no fewer than 19 cases in the Eastern District of Michigan since December 2009. Of these 19 lawsuits, ten involve petitions for writs of habeas corpus—one regarding the same facts alleged in the instant Complaint. *See Childress v. Booker,* Case No. 10–CV–11554 (Battani, J.). Plaintiff's habeas petition was denied by Judge Marianne O. Battani, without prejudice, because, at the time, Plaintiff had not been convicted of any criminal charges. *Childress v. Booker,* Case No. 10–11554 (Dkt.4). Plaintiff has since been convicted and was sentenced in July 2010. Both the instant complaint and Plaintiff's habeas petition involve the same allegations contesting what Plaintiff believes was an improper arrest and prosecution. More than three civil rights actions brought by Plaintiff under 42 U.S.C. § 1983 (filed subsequent to the filing of this action) have been dismissed for failure to state a claim. *See Childress v. Federal Bureau of Prisons,* No. 10–CV–14708 (Murphy, J.) (dismissed December 10, 2010); *Childress v. Special Agent Wood,* No. 10–CV–14711 (Borman, J.) (dismissed June 29, 2011); *Childress v. Patricia Caruso,* No. 10–CV–14725 (Goldsmith, J.) (dismissed December 10, 2010); *Childress v. Cole,* No. 10–CV–14821 (Rosen, C.J.) (dismissed January 19, 2011).

[4] Furthermore, most of the Defendants in this case are non-state actors. A plaintiff asserting a claim under § 1983 must show that a person acting under color of state law deprived him of a right secured by the federal Constitution. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Plaintiff's basis for including these Defendants in this suit is his allegation that the Defendant dealerships, financial institutions, and their representatives jointly engaged with the sheriffs by conspiring with them to illegal seize Plaintiff's property. *See id.* ("[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute") (quoting *United States v. Price,* 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966)). Thus, Plaintiff's insufficient allegations regarding his conspiracy claims provide no basis for § 1983 claims against the non-state Defendants.

[5] The Court vacates that portion of the order (Dkt.10) referring this case to the Magistrate Judge for all pretrial matters that pertains to non-dispositive motions, and denies the non-dispositive motions without further hearing because the record developed affords an adequate decisional basis. This denial includes Plaintiff's motion to amend the complaint (Dkt.22), which only seeks to change the first name of one of the Defendants, and Plaintiff's motion for "access to the Court and equal legal research material" (Dkt.42), which seeks an order that unpublished authorities cited in briefs be furnished to him. The former is moot because the Court is granting Plaintiff leave to file a proper motion to amend, which may include correcting the naming error; the latter is moot because the Court's disposition does not turn on the legal authorities Plaintiff sought. Plaintiff's extension motions (Dkt.46, 48) are moot because Plaintiff ended up responding to the motion (Dkt.28) for which an extension was sought and the other relief sought in this motion—that unpublished legal materials be furnished to Plaintiff—is unnecessary because such materials have no bearing on the disposition by the Court. Toyota's motion to strike notice (Dkt.86) concerned Plaintiff's "notice," which had claimed that Toyota's motion to dismiss was sanctionable; Plaintiff's notice contended that the Toyota motion falsely claimed Plaintiff was engaging in extortion by seeking a monetary settlement for his claims. The Toyota motion claimed the notice was improper because no motion for sanctions had been filed. However, Toyota's motion became moot once Plaintiff, in fact, filed a motion for sanctions (Dkt.93). The sanctions motion, however, is presently without merit and/or is moot, given that the Court has dismissed Plaintiff's complaint. Under these circumstances, the Court cannot say that the conduct of Toyota's counsel violated accepted norms of advocacy and was objectively unreasonable. *See* *INVST Financial Group, Inc. v. Chem–Nuclear Systems, Inc.,* 815 F.2d 391, 401 (6th Cir.1987).

EXHIBIT 2

2020 WL 3107696
Only the Westlaw citation is currently available.
Court of Appeals of Michigan.

Renee SWAIN, Plaintiff-Appellant,
v.
Michael MORSE, Mark Zarkin, and Steven Lellis On the Green, LLC, Defendants-Appellees.

No. 346850
|
June 11, 2020, 9:05 a.m.

Synopsis
Background: Restaurant guest sued restaurant, restaurant's owner, and friend of the owner, alleging sexual assault and battery, intentional infliction of emotional distress, and other counts arising from incident at restaurant. Following remand after appeal of a discovery order, 2018 WL 3789104, the Circuit Court, Oakland County, granted summary disposition to restaurant and restaurant owner, and partial summary disposition to owner's friend, and subsequently dismissed guest's remaining claims as sanction for discovery misconduct. Guest appealed.

Holdings: The Court of Appeals held that:

trial court was without authority under court rules to dismiss guest's claims as sanction for false deposition testimony;

guest's false deposition testimony did not justify penalty of dismissal of her claims against friend of restaurant owner;

guest's testimony that she did not feel coerced or pressured during her meeting with restaurant owner and his friend precluded defeated her civil conspiracy claim;

actions of restaurant owner and his friend did not constitute conspiracy to commit the unlawful purpose of witness tampering;

actions of restaurant owner did not constitute extreme and outrageous conduct;

genuine issue of material fact existed regarding whether alleged unwanted squeezing of restaurant guest's breast by friend of restaurant owner was extreme and outrageous conduct; and

trial court did not show bias toward restaurant, its owner, and owner's friend.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Disposition; Motion for Sanctions (Discovery).

Oakland Circuit Court, LC No. 2017-158765-CZ

Before: Beckering, P.J., and Fort Hood and Shapiro, JJ.

Opinion

Per Curiam.

***1** Plaintiff sued defendant Michael Morse, alleging sexual assault and battery, intentional infliction of emotional distress (IIED), and additional counts arising from an alleged incident at defendant Lellis On the Green, LLC (Lelli's), a restaurant owned and operated by defendant Mark Zarkin. Plaintiff appeals the trial court's opinion and order dismissing her verified complaint as a discovery sanction for untruthful deposition testimony. She also challenges the trial court's earlier opinions and orders granting Zarkin and Lelli's summary disposition and Morse partial summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). For the reasons stated in this opinion, we affirm the grant of summary disposition to Zarkin and Lelli's, but reverse the dismissal of plaintiff's complaint against Morse as a discovery sanction and the grant of summary disposition to Morse on the IIED claim.

I. BACKGROUND

This case stems from plaintiff and Morse's April 6, 2017 meeting at Lelli's. According to plaintiff,[1] she was having

dinner with a group of friends when Morse approached the table and initiated conversation. The group then began taking pictures and plaintiff offered to pose for a photograph with Morse. The photograph was taken by Zarkin, the restaurant's owner and Morse's friend. Later in the evening, plaintiff asked to take a "selfie" with Morse and he agreed to do so. Plaintiff testified that she complained about glare and focus issues on her phone and Morse suggested that they go to a different area of the restaurant to take the picture. According to plaintiff, after they took the photograph in this "secluded" area, Morse put his arm around her and grabbed her left breast through her clothing, squeezed it, and asked, "Is that better?" Morse denies that he grabbed or touched plaintiff's breast.

About a week later, plaintiff reported her allegations to the Farmington Hills police, and defendants learned of the accusation through the police. According to plaintiff, one of her friends who was at the dinner told her that Zarkin wanted to arrange a meeting to discuss what happened. Plaintiff ultimately agreed to meet with Morse at Lelli's on May 6, 2017, and, on her request, the police arranged for plaintiff to wear a recording device for the meeting. A transcript of the recording shows that Morse apologized to plaintiff during their meeting, but never admitted or denied touching her breast. Plaintiff said she forgave Morse and gave him a hug. Plaintiff gave the recording to the police and eventually the prosecutor decided not to bring charges.

On May 15, 2017, plaintiff filed a verified complaint alleging sexual assault and battery against Morse, premises liability against Zarkin and Lelli's, and, as to all defendants, IIED,[2] civil conspiracy, negligence, gross negligence, and wanton and willful misconduct. Immediately, an issue arose regarding the scope of Morse's deposition. Plaintiff sought to depose Morse about other allegations of sexual misconduct against him, and Morse sought and obtained a protective order barring plaintiff's counsel from asking Morse questions about acts unrelated to plaintiff. The order did not definitively foreclose discovery or admission of such evidence as it allowed plaintiff to submit an offer of proof relating to other acts evidence. Plaintiff did so, filing a motion captioned, "motion for offer of proof regarding MRE 404(b)." The motion set forth other allegations of sexual misconduct against Morse, and the trial court denied the motion without prejudice. Plaintiff sought interlocutory appeal of the denial of her motion for 404(b) discovery and on February 20, 2018, we granted leave.[3] On August 9, 2018, the Court reversed the trial court's denial of plaintiff's motion for discovery of 404(b) evidence, vacated the underlying protective order, and remanded for further proceedings.[4]

***2** We granted a stay of the lower court proceedings while plaintiff's prior appeal was pending.[5] On remand, the trial court heard oral arguments on defendants' pending motions for summary disposition and sanctions. On November 20, 2018, the trial court issued an opinion and order granting Zarkin and Lelli's summary disposition of all counts. In a separate opinion and order, the court granted Morse summary disposition of plaintiff's claims for IIED, civil conspiracy, and negligence, but concluded that there were questions of fact precluding summary disposition on plaintiff's claim for sexual assault and that she could proceed with the claim of gross negligence and willful and wanton misconduct to support a claim of exemplary damages.

However, on December 5, 2018, the trial court issued an opinion and order dismissing plaintiff's entire complaint against Morse as a sanction for discovery misconduct.[6] Defendants' motions seeking sanctions was based on plaintiff's deposition testimony regarding the amount and duration of financial support she had received from her friend Ken Koza. Morse asserts that Koza's financial support is relevant to whether he assaulted plaintiff because the support ceased shortly before plaintiff filed suit and so demonstrates a financial motivation for plaintiff to have fabricated her claim. Morse asserted that plaintiff committed perjury on those matters because she testified that Koza had made deposits of $10,000 into her bank account for only three months, while her bank records showed that she received $10,000 per month from Koza from February 2, 2015 through May of 2016. Also, while plaintiff originally estimated that payments from Koza stopped in March or May of 2017, she later testified that the monthly payments stopped at the end of 2016, which was inconsistent with her bank records that showed the regular payments did not stop until May 2017 as she originally estimated.

Based on the bank records, the court found that plaintiff "lied under oath" at her deposition. The trial court concluded that plaintiff's false statements warranted dismissal because: (1) they were not the product of mistake or misunderstanding; (2) she did not supplement or correct her deposition testimony; and (3) the statements were material. This appeal followed.

II. DISMISSAL FOR UNTRUTHFUL DEPOSITION TESTIMONY

Plaintiff argues that the trial court abused its discretion by dismissing her complaint against Morse as a discovery sanction. We agree for several reasons.[7] First, plaintiff's deposition testimony did not violate any court rule or order, which typically occurs before the harsh sanction of dismissal is imposed. Second, plaintiff's testimony did not undermine the integrity of the judicial process because defendant was able to obtain contradictory evidence through discovery and plaintiff's veracity can be addressed at trial through impeachment. Third, though the issue of Koza's financial support is relevant, it is not dispositive and Morse was not substantially prejudiced by plaintiff's testimony.

A. COURT RULES

***3** "Dismissal is a drastic step that should be taken cautiously." *Brenner v. Kolk*, 226 Mich. App. 149, 163, 573 N.W.2d 65 (1997). Severe sanctions such as default or dismissal are predicated on a flagrant or wanton refusal to facilitate discovery that typically involves repeated violations of a court order. See e.g., *Bass v. Combs*, 238 Mich. App. 16, 26, 604 N.W.2d 727 (1999) (affirming dismissal when the plaintiff violated "several court orders over a fifteen-month period"), overruled on other grounds by *Dimmit & Owen. Fin. Inc. v. Deloitte & Touche L.L.C.*, 481 Mich. 618, 627-628; 752 N.W.2d 37 (2008); *Mink v. Masters*, 204 Mich. App. 242, 244, 514 N.W.2d 235 (1994) (affirming a default judgment when the defendant twice failed to comply with the trial court's order compelling discovery). Cf. *Frankenmuth Mut. Ins. Co. v. ACO, Inc.*, 193 Mich. App. 389, 399, 484 N.W.2d 718 (1992) (holding that default judgment for failure to respond to interrogatories was an abuse of discretion "in the absence of an order or some other compelling circumstance ....").

The cases relied on by the trial court involved violation of orders or court rules and repeated efforts to stall discovery. None concerned allegations that a party lied at deposition, let alone a court finding to that effect. For instance, in *Kalamazoo Oil Co. v. Boerman*, 242 Mich. App. 75, 89, 618 N.W.2d 66 (2000), the trial court entered a default judgment against the defendant as a sanction for failing to appear for his deposition in violation of a court order compelling his attendance. This Court affirmed, finding that "[t]he record reveals defendant's deliberate noncompliance with court rules and a discovery order in addition to what the trial court evidently viewed as an attempt to mislead the court and disrupt the progression of the lawsuit." *Id.* Similarly, in *LaCourse v. Gupta*, 181 Mich. App. 293, 294-296, 448 N.W.2d 827 (1989), the plaintiff's case was dismissed after she repeatedly failed to disclose her expert witnesses and never supplemented her response despite a court order to do so. This Court found that dismissal was warranted because "[t]here were only two weeks left before the scheduled trial date, [and] there was a lengthy history of failure to comply with court rules ...." *Id.* at 297, 448 N.W.2d 827.

Unlike those cases, plaintiff's deposition testimony did not violate *any* court rule or order, and so sanctions were not authorized by MCR 2.504(B)(1) for noncompliance with a rule or order. Contrary to the trial court's opinion, deposition testimony is not subject to the duty to supplement discovery responses under MCR 2.302(E). At the time this case was decided, MCR 2.302(E) allowed the imposition of sanctions when a party failed to supplement a response to a "request for discovery" that the party knows was "incorrect when made." See MCR 2.302(E)(1)(b)(*i*) and (2) (2018). But a deposition is *not* a response to a request for discovery. A response to a discovery request is something that is capable of being signed by the attorney. See MCR 2.302(G)(1). Also, the rules refer to responses and depositions as distinct items. See MCR 2.302(H)(1) ("Unless a particular rule requires filing of discovery materials, requests, *responses*, *depositions*, and other discovery materials may not be filed with the court except as follows[.]") (emphasis added).[8]

The court rules governing depositions provide for sanctions in only one circumstance: "[O]n motion, the court may impose an appropriate sanction—including the reasonable expenses and attorney fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent or otherwise violates this rule." MCR 2.306(D)(2). Also, MCR 2.313(B)(1) allows for sanctions based on the deponent's failure to follow a court order, stating, "If a deponent fails to be sworn or to answer a question after being directed to do so by a court in the county or district in which the deposition is being taken, the failure may be considered a contempt of court."

Neither rule allows for sanctions based on the substance of the deponent's testimony. That the court rules contemplate sanctions for deposition-related misconduct, but not false testimony, strongly suggests that the Supreme Court does not view sanctions as an appropriate response to false deposition testimony.

***4** The lack of a court rule addressing sanctions for that misconduct is understandable when one considers that there are several existing disincentives for untruthful deposition testimony. First and foremost, a party's credibility can be impeached at trial with deposition testimony. Also, a deponent may be charged with perjury for willfully false testimony on a material fact. See *In re Contempt of Henry*, 282 Mich. App. 656, 677-678, 765 N.W.2d 44 (2009). Further, if it is ultimately determined that the complaint lacked evidentiary support other than the plaintiff's false statements, the prevailing party may seek costs and attorney fees under MCL 600.2591(a)(*ii*) for a frivolous action on the grounds that "[t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true."

B. INHERENT AUTHORITY

The lack of authority to impose sanctions for untruthful deposition testimony under the court rules raises the question of whether a court may do so under its inherent authority to sanction litigant misconduct. "[T]rial courts possess the inherent authority to sanction litigants and their counsel, including the power to dismiss an action." *Maldonado v. Ford Motor Co.*, 476 Mich. 372, 376, 719 N.W.2d 809 (2006). "This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* "Because these inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." *Cummings v. Wayne Co.*, 210 Mich. App. 249, 253, 533 N.W.2d 13 (1995) (cleaned up).

There are few cases of record examining the scope of misconduct that would justify dismissal or default in the absence of a court order or rule violation. No Michigan appellate court has held that the court's inherent authority extends so far as to dismiss a case based on the court's conclusion that a party did not tell the truth in deposition. The cases that have provided for an "inherent authority" dismissal differ substantially from the type of misconduct for which the court imposed the ultimate sanction in this case.

The two leading cases on a court's inherent authority to sanction litigant misconduct are *Cummings*, 210 Mich. App. 249, 533 N.W.2d 13, and *Maldonado*, 476 Mich. 372, 719 N.W.2d 809. In *Cummings*, the plaintiff threatened three of the defendant's witnesses with physical injury and committed acts of vandalism against them. *Cummings*, 210 Mich. App. at 251, 533 N.W.2d 13. The trial court dismissed the complaint with prejudice, and on appeal the plaintiff argued that the court lacked authority under court rules and statutes to impose sanctions for the misconduct. *Id.* This Court determined that the trial court had inherent authority to sanction litigant misconduct and affirmed the dismissal:

> We do not believe the trial court's decision to dismiss the action was the result of unrestrained discretion or imprudence. The court clearly acknowledged the harshness of the sanction and balanced it against the gravity of plaintiff's misconduct. The nature of the threats and the actual vandalism committed permanently deprived the court of the opportunity to hear the testimony of witnesses who would be able to testify openly and without fear. [*Id.* at 253, 533 N.W.2d 13.]

Like *Cummings*, *Maldonado* also concerned a blatant disregard of the judicial process. In that case, after the trial court ruled that evidence of a prior conviction was inadmissible, the plaintiff and her counsel "engaged in a concerted and wide-ranging campaign in the weeks before various scheduled trial dates to publicize the details of the inadmissible evidence through the mass media and other available means." *Maldonado*, 476 Mich. at 392, 719 N.W.2d 809. The trial court dismissed plaintiff's case because "plaintiff and her attorneys

repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny defendants a fair trial, and frustrate the due administration of justice." *Id.* at 376, 719 N.W.2d 809. In holding that the trial court did not abuse its inherent authority to impose sanctions, the Supreme Court relied on plaintiff and her counsel's continued misconduct even after "the trial court twice explicitly discussed the improper conduct with plaintiff's counsel and warned everyone about the consequences of continuing misconduct." *Id.* at 394, 719 N.W.2d 809. Moreover, counsel's conduct "violated numerous rules of professional conduct." *Id.* at 396, 719 N.W.2d 809. In sum, dismissal was justified because the misconduct tainted the potential jury pool, denied the defendant a fair trial, and so "was directly aimed at frustrating the due administration of justice." See *id.* at 398, 719 N.W.2d 809.

***5** *Cummings* and *Maldonado* concerned serious misconduct that went to the ability of the court to assure a fair trial. Witness intimidation and jury tampering are "administration of justice" issues because they make it impossible for a jury to make a reliable decision. In contrast, untruthful deposition testimony does not threaten the integrity of the judicial *system.* A witness can be impeached at trial and the jury can consider whether a witness was lying in making its credibility determination. In fact, the jury's verdict will in many, if not most, cases be an implicit finding that one of the parties has given untruthful testimony. It is therefore doubtful whether dismissal for intentionally false deposition testimony is ever appropriate. Indeed, rather than protecting the judicial process, permitting judges to dismiss cases for false deposition testimony would be a fundamental change and could itself undermine the integrity of the judicial system that has always relied on the factfinder for credibility determinations. See e.g., *Bank of America, NA v. Fidelity Nat'l Title Ins. Co.*, 316 Mich. App. 480, 512, 892 N.W.2d 467 (2016) ("It is for the trier of fact to assess credibility; a jury may choose to credit or discredit any testimony.").

Even if dismissal for intentionally false testimony could fall within a trial court's inherent authority, the testimony in this case would not justify that penalty. Before dismissing a case, a trial court should consider the following factors:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio*, 211 Mich. App. at 507, 536 N.W.2d 280.]

A trial court must give "careful consideration to the factors involved and consider[ ] all of its options in determining what sanction [is] just and proper in the context of the case before it." *Duray Dev., LLC v. Perrin*, 288 Mich. App. 143, 165, 792 N.W.2d 749 (2010) (holding that the trial court abused its discretion by barring presentation of a witnesses as a sanction for not filing a witness list as required by the scheduling order).

Regarding factor (1), plaintiff argues that she did not *deliberately* give false testimony.[9] We conclude that the trial court did not clearly err in finding that she did, but her testimony is more ambiguous than the court's opinion suggests. For instance, plaintiff testified that she had difficulty recalling the amount and dates of funds provided by Koza: "I know he put money in my account but I don't know exactly what he did at certain times." Later, however, she was "positive" that Koza did not deposit $10,000 in monthly income to her bank account beginning in February or March 2015, stating, "I'm not denying that he did it maybe for three maybe for three months, but after that, I—yes, I am denying that." This testimony cannot be squared with the bank records that showed that she received $10,000 in monthly payments from Koza from February 2015 through May 2016. Testifying nearly two years later in February 2018, it is certainly possible that plaintiff's testimony was due to a faulty memory, as she suggests.[10] The court also found that plaintiff received several additional payments from Koza in 2015—in the amounts of $20,000, $4,000, $22,000, and $15,000 in addition to the $10,000 monthly payments.

***6** As to when Koza stopped being a source of income,

plaintiff initially answered, "I think it was May. May or March." Morse concedes that this was a truthful answer because plaintiff's bank records show that Koza's regular deposits stopped in May 2017. But when plaintiff was later asked when Koza's support came to an end, she answered:

> *A.* Last year. I can't remember exactly—I don't remember.
>
> *Q.* All right.
>
> [Plaintiff's counsel]: When you say "last year," what year are you talking about? Because—
>
> BY [Morse's counsel]:
>
> *Q.* 2017?
>
> *A.* I am talking about '17.
>
> And it was—oh, no, no, no. That's—I would have to say '16. November of '16 or December of '16.

It is questionable whether plaintiff intentionally gave the wrong end-date for Koza's support considering that she initially provided an accurate answer and later answered, "I can't remember exactly," before changing her answer to November or December 2016. Plaintiff may have been "back peddling" when she changed her answer, as Morse argues, or she may have honestly believed, upon further reflection, that the payments stopped prior to 2017. However, the trial court also found that there was a $3,500 deposit from Koza in November 2017, just a few weeks before plaintiff's deposition. While it could be argued that plaintiff's deposition testimony was referring to the regular monthly income that she was receiving from Koza, and thus the $3,500 deposit in November 2017 is not contradictory, plaintiff does not make that contention. Accordingly, the trial court did not clearly err by finding an intentional misstatement on the duration of Koza's support.

That said, the fact that there is some ambiguity and equivocation in plaintiff's answers counsels against dismissal, and it also demonstrates why courts should be hesitant to impose sanctions based upon a finding that the deponent intentionally made false statements. Issues of credibility and intent and generally left to the trier of fact. See *Pemberton v. Dharmani*, 207 Mich. App. 522, 529 n. 1, 525 N.W.2d 497 (1994) ("[S]ummary disposition is inappropriate where questions of motive, intention or other conditions of mind are material issues."); *Goldsmith v. Moskowitz*, 74 Mich. App. 506, 518, 254 N.W.2d 561 (1977) ("In cases involving state of mind, such as the scienter requirement in fraud, summary judgment will be appropriate in relatively few instances because it will be difficult to foreclose a genuine dispute over this factual question.") (quotation marks and citation omitted).

Vicencio factors (2) and (5) do not provide any support for dismissal as there has been no allegation that plaintiff or her counsel failed to comply with court orders. Similarly, for factor (4), Morse has not alleged a history of deliberate delay. Accordingly, those factors weigh against dismissal.

Factor (3) also weighs against dismissal because Morse was not substantially prejudiced by plaintiff's testimony. Plaintiff's financial condition does not concern her prima facie case but rather relates to a defense based on motive. The testimony was material in that it was relevant to this defense, but it nonetheless related to an ancillary matter. More important than materiality, Morse's counsel's questioning at oral argument makes clear that the defense already had accurate information regarding the amount and duration of Koza's payments because the questioning is consistent with the bank records. Further, at the time of plaintiff's deposition on January 5, 2018, there was still over a month remaining in discovery. Plaintiff admitted that Koza had deposited funds in her bank account, and defendants had ample time to depose Koza and obtain all the relevant records. Significantly, this is not a case where the plaintiff wholly concealed a material fact and thereby prevented further discovery concerning it. Providing false, even intentionally false, testimony on a known and readily discoverable matter does not hinder the judicial *process* so as to justify dismissal.

***7** Perhaps recognizing the lack of actual prejudice, Morse emphasizes that "[t]he trial court has a gate-keeping obligation, when such misconduct occurs, to impose sanctions that will not only deter the misconduct *but also serve as a deterrent to other litigants.*" *Maldonado*, 476 Mich. at 392, 719 N.W.2d 809 (emphasis added). However, deterrence can be accomplished through a lesser sanction than dismissal. We are also mindful that permitting dismissal or default as a sanction for deposition testimony would invite parties to bait or lead the opposing party into making false or contradictory statements at deposition, a result plainly at odds with the purpose of discovery. See *People v. Burwick*, 450 Mich. 281, 298, 537 N.W.2d 813 (1995)

("A primary purpose of discovery is to enhance the reliability of the fact-finding process by eliminating distortions attributable to gamesmanship."). If we were to affirm dismissal in this case, it would open the door for motions to dismiss as a sanction for false deposition testimony in many, if not nearly all, contested cases. Ultimately, the determination of credibility would become one for the court rather than one for the jury and would result in a fundamental change to the judicial process.

Regarding factor (6), Morse focuses on plaintiff's failure to correct her testimony with a post-deposition affidavit and her attempt to quash the subpoena for her bank records. However, as discussed, plaintiff had no duty to supplement her deposition testimony under MCR 2.302(E). After plaintiff's deposition, Morse served a subpoena on plaintiff's bank and plaintiff brought an emergency motion to quash the subpoena, which the trial court denied. We agree with plaintiff that her motion to quash was not improper and that she had a good-faith argument that the bank records were not relevant to this case. And after the motion was denied, there was no need for plaintiff to file a supplemental affidavit because the bank records were the best evidence of Koza's deposits. Plaintiff was also aware that Morse would be deposing Koza.

As to the last factor, the trial court concluded—without elaboration or discussion of alternative remedies—that a lesser sanction than dismissal "would be insufficient to remedy the damage." For the reasons discussed, we fail to see how Morse was substantially damaged by plaintiff's testimony. Her statements regarding Koza's support were ancillary to her allegations and easily disproved by Morse, i.e., there was little prejudice. Further, her testimony did not threaten the integrity of the judicial process because she can be impeached at trial. Finally, considering that this was the only instance of misconduct found by the trial court and that plaintiff did not violate any court rule or order, it cannot be said that she flagrantly refused to facilitate discovery. Thus, the hallmarks of the type of misconduct warranting dismissal are not present in this case. For these reasons, the interests of justice would be better served by a lesser sanction than dismissal, and the trial court abused its discretion in concluding otherwise.

III. CIVIL CONSPIRACY

Plaintiff next argues that the trial court erred in granting defendants summary disposition of her civil conspiracy claim. We disagree.[11]

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins. Co. v. Columbia Cas. Ins. Co.*, 194 Mich. App. 300, 313, 486 N.W.2d 351 (1992).[12] Plaintiff alleges that Morse and Zarkin conspired to coerce her into withdrawing her criminal complaint and not pursuing civil litigation. Plaintiff specifically relies on defendants' conduct at the May 6, 2017 meeting where Morse apologized to her and Zarkin commended her for forgiving Morse. Plaintiff claims that defendants' conduct violated MCL 750.122, i.e., the "witness anti-intimidation statute." *Kimmelman v. Heath. Downs Mgmt. Ltd.*, 278 Mich. App. 569, 577, 753 N.W.2d 265 (2008). The trial court granted summary disposition because it found no evidence of a conspiracy and that defendants' alleged conduct did not violate MCL 750.122.

***8** We disagree with the trial court that plaintiff's deposition testimony indicating her belief that there was not a conspiracy between Morse and Zarkin is dispositive. While plaintiff's testimony was certainly damaging to her claim, she was not given the legal definition of conspiracy (as a jury would be). Further, as a lay witness, plaintiff is not qualified to testify to the legal effect of Morse and Zarkin's actions. See MRE 701. Viewing the evidence in a light most favorable to plaintiff, there is a question of fact whether Morse and Zarkin acted together to convince plaintiff to withdraw the criminal complaint against Morse. However, plaintiff does not merely allege that Morse and Zarkin sought to convince or encourage her to withdraw the complaint. Rather, she maintains that defendants *coerced* her into doing so. Plaintiff is uniquely qualified to testify whether she felt coerced or pressured at the meeting, and she denied that she did. While coercion is not an element of conspiracy, it is the underlying premise to plaintiff's claim, and so summary disposition was appropriate given the lack of factual dispute on that matter. Also, while plaintiff argues that summary disposition was premature because discovery had not been completed, she does not explain how the additional deposition testimony from defendants would support her claims.[13] See *Meisner Law Group PC v. Weston Downs Condo. Ass'n*, 321 Mich. App. 702, 724,

909 N.W.2d 890 (2017).

In addition, the trial court correctly concluded that the alleged conspiracy did not violate MCL 750.122 as alleged. That statute provides in pertinent part:

> (1) A person shall not give, offer to give, or promise anything of value to an individual for any of the following purposes:
>
> (a) To discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) To influence any individual's testimony at a present or future official proceeding.
>
> (c) To encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding. [MCL 750.122(1).]

Plaintiff specifically argues that Zarkin offered her something of value and encouraged her to avoid legal process in violation of MCL 750.122(1)(c) by offering her and family "free dinners" and also by applying "moral pressure." The trial court correctly ruled that merely encouraging someone to not pursue criminal and civil charges does not constitute encouraging someone to avoid "legal process." Statutory language must be interpreted based on its ordinary meaning and the context in which it is used. *Brickey v. McCarver*, 323 Mich. App. 639, 643, 919 N.W.2d 412 (2018). "The unifying theme among [MCL 750.122's] subsections is an attempt to identify and criminalize the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding, as defined in subsection 12(a)."[14] *People v. Greene*, 255 Mich. App. 426, 438, 661 N.W.2d 616 (2003). Multiple sections of the Michigan Penal Code, MCL 750.1 *et seq.*, define "legal process" as:

> [A] summons, complaint, pleading, writ, warrant, injunction, notice, subpoena, lien, order, or other document issued or entered by or on behalf of a court or lawful tribunal or lawfully filed with or recorded by a governmental agency that is used as a means of exercising or acquiring jurisdiction over a person or property, to assert or give notice of a legal claim against a person or property, or to direct persons to take or refrain from an action. [MCL 750.368(9)(b); MCL 750.217c(7)(b).]

Viewed in context, the anti-tampering statute refers to encouraging an individual to avoid service of process for testimony at an official proceeding. Plaintiff cites no authority for her expansive view that this statute makes it a crime to merely encourage an individual to withdraw a criminal complaint or discourage the filing of suit. Accordingly, she fails to establish that Morse and Zarkin were acting in concert to commit an unlawful purpose.

IV. IIED

***9** Plaintiff also argues that the trial erred in granting summary disposition of her claim for IIED. We affirm the grant of summary disposition to Zarkin and Lelli's but reverse as to Morse.

"To establish a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Hayley v. Allstate Ins. Co.*, 262 Mich. App. 571, 577, 686 N.W.2d 273 (2004) (quotation marks and citation omitted). "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." *Lewis v. LeGrow*, 258 Mich. App. 175, 196, 670 N.W.2d 675 (2003) (quotation marks and citation omitted). "Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Doe v. Mills*, 212 Mich. App. 73, 91, 536 N.W.2d 824 (1995). The test is whether "the

recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 602-603, 374 N.W.2d 905 (1985) (quotation marks and citation omitted).

The trial court initially determines "whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Hayley*, 262 Mich. App. at 577, 686 N.W.2d 273. "But where reasonable individuals may differ, it is for the jury to determine if the conduct was so extreme and outrageous as to permit recovery." *Id.* Plaintiff's IIED claim is primarily based on the alleged sexual touching. She alleges that Morse grabbing her breast was extreme and outrageous conduct and that Zarkin committed IIED by failing to supervise Morse. The trial court granted Zarkin and Lelli's summary disposition because they did not have a duty to supervise Morse, and there is no evidence they knew that Morse was about to commit the alleged assault. As to Morse, the court concluded that "[e]ven taking plaintiff's version of the facts as true, a single touch to her breast does not amount to extreme and outrageous conduct."

We agree with the trial court that plaintiff failed to state a claim of IIED against Zarkin and Lelli's. Plaintiff has effectively abandoned her allegation that Zarkin had a duty to supervise Morse by failing to support it with legal authority. See *Mitcham v. Detroit*, 355 Mich. 182, 203, 94 N.W.2d 388 (1959). In any event, allowing patrons to take a photograph in a "secluded" area of the restaurant is not extreme and outrageous conduct. Plaintiff also argues that the conduct underlying her civil conspiracy claim supports her IIED claim. As discussed, plaintiff agreed that she was not coerced or pressured at the meeting where Morse apologized to her and Zarkin made remarks commending her for forgiving Morse. Zarkin also indicated at the meeting that it would hurt his restaurant if the allegations became public and that he would provide plaintiff and her family with a free dinner. That is not extreme and outrageous behavior even if the purpose was to dissuade plaintiff from pressing criminal charges. Thus, Morse and Zarkin's conduct at the meeting does not support an IIED claim.

***10** The remaining question then is whether plaintiff may proceed with a claim of IIED against Morse based on the alleged grabbing and squeezing of her breast. We are not aware of any published opinion addressing whether an alleged sexual assault involving a single touch to the breast through clothing meets the IIED threshold. Regarding sexual remarks, we have held that a supervisor's proposition of sex to an employee was not sufficiently outrageous for purposes of IIED. See *Trudeau v. Fisher Body Division*, 168 Mich. App. 14, 20, 423 N.W.2d 592 (1988). On the other hand, we determined that a circulation of a cartoon depicting the plaintiff and a male coworker in a "sexually compromising position" set forth a prima facie case. See *Linebaugh v. Sheraton Mich. Corp.*, 198 Mich. App. 335, 338, 342-343, 497 N.W.2d 585 (1993). And in *Lewis*, 258 Mich. App. at 197-198, 670 N.W.2d 675, we held that secretly recording consensual sexual activity, even though the recordings were not published or distributed, presented a factual question for the jury to resolve.

It is safe to say that an unwanted sexual touching is typically more extreme conduct than sexual remarks or drawings. And while Morse's conduct as described by plaintiff was not as outrageous as secretly recording sex acts, she does allege unwanted sexual contact. Certain factors suggest that the conduct, assuming it occurred, fails to meet the high threshold for IIED. Specifically, the alleged assault was a single outside-the-clothing breast squeeze after Morse took a "selfie" with plaintiff. On the other hand, plaintiff had just met Morse and they were in a public place with other people nearby. Thus, the conduct, if it occurred, would have been particularly brash and unexpected. We are also mindful that community standards regarding sexual misconduct have changed significantly over the past few years. We therefore conclude that an average member of today's community could find the alleged conduct in this case outrageous. In sum, we conclude that reasonable minds may differ as to whether the alleged conduct was extreme and outrageous and therefore the trial court erred in granting Morse summary disposition of plaintiff's IIED claim.

V. REASSIGNMENT ON REMAND

Finally, plaintiff asks that we reassign this case to a different judge on remand. We decline to do so.

"The general concern when deciding whether to remand to a different trial judge is whether the appearance of

justice will be better served if another judge presides over the case." *Bayati v. Bayati*, 264 Mich. App. 595, 602-603, 691 N.W.2d 812 (2004). "In deciding whether to remand to a different judge, this Court considers whether the original judge would have difficulty in putting aside previously expressed views or findings, whether reassignment is advisable to preserve the appearance of justice, and whether reassignment will not entail excessive waste or duplication." *In re Bibi Guardianship*, 315 Mich. App. 323, 337, 890 N.W.2d 387 (2016). "A trial judge is presumed to be fair and impartial, and any litigant who would challenge this presumption bears a heavy burden to prove otherwise." *In re Susser Estate*, 254 Mich. App. 232, 237, 657 N.W.2d 147 (2002).

Plaintiff argues that the trial court made statements indicating a bias in favor of defendants. Most of the statements identified by plaintiff pertain to the timing of discovery. For instance, the trial court stated that it previously bifurcated discovery into a liability and damages phase because, if the alleged assault did not occur, the court wanted to confine the case "before we were going to get far flung and try this to the press and potentially, you know, destroy reputations and hope that, you know, an action for abuse of process could clean it up afterwards." The court also stated at one point that it wanted to decide whether Zarkin and Lelli's were entitled to summary disposition before any further proceedings "because if in fact they have no business having been in this case, they need to get out before any more damage is done to them." Plaintiff apparently takes issue with court's concern for defendants' reputations and protecting them from unnecessary "damage." However, the court's decision to consider unnecessary expense and burden to the parties was proper and does not show a bias toward defendants. See MCR 2.302(C) ("[T]he court in which the action is pending may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ....").

***11** Further, we are not persuaded that the trial court showed preferential treatment in favor of defendants. Plaintiff highlights that the court denied her motions for default and sanctions against Morse and asks us to compare those rulings with the court's decision to dismiss her case. But plaintiff did not appeal the denial of her motions, and we therefore see no basis to review the trial court's rulings or the underlying allegations. Further, an adverse ruling is not a sufficient reason for disqualification or reassignment, even if that ruling is later reversed. *In re Contempt of Henry*, 282 Mich. App. 656, 680, 765 N.W.2d 44 (2009). Therefore, we are also unpersuaded by plaintiff's arguments relating to the trial court's MRE 404(b) ruling and the court's statements regarding this Court's reversal of that ruling on remand. Moreover, considering the case's lengthy history, we conclude that reassignment would entail excessive and duplicative costs.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

All Citations

--- N.W.2d ----, 2020 WL 3107696

Footnotes

[1] In reviewing a motion for summary disposition under MCR 2.116(C)(10), we must view the evidence in the light most favorable to plaintiff, the nonmoving party. See *Maiden v. Rozwood,* 461 Mich. 109, 120, 597 N.W.2d 817 (1999).

[2] Plaintiff also claimed negligent infliction of emotional distress but later stipulated to the dismissal of that claim.

[3] *Swain v. Morse*, unpublished order of the Court of Appeals, entered February 20, 2018 (Docket No. 342410).

[4] *Swain v. Morse*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2018 (Docket No. 342410), 2018 WL 3789104.

[5] *Swain v. Morse*, unpublished order of the Court of Appeals, entered March 8, 2018 (Docket No. 342410).

[6] On the same day, the court entered an order denying Zarkin and Lellis's motion for sanctions.

[7] We review a trial court's decision regarding discovery sanctions for an abuse of discretion. *Traxler v. Ford Motor Co.*, 227 Mich. App. 276, 286, 576 N.W.2d 398 (1998). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable outcomes. *PCS4LESS, LLC v. Stockton*, 291 Mich. App. 672, 676, 806 N.W.2d 353 (2011). A trial court's factual findings are reviewed for clear error. *Traxler*, 227 Mich. App. at 282, 576 N.W.2d 398. "A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

[8] Consistent with this interpretation, effective January 1, 2020, the rule governing the duty to supplement now expressly applies to initial disclosures and response to interrogatories, requests for production and admissions, i.e., it does not apply to depositions. See MCR 2.302(1)(a) (2020).

[9] We decline plaintiff's novel invitation to adopt the standards and caselaw governing judicial misconduct because there is no basis to apply that authority to a discovery-misconduct case. We also reject plaintiff's argument to consider Morse's purported discovery misconduct in determining whether dismissal of her case was an appropriate sanction. Plaintiff has not cited authority holding or indicating that it is appropriate to consider the other party's allege misconduct in reviewing discovery sanctions. Further, she chose not to appeal the trial court's order denying her motion for sanctions against Morse and so that matter is not before us.

[10] Notably, although the question was directed at $10,000 monthly payments, other questions were directed at a subsequent reduction to $5,000 monthly payments, which plaintiff claimed not to recall. Plaintiff's bank records show that after receiving the monthly $10,000 payments as described above, she received a $5,000 payment on June 29, 2016, and then $5,000 in monthly payments from August 2016 to May 2017, making the concept of monthly payments much harder to forget.

[11] A trial court's decision on a motion for summary disposition is reviewed de novo. *Spiek v. Dep't of Transp.*, 456 Mich. 331, 337, 572 N.W.2d 201 (1998). In evaluating a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties, and view that evidence in the light most favorable to the nonmoving party to determine if a genuine issue of material fact exists. MCR 2.116(G)(5); *Maiden*, 461 Mich. at 118-120, 597 N.W.2d 817. Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v. Robertson*, 212 Mich. App. 45, 48, 536 N.W.2d 834 (1995).

[12] Liability does not arise from a civil conspiracy alone; "rather, it is necessary to prove a separate, actionable tort." *Advocacy Organization for Patient. & Providers v. Auto Club Ins. Ass'n*, 257 Mich. App. 365, 384, 670 N.W.2d 569 (2003) (quotation marks and citation omitted). See also *Franks v. Franks*, —— Mich. App. ——, ——, slip op. at 20, —— N.W.2d ——, 2019 WL 4648446 (2019) (Docket No. 343290). Here, plaintiff does not seek to hold defendants liable for a separate tort under a theory of civil conspiracy but rather seeks relief for a civil conspiracy in and of itself. But defendants did not seek summary disposition on this ground, and we will not address it.

[13] Plaintiff twice deposed Morse and had the opportunity to depose Zarkin. After Morse's second deposition, plaintiff filed a motion to continue the deposition and to compel answers to certain questions. The trial court denied the motion as moot following dismissal.

[14] An official proceeding is defined "as a proceeding heard before a legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including a referee, prosecuting attorney, hearing examiner, commissioner, notary, or other person taking testimony or deposition in that proceeding." MCL 750.122(12)(a).

End of Document

EXHIBIT 3

2011 WL 1687622
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

EDWARDS PUBLICATIONS, INC.,
Plaintiff/Counter Defendant–Appellee/Cross Appellant,
v.
Tracy KASDORF, Defendant–Appellant/Cross Appellee,
and
Bilbey Publications, LLC, Defendant/Counter Plaintiff.

Docket No. 293617.
|
May 3, 2011.

Tuscola Circuit Court; LC No. 06–023444–CK.

Before: TALBOT, P.J., and SAWYER and M.J. KELLY, JJ.

Opinion

PER CURIAM.

***1** Plaintiff proceeded to trial on three counts: (1) breach of contract; (2) intentional interference with business relationships; and (3) civil conspiracy. The jury found no cause of action on the first two claims. However, the jury did find in plaintiff's favor on the claim for civil conspiracy and awarded $15,822. Defendant Kasdorf[1] moved for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial. At the same time, plaintiff moved for an amended judgment and attorney fees or, alternatively, a new trial. Both motions were denied. Because we conclude that the jury's verdict was irreconcilably inconsistent and contrary to law, we reverse and remand for a new trial.

I. BASIC FACTS

Defendant began working as a sales representative for plaintiff in 1992. As a condition of employment, defendant signed a non-competition agreement[2] which prohibited her from working for a competitor within a 25–mile area for a period of two years after leaving plaintiff's employment. Defendant was compensated for her concurrence to this agreement.

In 2005, defendant discontinued her employment relationship with plaintiff and began working as a sales representative for Bilbey, a direct competitor of plaintiff located within a 25–mile distance. Bilbey was aware of the agreement defendant had signed with plaintiff but nevertheless decided to hire her. Defendant was assigned customers when she went to work for Bilbey, some of whom had been her customers while working for plaintiff. As a result, plaintiff sent cease-and-desist letters to defendant and her new employer. While defendant acknowledged receiving the letters, she continued to work for Bilbey.

In 2006, the year after defendant left plaintiff's employment, plaintiff's sales revenue decreased dramatically. While small gains were made in later years, overall sales figures were still lower than when defendant worked for plaintiff. In contrast, Bilbey expanded its sales routes and increased sales dramatically in the same time period.

II. PROCEDURAL HISTORY

After plaintiff instituted its multi-count lawsuit, defendant moved for summary disposition on all counts, which the trial court granted. Plaintiff appealed that decision. In that prior appeal, this Court affirmed in part, reversed in part, and remanded the matter for further proceedings. See *Edwards Publications v. Kasdorf*, unpublished opinion of the Court of Appeals, issued January 20, 2009 (Docket No. 281499). This Court upheld the trial court's grant of summary disposition in favor of defendant on plaintiff's claims for breach of contract based on non-disclosure or confidentiality provisions, and for violation of the uniform trade secrets act, MCL 445.1901 *et seq.* *Id.* at slip op 6, 8. However, this Court concluded that at least one of

the employment agreements was valid and had been violated as a matter of law requiring further proceedings to determine causation and damages. *Id.* at slip op 7. In addition, this Court found that the trial court erred in summarily dismissing plaintiff's claim for tortious interference and civil conspiracy. *Id.* at slip op 6–8.

***2** Following remand, the matter proceeded to trial on the remaining counts. A three-day trial was held and the jury reached the result detailed above.

III. JNOV

Both parties argue that the trial court should have granted JNOV in their favor or, alternatively, a new trial.[3] Specifically, defendant argues that the trial court should have entered a judgment of no cause of action on all of plaintiff's claims. In contrast, plaintiff argues that the trial court should have entered a judgment in plaintiff's favor for it claims of tortious interference and civil conspiracy, rather than just civil conspiracy. Both parties premise their arguments on the fact that the jury found no cause of action on plaintiff's claim for tortious interference, yet found in plaintiff's favor on the claim for civil conspiracy.

We review a trial court's ruling on a motion for JNOV de novo. *Sniecinski v. Blue Cross & Blue Shield of Michigan*, 469 Mich. 124, 131; 666 NW2d 186 (2003). We also review a claim of inconsistent verdicts, which is a question of law, de novo. See *Lagalo v. Allied Corp*, 457 Mich. 278, 282–285; 577 NW2d 462 (1998).

When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Merkur Steel Supply, Inc v. Detroit*, 261 Mich.App 116, 123–124; 680 NW2d 485 (2004). If the evidence is such that reasonable jurors could disagree, JNOV is improper. *Foreman v. Foreman*, 266 Mich.App 132, 136; 701 NW2d 167 (2005).

We conclude that the trial court properly declined to grant JNOV to either party. The evidence presented at trial did not preclude judgment for either party as a matter of law. However, even though JNOV was inappropriate for either party, a new trial should have been granted due to the irreconcilable verdict reached by the jury.

"A civil conspiracy is a combination of two or more persons, by some concerted action to accomplish a criminal or unlawful purpose, or to accomplice a lawful purpose by criminal or unlawful means." *Admiral Ins Co v. Columbia Casualty Ins* Co, 194 Mich.App 300, 313; 486 NW2d 351 (1992). For a claim of civil conspiracy to succeed, "it is necessary to prove a separate, actionable tort." *Early Detection Center, PC v. New York Life Ins Co*, 157 Mich.App 618, 632; 403 NW2d 830 (1986). The instruction provided to the jury accurately reflected the law and required the jury to find that all of the elements of the claim had been proven, including proof of the underlying claim for tortious interference, to find in plaintiff's favor. In spite of this instruction, the jury concluded that plaintiff had failed to prove its claim for tortious interference, yet could succeed on its claim for civil conspiracy.

Trial courts are required to make every effort to reconcile a seemingly inconsistent verdict. *Bean v. Directions Unlimited, Inc*, 462 Mich. 24, 31; 609 NW2d 567 (2000). The verdict should be upheld "if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury." *Id.* (internal quotation marks and citation omitted). Here, there is no logical explanation for the jury's conclusion that plaintiff's claim for tortious interference should fail, yet also conclude that plaintiff's conspiracy claim should succeed despite receiving specific instruction prohibiting such a result. It is tempting to merely conclude that the conspiracy verdict should be set aside in light of the verdict on the tortious interference claim. But that would require that we have the ability to read the jurors' minds and be able to confidently conclude that their error lay in a misunderstanding of the elements of conspiracy and that the jury would have returned a verdict for defendants had they properly understood it. But it is also possible that the jury merely felt more comfortable with their understanding of civil conspiracy over the more complicated tort of tortious interference and merely hung their judgment on that claim. And because we lack the ability to read the jurors' minds, we are not confident in divining which result they truly reached. Accordingly, we conclude the proper remedy is to remand for a new trial to allow a new jury to reach a consistent verdict.

IV. ATTORNEY FEES

***3** Plaintiff's cross appeal included an argument that the trial court improperly denied its request for attorney fees. In light of our conclusion that a new trial is required, it is not necessary to address this issue.

Reversed and remanded for a new trial. We do not retain jurisdiction. No costs.

TALBOT, P.J. (dissenting).

***3** I respectfully dissent as I see no reasonable alternative other than affirm the judgment based on the instructions and verdict form provided to the jury and approved by counsel.

As noted, Edwards Publications, Inc. (Edwards) proceeded to trial on three counts, consisting of (a) breach of contract, (b) intentional interference with business relationships, and (c) civil conspiracy. An element or factual predicate for the determination of a civil conspiracy in this case was the existence or finding that the tort comprising an intentional interference with business relationships had occurred. This was clearly indicated by the trial court's instruction to the jury, which was approved by counsel for both parties, as follows:

> Plaintiff claims that the Defendant engaged in a civil conspiracy. A civil conspiracy is a combination of two or more persons by some concerted action to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.
>
> In order to establish the claim, Plaintiff has the burden of proving each of the following:
>
> a. a concerted action
>
> b. by Defendant or some other persons
>
> c. to accomplish a criminal or unlawful purpose or accomplish a lawful purpose by criminal or unlawful means
>
> d. Plaintiff was damages [sic] as a result of the Defendant's conduct; and
>
> e. Plaintiff proved its claim of tortuous [sic] interference with a business relationship.
>
> Your verdict will be for the Plaintiff if you find that the Plaintiff has proved all of these elements.
>
> Your verdict will be for the Defendant if you find the Plaintiff has failed to prove any one of these elements.

A written copy of these instructions was provided to the jury for use or reference during their deliberations in conjunction with the verdict form.

As properly elucidated by the trial court in the jury instructions to establish a cause of action for civil conspiracy it is necessary to prove the existence of (a) a "concerted action" (b) by "a combination of two or more persons" (c) "to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means."[1] In addition, to support a civil conspiracy claim, the proponent must demonstrate the existence of a "separate, actionable tort"[2]; in this case the tortious interference with a business relationship. The jury instructions treated the three claims as separate. This was reinforced by the inartful drafting of the verdict form as approved by counsel, which treated the claims as distinct and capable of standing alone. Specifically, the verdict form contained the following questions for the jury's response:

> ***4** QUESTION NO. 1: Did Plaintiff suffer damages as a result of the Defendant's breach of contract?
>
> ANSWER: _____ (yes or no)
>
> QUESTION NO. 2: Did the Defendant tortuously interfere with the Plaintiff's business relationships or expectancies with its customers and cause the Plaintiff to suffer damages because of this interference?
>
> ANSWER: _____ (yes or no)
>
> QUESTION NO. 3: Did the Defendant conspire with one or more persons to commit an unlawful act and cause the Plaintiff to suffer damages because of this conspiracy?
>
> ANSWER: _____ (yes or no)
>
> If your answer to **any** of the above is "yes", please state the amount:
>
> $_____

In fact, the jury indicated to the trial court that it had a question regarding the wording of the verdict form during their deliberations. Unfortunately, while the record discloses the existence of the query the specific content or focus of the jury's concern cannot be discerned from the lower court file or transcript. The

> record does reveal, however, that within approximately 30 minutes of having received a response to their query, the jury indicated that they had attained a verdict. As counsel for both parties approved both the relevant jury instructions and the verdict form and gave no indication of concern when the verdict was announced and the jury polled, they should not now be permitted to complain regarding the result obtained or be given another opportunity to try this case.

Any analysis must begin with the presumption that the jurors comprehended and followed the instructions provided by a trial court .[3] Based on the responses to the verdict form, the jury accepted that a civil conspiracy occurred but that any resultant interference with Edwards' business relationships was minimal as demonstrated by the amount of the award. This would be consistent with the trial court's instruction on civil conspiracy, "Your verdict will be for the Plaintiff if you find that the Plaintiff has proved all of these elements."

While superficially, the responses on the verdict form are inconsistent, they are not irreconcilable.[4] It has been repeatedly recognized by this Court and our Supreme Court that a

> jury's verdict must be upheld, even if it is arguably inconsistent, [i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. [E]very attempt must be made to harmonize a jury's verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.[5]

Contrary to the majority's opinion, the resultant discrepancy can be explained by examining the verdict form and how it permitted the jury to reach a verdict finding a civil conspiracy premised on tortious interference with business relationships while responding negatively on the question pertaining to the underlying tort. Had the jury responded affirmatively to the existence of a civil conspiracy but indicated no resultant damages any purported inconsistency in the verdict would be irrelevant. In addition, the questions posed to the jury for each charged claim are compound. In reviewing the question pertaining solely to tortious interference the jury was allowed only one response but asked two separate questions: (a) "Did Defendant tortuously interfere with Plaintiff's business relationships or expectancies with its customers" and (b) did such interference "cause the Plaintiff to suffer damages?" It is not impossible or beyond contemplation to apprehend the jury's negative response to this question to be a more directed indication that although they believed tortious interference occurred that Edwards did not incur damages on this basis. The phrasing regarding the question pertaining to civil conspiracy is similarly compound permitting the jury to determine that Edwards was aggrieved and suffered damages because of the conspiracy rather than the interference with its business.

***5** Because the jury actually calculated an award and the verdict form permitted them to determine an award should they answer "any" of the questions posed to them in the affirmative, the resultant verdict while inconsistent can be satisfactorily explained and, therefore, should be affirmed.

All Citations

Not Reported in N.W.2d, 2011 WL 1687622

Footnotes

1 Defendant Bilbey Publications was dismissed by stipulation below and is not a party to this appeal. Thus, references to "defendant" in the singular throughout this opinion pertain to defendant Kasdorf only.

2 Defendant signed a second agreement in 2002. However, at trial plaintiff relied solely on the agreement executed in 1992.

3 Plaintiff framed its motion as a request to amend the judgment. However, the relief requested effectively amounts to a request for JNOV.

1 *Admiral Ins Co v. Columbia Cas Ins Co,* 194 Mich.App 300, 313; 486 NW2d 351 (1992).

2 *Advocacy Org for Patients & Providers v. Auto Club Ins Ass'n,* 257 Mich.App 365, 384; 670 NW2d 569 (2003);

Early Detection Ctr, PC v. New York Life Ins Co, 157 Mich.App 618, 632; 403 NW2d 830 (1986).

[3] *Bordeaux v. Celotex Corp,* 203 Mich.App 158, 164, 511 NW2d 899 (1993).

[4] Inexplicably, the majority would approve remanding the entire matter for a new trial even though there is no dispute or contention pertaining to the verdict on the breach of contract claim.

[5] *Allard v. State Farm Ins Co,* 271 Mich.App 394, 407; 722 NW2d 268 (2006) (footnotes and quotation marks omitted).

EXHIBIT 4

KeyCite Yellow Flag - Negative Treatment
Distinguished by Etts v. Deutsche Bank National Trust Company, E.D.Mich., August 25, 2015

2014 WL 7184457
Only the Westlaw citation is currently available.
United States District Court,
E.D. **Michigan**,
Southern Division.

Barbara ELLIS, Plaintiff,
v.
CHASE HOME FINANCE, LLC, JPMorgan Chase Bank, N.A., Deutsche Bank National Trust Company, as Trustee, and Unknown Trust, the currently unknown asset-backed security at issue, Defendants.

No. 14–11186.
|
Signed Dec. 16, 2014.

Attorneys and Law Firms

Adam J. Gantz, Gantz Associates, Farmington Hills, MI, for Plaintiff.

Thomas H. Trapnell, Kyle R. Dufrane, Dykema Gossett PLLC, Detroit, MI, Christyn M. Scott, Dykema Gossett, Bloomfield Hills, MI, for Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS [4]

LAURIE J. MICHELSON, District Judge.

***1** Plaintiff Barbara Ellis seeks relief following the foreclosure of her South Rockwood, **Michigan** property after she defaulted on the mortgage. Her lawyer filed in state court his cookie-cutter complaint against Defendants Chase Home Finance, LLC, JPMorgan Chase Bank, N.A., DeutscheBank National Trust Company, and an Unknown Trust. (Dkt.1–1). The twenty-two count, 269–paragraph complaint alleges numerous violations of federal and state law in the servicing, management, and foreclosure of Ellis' home. Defendants removed the action to this Court (Dkt.1) and filed a motion to dismiss shortly thereafter. (Dkt.4.) Having carefully reviewed the briefing, the Court finds that oral argument will not aid in resolving the pending motion. *See* E.D. **Mich**. LR 7.1(f)(2). For the reasons set forth below, the motion is granted.

I. LEGAL STANDARD

The Federal Rules of Civil Procedure require that pleadings contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). A plaintiff "must allege 'enough facts to state a claim of relief that is plausible on its face.' " *Traverse Bay Area Int. Sch. Dist. v. **Mich**. Dep't of Educ.*, 615 F.3d 622, 627 (6th Cir.2010) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Facial plausibility means that "the complaint has to 'plead[ ] factual content that allows the court to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged.' " *Ohio Police & Fire Pension Fund v. Std. & Poor's Fin. Servs., LLC*, 700 F.3d 829, 835 (6th Cir.2012) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). "This standard does not require detailed factual allegations, but a complaint containing a statement of facts that merely creates a suspicion of a legally cognizable right of action is insufficient." *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 614 (6th Cir.2012) (citation and internal quotation marks omitted).

The court must "accept all well-pleaded factual allegations as true and construe the complaint in the light most favorable to plaintiffs." *Bennet v. MIS Corp.*, 607 F.3d 1076, 1091 (6th Cir.2010). The court "need not, however, accept unwarranted factual inferences." *Id.* (citing *Twombly*, 550 U.S. at 570). Nor are "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" entitled to an assumption of truth. *Iqbal*, 556 U.S. at 678. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Iqbal*, 556 U.S. at 679 (quoting Fed.R.Civ.P. 8(a)(2)).

II. ALLEGATIONS OF THE COMPLAINT

On February 27, 2004, Ellis and Washington Mutual Bank executed a note and a mortgage as security for a $240,000 loan to purchase real property in South Rockwood, **Michigan** ("the Property"). (Compl.Ex. A.) Washington Mutual became defunct after the 2008 financial collapse. The mortgage was thus transferred to a trust consisting of a pool of former Washington Mutual mortgages, with Deutsche Bank acting as trustee. (*Id.* at ¶¶ 27–28.) The Federal Deposit Insurance Corporation ("FDIC") reassigned the servicing of Ellis' mortgage to JPMorgan Chase. (*Id.* at ¶¶ 21–25; Compl. Ex. AA, Assignment.) Attached to the Complaint is a document stating that the assignment was recorded on May 11, 2012, in the Monroe County Register of Deeds. (Assignment at PageID 256.) Ellis alleges that the signatures on the assignment were forged by "robo-signers." (*See* Compl. ¶¶ 68–79.)

***2** The Complaint alleges misconduct by Washington Mutual as early as 2007. Specifically, the terms of the mortgage required that Ellis maintain an escrow fund for taxes, insurance, and other "Escrow Items." (Compl. Ex. A, Mortgage Agreement, at PageID 83.) The mortgage also required that Ellis purchase insurance for the property, and provided that if Ellis did not purchase insurance, the Lender would be able to obtain coverage "through any company acceptable to Lender, including, without limitation, an affiliate of lender ...." (*Id.* at PageID 85.) Ellis says that Washington Mutual abused these provisions by placing two flood insurance policies on the Property at the same time. (Compl.¶¶ 17, 19.) She alleges that Chase continued this misconduct after receiving the assignment. (*Id.* at ¶ 33.) She says that Chase failed to pay mandatory hazard insurance premiums, replaced her original policy with a more expensive one, and that eventually she purchased her own hazard insurance at half the cost of Chase's chosen policy. (*Id.* at ¶¶ 43–47.) She attached documentation of these policies to her Complaint. (*See* Compl. Ex. M, N.)

Although Ellis made her mortgage payments on time for several years (Compl.¶ 32), in 2009, she suffered an "economic hardship" and began working with Chase to modify her loan. (*Id.* at ¶ 38.) The Complaint characterizes this process as "Paperwork Hell."[1] (*Id.* at ¶ 55.) Ellis says that Chase told her that the only way she could obtain a modification would be to intentionally fall behind on her payments, which she did. (*Id.* at ¶¶ 39–40.) On February 16, 2010, Ellis received a letter from Chase offering a modification. (Compl. Ex. L, Correspondence, PageID 156.) The letter advised that to take advantage of the modification, she would need to allow Chase to access her most recent tax return, verify her income, sign several forms, and make her first modified payment before April 1, 2010. (*Id.* at PageID 159.)

By signing the Agreement, Ellis acknowledged that the modification would not take effect "unless and until Lender has confirmed my eligibility for this program, I have returned any required verification documents requested by Lender, and the Lender signs and returns a copy to me." (*Id.* at PageID 160.) Ellis signed the form and has attached it to the Complaint. (*Id.* at PageID 162.) But there is no signature from a Chase representative, nor does Ellis allege that she received a copy of the agreement with a signature from a Chase representative. (*Id.*)

Over the next year, Chase sent Ellis at least four letters requesting information necessary to complete her loan modification. On May 10, 2011, Chase sent Ellis a letter acknowledging her interest in a loan modification and informed her that she would need to submit additional documentation to allow Chase to process her request. (Compl. Ex. R at PageID 176.) Chase sent another request for documentation on August 30, 2011. (*Id.* at PageID 177.) On February 21, 2012, Chase sent a third letter requesting information. (*Id.* at PageID 179.) Ellis explained her failure to provide the required documentation as follows: "Income taxes for my mother's estate and myself have not been filed for three years due to our documented illness. When I discussed this with the IRS ... they requested that all back taxes for both my mother and myself be filed together and they are two thirds done.... I hope to finish, submit to my CPA and file before the end of March (if not sooner)." (*Id.* at PageID 182.) On May 18, 2012, Chase sent a fourth letter instructing Ellis to submit the outstanding documentation within fifteen days, stating that if Ellis did not return the documentation, her request for a modification would be canceled. (*Id.* at PageID 196.)

***3** On June 3, 2012, Ellis sent a letter to Chase with the following requests:

> [I]f a loan modification cannot be made, I request that we short sale this property. If a short sale cannot be done, then I officially request that the property be returned to Chase as 'deed in lieu.' If for some reason, the federal government's onus to perform 'deed in lieu' over foreclosure cannot be honored, I suggest that we creatively work out

> some circumstance where I remain in the property until it sells.

(*Id.* at PageID 198.)

On July 23, 2012, Chase notified Ellis that she was not eligible for a loan modification under the Home Affordable Modification Program ("HAMP"). (*Id.* at PageID 201.) So Ellis chose to pursue a short sale, which Chase preliminarily approved on February 4, 2013. (*Id.* at PageID 228.) Ultimately, Ellis informed Chase that she did not want to go through with the short sale because of the potential buyer's alleged hostility towards her. (*Id.* at PageID 218–20.) She noted that the buyer's behavior had "made a sheriff's sale the more attractive option." (*Id.* at PageID 219 .)

The foreclosure process moved forward and Chase purchased the Property at a sheriff's sale on August 1, 2013. (*See* Compl. Ex. X.) The Sheriff's Deed provided that February 1, 2014 would be the last day to redeem the Property. (*Id.* at PageID 233.)

Ellis failed to do so, instead filing this lawsuit on February 27, 2014. (*See* Compl.) She claims that Defendants violated the federal Truth in Lending Act, the federal Real Estate Settlement Procedures Act, and **Michigan** state law. (*See generally id.*) Defendants removed the case to this Court on March 20, 2014 (Dkt.1) and filed their Motion to Dismiss on April 16, 2014 (Dkt.4). Ellis then filed a Motion to Remand (Dkt.9), which the Court denied on June 6, 2014 (Dkt.15).

III. ANALYSIS

Ellis alleges numerous claims under state and federal law. Many of these theories are familiar to the judges of this District and have been roundly rejected. Ellis' Complaint meets the same fate.

A. Claims Against the Trustee

As an initial matter, the Court agrees with Defendants that the Complaint is wholly devoid of actionable allegations regarding Deutsche Bank's conduct as Trustee. Ellis describes the 2008 financial crisis in some detail in her Complaint. (*See, e.g.*, Compl. ¶¶ 24–39.) While she accuses Deutsche Bank of obtaining a financial benefit from her default, she does not state how that benefit fits into any of her twenty-two counts. Indeed, Ellis responds to Defendants' motion by stating that the Complaint states a claim against Deutsche Bank because Deutsche Bank participated in a "fraudulent conspiracy" to force her into foreclosure. (Pl.'s Resp. Br. at 5.) The Court finds that Ellis' accusations against the Trustee amount to an "industry-wide conspiracy" theory that is not sufficiently particularized to give rise to claims against the Trustee itself. *Barkho v. Homecomings Fin., LLC*, 657 F.Supp.2d 857, 863 (E.D.Mich.2009). Therefore, the Court will dismiss the Complaint in its entirety as to Deutsche Bank and now turns to whether Ellis has stated a claim against Chase.

B. Expiration of the Redemption Period

***4** In **Michigan**, foreclosures by advertisement are governed by statue. **Mich**. Comp. Laws § 600.3204. The statutory scheme "provides certain steps that the mortgagee must go through in order to validly foreclose" and "controls the rights of both the mortgagee and the mortgagor once the sale is completed." *Conlin v. Mortg. Elec. Regis. Sys.*, 714, F.3d 355, 359 (6th Cir.2013) (citation omitted). Once a sheriff's sale is completed, the mortgagor is afforded a six-month period in which he or she may redeem the property. **Mich**. Comp. Laws § 600.3204(8); *Mitan v. Fed. Home Loan Mortg. Corp.*, 703 F.3d 949, 951 (6th Cir.2012).

After the redemption period expires, "all of [a] plaintiff's rights in and title to the property [are] extinguished." *Bernard v. Fed. Nat. Mortg. Ass'n*, —— F. App'x ——, 2014 WL 4800123, at *2 (6th Cir. Sept.29, 2014) (quoting *Bryan v. JPMorgan Chase Bank*, 304 Mich.App. 708, 848 N.W.2d 482, 485 (Mich.Ct.App.2014)). Therefore, "**Michigan** courts have held that once the statutory redemption period lapses, they can only entertain the setting aside of a foreclosure sale where the mortgagor has made 'a clear showing of fraud, or irregularity.' " *Conlin*, 714 F.3d at 359 (6th Cir.2013) (quoting *Schulthies v. Baron*, 16 Mich.App. 246, 167 N.W.2d 784, 785 (**Mich**.1969)). And "not just any type of fraud will suffice. Rather, the mortgagor's claim of fraud must relate to the sheriff's sale itself, not to underlying equities, if any, bearing on the instrument ...." *Bernard*, 2014 WL 4800123, at *2.

Even if the mortgagor can establish all of the foregoing, a

court will only set aside the foreclosure if she can establish prejudice stemming from the fraud or irregularity. *Kim v. JPMorgan Chase Bank, N.A.*, 493 Mich. 98, 825 N.W.2d 329, 337 (Mich.2012). Indeed, *Kim* "made clear that failure to comply with the conditions set forth in Michigan's foreclosure-by-advertisement statute does not render flawed foreclosures void (i.e., void ab initio) but merely voidable." *Conlin*, 714 F.3d at 361 (citing *Kim*, 825 N.W.2d at 337). "To demonstrate such prejudice, [plaintiffs] must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute." *Kim*, 825 N.W.2d at 337.

In this case, the redemption period ended on February 1, 2014. Accordingly, for the Court to set aside the sheriff's sale, Ellis must allege facts to show fraud or irregularity in the mortgage foreclosure process and prejudice to her stemming from the alleged fraud or irregularity. With this standard in mind, the Court turns to the Complaint.

C. Count I—Violation of Michigan Compiled Laws § 600.3204(1) and (3)

In Count I, Ellis asserts that the foreclosure was invalid under Michigan Compiled Laws 600.3204(3), which states that "[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title must exist before the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage." She says that the assignment to Chase was a forgery executed by "robo-signers" and is therefore invalid. (Compl.¶¶ 105, 108.)

***5** Defendants rely on *Livonia Props. Holdings, LLC v. 12840–12976 Farmington Rd. Holdings, LLC*, 399 F. App'x 97, 102 (6th Cir.2010), for "the proposition that a litigant who is not a party to an assignment lacks standing to challenge that assignment." (Def.'s Br. at 11.) In that case, "the Sixth Circuit recognized that an obligor may assert certain defenses which may render an assignment void, but that these defenses exist to protect the obligor from a potential double liability ...." *Wiggins v. Argent Mortgage Co., LLC*, 945 F.Supp.2d 817, 821 (E.D.Mich.2013). Thus, there is an "exception" to the rule in *Livonia* where a third party to an assignment asserts defenses such as "nonassignability of the instrument, assignee's lack of title, and a prior revocation of the assignment, all of which give the obligor standing because there was a possibility of having to pay the same debt twice." *Connolly v. Deutsche Bank Nat. Trust Co.*, 581 F. App'x 500, 500 (6th Cir.2014). That is, in order for a third party to challenge an assignment, the third party must have "a genuine claim" that she might be "subject to double liability on the debt." *Keyes v. Deutsche Bank Nat. Trust Co.*, 921 F.Supp.2d 749, 757 (E.D.Mich.2013).[2]

Ellis articulated two arguments as to her standing to challenge the foreclosure: irregularities in securitization of the mortgage and fraud via robo-signing. Neither persuade. First, "courts have repeatedly rejected" claims that defects in the securitization of a loan renders a foreclosure invalid and, furthermore, Michigan law is now well established that "splitting of the note and mortgage does not invalidate a foreclosure." *See Ross v. Wells Fargo Bank, N.A .*, No. 1:14–CV–627, 2014 WL 5390659, at *4 (W.D.Mich. Oct.22, 2014) (collecting cases). And as to the alleged robo-signing, the Sixth Circuit has held such claims do not negate Michigan statutory law stating that the "mortgagee of record ... has the power to foreclose the mortgage." *Connolly*, 581 F. App'x at 500; *see also* Mich. Comp. Laws § 600.3204(d). The recorded assignment Ellis attached to her Complaint shows that Chase is the mortgagee of record, therefore Ellis' argument regarding Chase's authority to foreclosure fails. Furthermore, "[g]rounds that render an assignment merely voidable, including fraud, cannot be challenged by the debtor because the debtor's interest in protecting themselves from having to pay the same debt twice is not present." *Boone v. Seterus, Inc.*, No. 13–CV–13457, 2014 WL 1460984, at *4 (E.D.Mich. Apr.15, 2014).

Moreover, as noted by the Court in *Conlin*, "*Kim's* holding makes § 600.3204 defects actionable to the same extent that notice defects under Mich. Comp. Laws § 600.3208 are—only on a showing of prejudice." 714 F.3d at 361–62. And here, Ellis has not alleged any harm stemming from the alleged robo-signing. Indeed, for all its detail regarding Defendants' alleged robo-signing practices, her Complaint utterly fails to "suggest how this practice might have impaired [her] opportunity to achieve a loan modification or otherwise avoid a foreclosure sale of the Property." *Donahue v. Fed. Nat. Mortgage Ass'n*, No. 13–10205, 2014 WL 1305017, at *7 (E.D.Mich. Mar.31, 2014). Count I does not state a claim.

D. Count II—Violation of Michigan Compiled

Laws §§ 600.3204(4), 600.3205a, and 600.3205c

***6** Ellis next asserts that Defendants failed to comply with mandatory procedures relating to loan modifications, **Michigan** Compiled Laws §§ 600.3204(4), 600.3205a, and 600.3205c. (Compl.¶ 131.) These sections, when they were in existence,[3] provided for pre-foreclosure review of mortgages to determine whether the borrower would qualify for a loan modification.

Aside from the fact that the statutes have been repealed, the Complaint fails to state a claim. Specifically, Ellis' bare assertions that she complied with the statute by "contact[ing] the foreclosing law firm" to initiate the modification process and that Defendants violated the statute by ignoring her are contradicted by the exhibits. *See also Thill,* 8 F.Supp.3d at 954 (dismissing a similar claim and noting that "[s]imply articulating that Plaintiff complied with the statutory requirements and Defendants did not are legal conclusions that fall well short of *Twombly/Iqbal"*).[4] It is unclear why Ellis believes that Chase never provided her with information related to loan modification when she attached to the Complaint numerous letters from Chase concerning her request for a loan modification. (*See, e.g.,* Compl. Ex. L at PageID 174.) Finally, even if Ellis had stated a claim for relief under these sections, "her only available remedy under **Michigan** law was conversion of the foreclosure by advertisement to a judicial foreclosure prior to the sheriff's sale." *Wilson v. HSBC Bank, N.A.,* —— F. App'x ——, No. 13–2009, 2014 U.S.App. Lexis 22055, at *9, 2014 WL 6463020 (6th Cir. Nov. 19, 2014); *see also Ross v. Fed. Nat. Mortgage Ass'n,* No. 13–12656, 2014 WL 3597633, at *5 (E.D.Mich. July 22, 2014). Ellis did not avail herself of this remedy, and so the Court is unable to set aside the foreclosure now. Accordingly, Count II is dismissed.

E. The Statute of Frauds Bars Count XIII—Breach of Contract and Count XIV—Promissory Estoppel

In Counts XIII and XIV, Ellis seeks to enforce an alleged loan modification agreement. (Compl. ¶ 191 ("[T]here is a valid, binding Contract between the parties requiring Defendants to modify Plaintiff's loan ...."); Compl. ¶ 197 ("Plaintiff has detrimentally relied upon the promises of Defendants to modify the Loan ....").) **Michigan's** statute of frauds bars both of these claims because the loan modification agreement does not bear the signature of an authorized Chase representative. (*See* Compl. Ex. L.)

In **Michigan**, "certain types of agreements must be in writing before they can be enforced .... [and][t]he burden of proving an enforceable agreement is even heavier when claiming against a financial institution." *Dingman v. OneWest Bank, FSB,* 859 F.Supp.2d 912, 920 (E.D.Mich.2012). **Michigan** Compiled Laws § 566.132(2) provides in relevant part:

> An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution: A promise or commitment to renew, extend, *modify,* or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

***7** (emphasis added). **Michigan** courts read this provision as an "unqualified and broad ban" on actions, including promissory estoppel, that are premised on unwritten or unsigned promises by banks. *Crown Tech. Park v. D & N Bank, FSB,* 242 Mich.App. 538, 619 N.W.2d 66, 72 (2000).

The fact that the alleged loan modification is not signed by Chase therefore forecloses the breach of contract and promissory estoppel claims. *See also Goss v. ABN AMRO Mortg. Grp.,* 549 F. App'x 466, 470 (6th Cir.2013) ("In **Michigan**, a loan modification proposal 'd[oes] not ripen into a binding agreement' if the modification agreement bears the signature of the borrower but not the lender because such a proposal 'does not objectively reflect a meeting of the minds regarding the essential modification terms.' " (citing *Voydanoff v. Select Portfolio Servicing, Inc.,* No. 298098, 2011 WL 6757841, at *7 (Mich.Ct.App. Dec.22, 2011)).

Ellis responds to this well-settled principle by arguing that her unsigned loan modification contract is "essentially identical" to Trial Period Plan ("TPP") agreements that have been enforced where the borrower complies with the loan modification trial period terms. (Pl.'s Resp. Br. at 16.) Not so.

First, the alleged agreement attached to the Complaint does not appear to be a TPP but rather a permanent modification agreement. (*See* Compl. Ex. L at PageID 160.) But to the extent it could be construed that way, it still is not signed by a Chase representative, nor does it unconditionally promise that Ellis' loan would be modified. *See* *Fed. Home Loan Mortg. Corp. v. Hassell*, No. 11–14564, 2013 WL 823241, at *6 (E.D.Mich. Mar.6, 2013) (declining to enforce a TPP where "[n]either the Trial Plan nor the Partial Reinstatement Agreement unconditionally promises Plaintiff that her loan would be modified and neither document is signed by Wells Fargo"); *cf.* *Bolone v. Wells Fargo Home Mortg., Inc.*, 858 F.Supp.2d 825, 828 (E.D.Mich.2012) (enforcing a signed TPP agreement).

The few cases in which courts in this District have enforced unsigned TPPs are readily distinguishable. For example, an unsigned TPP was enforced in *Yates v. U.S. Bank Nat. Ass'n,* 912 F.Supp.2d 478, 487 (E.D.Mich.2012), where the "plaintiff alleged that: (1) defendants offered a TPP as step one in the HAMP program, (2) defendants sent the form agreement to plaintiff for her signature, (3) the plaintiffs signed the TPP and returned two copies to the lender, and (4) *the plaintiff made the monthly payments required by the TPP for (at least) the requisite three-month period."* (emphasis added). By contrast, Ellis pled no allegations that she made payments under a modified agreement, nor does she offer any allegations regarding her compliance with the conditions of the agreement. Accordingly, Counts XIII and XIV are dismissed.

F. Count XV—Breach of Contract ¶¶ 1–5 of Mortgage

In Count XV, Ellis alleges that Defendants breached the terms of the mortgage agreement by "failing to credit Plaintiff for payments made for escrow items, by failing to pay escrow items, by force-placing fake and ridiculously expensive and duplicative insurance policies on Plaintiff's account, and by foreclosing instead of cleaning up their own mistake." (Compl.¶ 203.) To state a claim for breach of contract, Ellis must allege facts to show (1) the existence of a contract; (2) the terms of the contract; (3) that Defendants breached the contract; and (4) that the breach caused her injury. *Webster v. Edward D. Jones & Co., LP*, 197 F.3d 815, 819 (6th Cir.1999).

***8** The problem for Ellis is that she has not pled facts to show that Defendants breached the mortgage agreement. Her allegations regarding Defendants' failure to credit her account fail because she has not even alleged that she made a payment, much less that Defendants failed to credit it or credited it in an erroneous manner under the terms of the contract. *See* *Boone v. Seterus, Inc.*, No. 13–CV–13457, 2014 WL 1460984, at *2 (E.D.Mich. Apr.15, 2014) (quoting *Thill*, 8 F.Supp.3d at 956 (citing similar claims filed by Gantz Associates that have been dismissed for the same reason by courts in this District)).

As to the insurance allegations, the mortgage agreement explicitly states that

> If Borrower fails to maintain any of the coverages described above [including hazard insurance], Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage.... Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained.

(Mortgage Agreement ¶ 5.) Ellis does not allege that she herself had purchased hazard insurance until August 2010; therefore, until that point, the plain language of the mortgage permitted Chase to purchase a policy of its choosing. Thus, though Ellis alleges that Chase placed more expensive hazard insurance on the property than she herself was able to obtain later, she does not explain how that action could be a breach of the unambiguous mortgage contract.

Ellis' allegation that Chase placed duplicative insurance policies on the property is contradicted by an exhibit to the Complaint showing that one of the policies was cancelled shortly after the second one went into effect. (Compl. Ex. M, at PageID 166; Comp. Ex. N, at PageID 168.) *See* *Creelgroup, Inc. v. NGS Am., Inc.* ., 518 F. App'x 343, 347 (6th Cir.2013) ("[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations."). Similarly, Ellis' allegation that Chase allowed hazard insurance on her home to lapse for the period between March 2 and May 18 is directly contradicted by the exhibit she attached to her complaint, which shows that

Chase placed a new hazard insurance policy on the home effective March 1, 2010 and expiring March 1, 2011. (Compl. Ex. N, at PageID 168.)

In response to these arguments, Ellis merely quotes the conclusory allegations of her Complaint. (Pl.'s Resp. Br. at 19.) The Court does not take as true conclusory allegations. Count XV is dismissed.

G. Fraud Claims—Counts XVI and XVII

In Count XVI, "Intentional Fraud," Ellis accuses Chase of "tricking her into foreclosure" by placing duplicative insurance policies on the home, offering her a loan modification that never materialized, and forging the assignment. (Compl.¶¶ 208, 209, 214.) In Count XVII, Ellis converts Count XVI into a claim for "Constructive Fraud," alleging that Defendants made the alleged misrepresentations "without a purposeful design" to defraud her, but that Defendants should be forced to pay damages because "the representations were false and induced Plaintiff to ... refrain from exercising her rights ...." (Compl.¶¶ 240, 241.)

***9** Insofar as these claims seek to enforce a loan modification, they are barred by the statute of frauds for the same reasons that Ellis' breach of contract and promissory estoppel claims fail. *See McCann v. U.S. Bank, N.A.*, 873 F.Supp.2d 823, 835 (E.D.Mich.2012) (adopting magistrate judge's finding that the statute of frauds barred claims of intentional and constructive fraud based on an alleged promise to modify a loan).

As to the other allegations, "[t]he elements constituting actionable fraud or misrepresentation are well-settled in **Michigan**." *Hi–Way Motor Co. v. Int'l Harvester Co.*, 398 **Mich**. 330, 247 N.W.2d 813, 815 (**Mich**.1976).

> The general rule is that to constitute actionable fraud it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

Id. Moreover, Federal Rule of Civil Procedure 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Sixth Circuit "interpret[s] Rule 9(b) as requiring plaintiffs to allege the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1100 (6th Cir.2010).

Here, Ellis fails to identify any representations made to her with respect to the alleged forgery or the duplicative insurance, the particular person or persons making the misrepresentations, or the time and place of the misrepresentations. Despite eighty-three paragraphs proclaiming fraud, Ellis has not managed to provide with sufficient particularity the "who, what, when, where, and how of the alleged fraud." *Sanderson v. HCA–The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir.2006) (citation omitted). For this reason as well, her fraud claims are dismissed.

H. Count XX—Violation of Michigan's Regulation of Collection Practices Act, MCL § 445.251

In Count XX, Ellis alleges that Chase violated **Michigan's** RCPA, **Michigan** Compiled Laws § 445.251. The act "prohibits abusive collection efforts ... with respect to obligations arising out of a 'purchase made primarily for personal, family, or household purposes.' " *Levant v. Am. Honda Fin. Corp.*, 356 F.Supp.2d 776, 782 (E.D.Mich.2005) (quoting **Michigan** Compiled Laws § 445.251(a)).

Ellis alleges various violations of the statute, including "[c]ommunicating with Plaintiff in a misleading or deceptive manner," "[m]aking an inaccurate, misleading, untrue, or deceptive statement or claim in a communication to collect a debt," "[c]ommunicating with Plaintiff when Plaintiff was actively represented by an attorney," "[c]ommunicating with Plaintiff without accurately disclosing the caller's identity," "[u]sing a harassing, oppressive, or abusive method to collect a debt," and "[f]ailing to implement a procedure designed to prevent a violation by an employee." (Compl.¶ 258)

***10** But these allegations merely parrot the statute without any factual detail and therefore do not state a claim upon which relief could be granted. *See* *Iqbal*, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' " (quoting *Twombly*, 550 U.S. at 555)); *Stroud v. Bank of Am., N.A.*, No. 13–10334, 2013 WL 3582363, at *10 (E.D.Mich. July 12, 2013) (dismissing a similarly deficient RCPA claim). Therefore, Count XX is dismissed.

I. Count XXI—Michigan Fair Debt Collection Practices Act, MCL § 339.918

In Count XXI, Ellis alleges that Chase violated the "**Michigan** Fair Debt Collection Practices Act" (in fact, the statutory section Ellis cites is part of the **Michigan** Occupational Code ("MOC")) by "fail[ing] to properly and completely give the validation notice required" by the statute and "ma[king] false threats to initiate legal action ...." (Compl.¶ 264.)

Again, Ellis merely parrots the alleged violations from the statute without any supporting factual allegations. For this reason alone, the Court would dismiss her claim. But courts in this district have also dismissed similar claims because a "nationally chartered bank attempting to collect its own claims, i.e. mortgage debt," is "expressly exempt from the purview of the MOC." *McCann*, 873 F.Supp.2d at 849, *report and recommendation adopted*, 873 F.Supp.2d at 836. Count XXI is therefore dismissed.

J. Count XXII—Foreclosure by Unlicensed Corporation

Ellis has pled herself out of court in Count XXII. Her Complaint alleges Chase to be "a national banking association ... which is authorized to conduct business and which does in fact conduct business within the jurisdiction of this Honorable Court" (that is to say, in **Michigan**) (Compl.¶ 2), but, in Count XXII, she asserts that Chase is "not even authorized to conduct business in the State of **Michigan**!" (Compl.¶ 267.) The inconsistent allegations of Count XXII do not state a claim upon which this Court can grant relief. *See* *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 613 (6th Cir.2009) ("[I]f a plaintiff "pleads facts that show that his suit is time-barred or otherwise without merit, he has pleaded himself out of court." (quoting *Tregenza v. Great Am. Commc'ns Co. .*, 12 F.3d 717, 718 (7th Cir.1993)). Count XXII is therefore dismissed.

K. Claims under the Real Estate Settlement Procedures Act, Counts IV through IX and XI

Ellis asserted seven claims under RESPA in her Complaint, but in response to Defendants' motion, Ellis states that she "would agree to dismiss" Counts VI and XI. (Pl.'s Resp. Br. 14.) Accordingly, those claims are dismissed and the Court will address only the remaining RESPA claims.

Ellis first asserts claims under 12 U.S.C. § 2609, which provides certain requirements for the management of escrow accounts, including notice requirements and limitations on required deposits. *See generally* 12 U.S.C. § 2609(a). It empowers the Secretary of Housing and Urban Development to assess civil penalties for failure to comply with these requirements. 12 U.S.C. § 2609(d). As reflected in the briefing, there is conflicting case law among the circuits as to whether there is a private right of action to enforce § 2609(a). *Compare* *Vega v. First Fed. Sav. & Loan Ass'n of Detroit,* 622 F.2d 918, 925 n. 8 (6th Cir.1980) ("While the Act does not expressly provide for such a causes of action, we believe, based on the legislative history, that Congress intended to create a private remedy for violations of the Act."), *with Louisiana v. Litton Mortgage Co.*, 50 F.3d 1298, 1300–02 (5th Cir.1995) (holding that "Congress did not intend to create a private remedy" for violations of 12 U.S.C. § 2609(a)); *Allison v. Liberty Sav.*, 695 F.2d 1086, 1091 (7th Cir.1982) ("Since we have been unable to find anything in the legislative history supporting [*Vega's*] conclusion, and in view of that court's cursory treatment of the issue in a short footnote, we do not find the Sixth Circuit's position persuasive."). Indeed, at least one district court within the Sixth Circuit has rejected *Vega* as non-binding dicta. *Hunter v. Wash. Mut. Bank*, No. 2:08–CV–069, 2008 WL 4206604, at *5 (E.D.Tenn. Sept.10, 2008).

***11** The Court declines to reach the issue because a narrower, dispositive ground exists: Ellis fails to allege facts showing that Defendants violated 12 U.S.C. § 2609(a). The subsection that Ellis has quoted in her Complaint places caps on the deposits Lenders can require from Borrowers for their escrow accounts. Ellis does not allege that Defendants forced her to deposit more than the maximum amount; rather, she takes issue with alleged mismanagement of her hazard insurance. Thus,

even if she could sue pursuant to 12 U.S.C. § 2609(a), she has not stated a claim under that provision. Therefore, Count IV is dismissed.

Ellis' other RESPA claims arise under 12 U.S.C. § 2605. RESPA provides a three-year statute of limitations for such actions. 12 U .S.C. § 2614. The Court agrees with Defendants that this period has run on all of the alleged violations. (*See* Def.'s Br. at 15–16.) According to Ellis, the remaining RESPA claims rest on paragraphs 41–48, 152–75 and 181–84 of the Complaint. (Pl.'s Resp. Br. 14–15.) The non-conclusory allegations of these paragraphs state that Chase stopped making payments on an existing hazard insurance policy and replaced it with a more expensive policy, that Ellis purchased her own policy and challenged Chase's handling of the escrow account but that Chase did not respond, and that Ellis never received notice of the assignment of the mortgage. (*See* Compl. at ¶¶ 41–48; 152–75; 181–84.) All of these alleged violations occurred in 2010 or earlier. (*Id.*) But Ellis did not file her Complaint until February 28, 2014. (Compl.) Therefore, because the RESPA statute of limitations begins on "the date of the violation," 12 U.S.C. § 2614, her RESPA claims are now barred.

Ellis' argument that these actions constituted an "ongoing act of fraud" is not persuasive. (Pl.'s Br. at 15.) Ellis has not pled that any of the aforementioned acts were an ongoing occurrence, rather, she pled that they were discrete violations of the statute that occurred in 2010. That these individual acts might not have been corrected does not allow Ellis to restart the clock to bring her Complaint within the statute of limitations when she had notice of the violation in 2010. *See Page v. Metro. Sewer Dist. of Louisville & Jefferson Cnty.*, 84 F. App'x 583, 585 (6th Cir.2003) ("Page's action is not preserved from dismissal under a continuing violation theory .... when an employee believes that he or she has been subjected to discrimination, the statute of limitations begins to run from the date the employee knew or should have known the act of discrimination occurred. Page admitted that she knew that the alleged act of discrimination occurred on October 17, 1996.... Her ongoing employment was insufficient to prolong the life of her discrimination claim." (citation omitted)). Therefore, Counts V though IX and XI are dismissed.

L. Plaintiff has waived Counts III, X, XII, and XVIII

The Court finds that Ellis has abandoned Counts III, X, and XVIII. Aside from her admission that Counts III and X, both under the federal Truth in Lending Act, contain the same claim, Ellis did not respond to Defendants' motion to dismiss these two claims. Ellis also failed to respond to Defendants' motion with respect to Count XII, Negligent Administration of Loan, and Count XVIII, Tortious Interference with Contractual Relations. Accordingly, she has abandoned all four of these claims and they are dismissed. *Bazinski v. JPMorgan Chase Bank, N.A.*, No. 13–14337, 2014 WL 1405253, at *2 (E.D.Mich. Apr.11, 2014) ("Claims left to stand undefended against a motion to dismiss are deemed abandoned." (citing cases)); *see also Jones v. Nationstar Mortgage LLC*, No. 14–11642, 2014 WL 5307168, at *4 (E.D.Mich. Oct.16, 2014); *Thielen v. GMAC Mortgage Corp.*, 671 F.Supp.2d 947, 957 (E.D.Mich.2009).

M. Count XIX—Civil Conspiracy

***12** "[A] claim for **civil conspiracy** may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 257 Mich.App. 365, 670 N.W.2d 569, 580 (2003) (internal quotations omitted). Having dismissed all of Ellis' tort claims, the Court must dismiss the **civil conspiracy** claim in Count XIX because **civil** "**conspiracy**, by itself, is not a cause of action." *Meyer v. Citimortgage, Inc.*, No. 11–13432, 2012 WL 511995, at *4 (E.D.Mich. Feb.16, 2012).

IV. CONCLUSION

For the reasons set forth above, the Court concludes that each of Ellis' twenty-two counts are either waived or fail to state a claim upon which relief can be granted. Accordingly, it is ORDERED that Defendants' Motion to Dismiss (Dkt.4) is GRANTED and Plaintiff's Complaint is DISMISSED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 7184457

Footnotes

[1] Chief Judge Gerald E. Rosen of this District delivered a stern warning to Gantz Associates, the attorneys representing Ellis here, regarding their oft-advanced, consistently-rejected "Paperwork Hell" theory in March of this year. Chief Judge Rosen advised Gantz Associates that "consistently advancing the same rejected legal theories borders on sanctionable and ethical misconduct." *Thill v. Ocwen Loan Servicing, LLC,* 8 F.Supp.3d 950, 958 (E.D.Mich.2014). He pointed out that Gantz Associates had filed at least forty-five complaints alleging the "Paperwork Hell" theory, none of which had survived motion practice. *Id.* Regrettably, the present Complaint, filed on March 20, 2014, is no different. (Compl.¶¶ 53–62.) In fact, the "Paperwork Hell" allegations appear to have been cut-and-pasted from the Complaint in *Thill.* (*Compare* Compl. ¶¶ 53–62, *with* Compl. ¶¶ 30–36, *Thill v. Ocwen Loan Servicing, LLC,* No. 13–cv–14151 (E.D.Mich. Sept. 27, 2013), ECF No. 1.)

[2] Defendants, not Ellis, pointed out this exception in a footnote in their brief. (Def.'s Mot. at 11 n. 4.) Defendants correctly note that if the mortgage and the note are in different hands, there may be a possibility of double recovery. *See, e.g.,* *Keyes.* 921 F.Supp.2d at 757 (citing *Residential Funding Co., LLC v. Saurman,* 490 **Mich**. 909, 805 N.W.2d 183 (**Mich**.2011)). However, Ellis does not plead that Deutsche Bank has "sought or threatens to seek payment" from her; therefore, her claims do not fall within this exception. *Etts v. Deutsche Bank Nat. Trust Co.,* No. 4:13–CV–11588, 2014 WL 645358, at *7 (E.D.Mich. Feb.19, 2014) (dismissing a similar claim).

[3] All three of these statutory sections were repealed, in 2012 and 2013. *See* 2014 **Mich**. Leg. Serv. P.A. 125 (HB 5277) (West) (repealing section 600.3204(4)); **Mich**. Comp. L. § 600.3205e (repealing sections 600.3205a through 3205d). **Michigan** courts have questioned whether relief is available under these now-repealed provisions, even for claims arising while the statutes were still in effect. *Hardwick v. HSBC Bank USA, N.A., No. 310191,* 2013 WL 3815632, at *2 (Mich.Ct.App. July 23, 2013).

[4] The opinion also contains a summary of Ellis' counsel's numerous misstatements of the **Michigan** loan modification statute's requirements, many of which are repeated in the present Complaint. *See Thill,* 8 F.Supp.2d 953–55.

End of Document

EXHIBIT 5

2004 WL 1459357
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

Christopher DICKINSON and Tammy Dickinson, Plaintiffs-Appellants,
v.
Limp BIZKIT, Limp Bizness, Inc., Fred Durst, Wes Borland, Sam Rivers, D.J. Lethal, John Otto, Palace Sports and Entertainment, Inc ., SFX Entertainment, Inc., SFX Tours, Inc., and Cellar Door Entertainment, Inc., Defendants-Appellees, and
TENABLE PROTECTIVE SERVICES, INC., and Gallagher Security, Inc., Defendants.

No. 244021.
|
June 29, 2004.

Before: SAAD, P.J., and SAWYER and HOOD, JJ.

[UNPUBLISHED]

PER CURIAM.

I. FACTS AND PROCEDURAL HISTORY

***1** Plaintiff[1] appeals from the trial court's order that granted defendants' motions for summary disposition, and we affirm.

During a concert that featured the band Limp Bizkit, an unknown assailant kicked plaintiff in the head while he worked as a paramedic at the Palace of Auburn Hills. At the performance, the band's lead vocalist, defendant Fred Durst, invited patrons in the stands to disregard security and come down to the main floor. During the resulting crowd surge, an unidentified third party kicked plaintiff in the head. Plaintiff brought suit, alleged various theories of negligence, assault and battery, intentional infliction of emotional distress, and civil conspiracy, and named as defendants the individual members of Limp Bizkit, the band itself as a partnership, the band's corporate entity,[2] the promoters of the concert in question, and two security services.

The trial court granted summary disposition to all defendants. The court stated that *"it cannot be disputed that [plaintiff] was injured as a result of a criminal act by a third party,"* and concluded that *"this case involves a single concertgoer assaulting another invitee on the premises, not the propensity of a band to stir up a crowd."*[3]

II. STANDARD OF REVIEW

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Decker v. Flood*, 248 Mich.App 75, 81; 638 NW2d 163 (2001). The court considers the pleadings, affidavits, and other evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. *Id* . "The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* To recover in negligence, a plaintiff must prove duty, breach, causation, and damages. *Schuster v. Sallay*, 181 Mich.App 558, 562; 450 NW2d 81 (1989). We agree with the trial court that plaintiff's injury did not result from a breach of duty on Durst's part.

III. ANALYSIS

A. DUTY

Plaintiff argues that the trial court erred in failing to recognize that Durst had a duty to plaintiff to refrain from inviting audience members to migrate to the main floor, or at least that this proposition constitutes a question of fact for jury resolution. "Generally, an individual has no duty to protect another who is endangered by a third person's conduct." *Murdock v. Higgins*, 454 Mich. 46, 54; 559 NW2d 639 (1997).[4] " 'Generally, there is no duty to protect another from the criminal acts of a third party in the absence of special circumstances." ' *Krass v. Tri-County Security, Inc*, 233 Mich.App 661, 668; 592 NW2d 578 (1999), quoting *Tame v. A L Damman Co*, 177 Mich.App 453, 455-456; 442 NW2d 679 (1989). Here, the sole eyewitness described the offense in the following terms: "The AMR medic ... got socked soccer hit style.... Like you're kicking a soccer ball or football, just a big kick.... [C]ame from the stand, came over top, kicked him in the head." Because the only admissible evidence shows that plaintiff's injury was the result of an intentional kick to the head, we conclude that the trial court did not fail in its obligation to construe the evidence in plaintiff's favor when the court characterized that kick as a third party's criminal act. The duty to construe the evidence in plaintiff's favor does not extend to presuming an accident where, as here, the only admissible evidence clearly shows that a battery caused the injury.[5] Therefore, defendant Durst is not liable for the intentional criminal conduct that caused plaintiff's injuries.[6]

***2** It is not inherent in surging crowds that a rogue might commit an intentional criminal act of physical violence upon another patron or security officer. Plaintiff's broad sense of what kind of duty should obtain in this case would make a performer at a rock concert the insurer of all concertgoers against acts of physical aggression from each other. The trial court properly rejected this view of duty. The thug who kicked plaintiff in the head violated his duty to plaintiff and, if caught, should be held accountable.[7]

B. CAUSATION

Nor could Durst's actions reasonably be considered the cause of plaintiff's injury. Although an intervening act of a third person is not deemed a superceding cause of an injury if that intervening act was foreseeable, *David v. Thornton*, 384 Mich. 138, 148; 180 NW2d 11 (1970), an instance of random intentional and criminal physical violence is not a foreseeable consequence of inviting concertgoers to flout house policy and come to the main floor. And, because Durst was not liable in the matter, there is no liability to extend to Durst's bandmates, the band's corporate embodiment, or the promoters of the concert, on theories of vicarious liability.

Nor is the venue itself, defendant Palace, responsible for plaintiff's injury on a premises liability theory. Where a situation arises at an entertainment venue that poses a risk of imminent and foreseeable harm to identifiable invitees, the venue's duty in response "is limited to reasonably expediting the involvement of the police." *MacDonald v. PKT, Inc*, 464 Mich. 322, 326; 628 NW2d 33 (2001). "[T]here is no duty to otherwise anticipate and prevent the criminal acts of third parties." *Id.*[8]

In sum, because plaintiff's injury was caused by a third party's intentional, criminal conduct, which is not attributable, as a matter of duty or causation, to Durst's conduct, plaintiff's claims against defendants were properly dismissed.[9]

Affirmed.

All Citations

Not Reported in N.W.2d, 2004 WL 1459357

Footnotes

[1] Plaintiff Tammy Dickinson's interest in this case is derivative of that of plaintiff Christopher Dickinson. For convenience, in this opinion the designation "plaintiff" will refer exclusively to the latter.

[2] Plaintiff conceded below, as he does on appeal, that the corporate form of the band obviates any claims against its members on a partnership theory.

[3] Plaintiff does not challenge the granting of summary disposition to the two security companies, and so the latter are not participating in this appeal.

[4] The major exception is where a "special relationship" exists, between the defendant and either the victim or the third party. *Murdock, supra* at 54. However, plaintiff concedes that no such special relationship existed in this case.

[5] To put it another way, where there was only one description of how plaintiff suffered his injury, the trial court was not obliged to ignore clear evidence of intentional conduct within that account and then imagine that the resultant injury may somehow have been caused by accident.

[6] Plaintiff repeatedly characterizes what ensued at Durst's invitation as a riot. However, MCL 752.541 defines "riot" as when "5 or more persons, acting in concert, ... wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm." Had Durst incited a bona fide riot, then wanton violence in the melee might indeed be attributed to him. However, although inviting audience members to relocate in disregard of the venue's rules obviously shows poor judgment, such action is not violent conduct. Moreover, plaintiff points to evidence of aggression and ribaldry, not "public terror or alarm." Also, in the course of inviting the fans to come to the floor, Durst cautioned them, as the trial court recounted, "to calm down, to not hurt anyone, to take care of one another and 'if you see somebody fall, pick [']em up." ' For these reasons, the trial court properly recognized that the evidence did not support the conclusion that Durst incited a riot.

[7] Plaintiff additionally grafts onto his discussion of duty a cursory argument that the trial court erred in dismissing the assault and battery claim against Durst, and a more detailed one that the court erred in dismissing the claim of intentional infliction of extreme emotional distress. Neither of these issues is germane to the question presented-whether Durst violated a duty to plaintiff, which obviously invokes the tort of negligence. We thus decline to consider these ancillary arguments. See MCR 7.212(C)(7); *Meagher v. McNeely & Lincoln, Inc,* 212 Mich.App 154, 156; 536 NW2d 851 (1995). They are without merit in any event, owing to plaintiff's failure to show that his injury was caused by any breach of duty attributable to Durst.

[8] Plaintiff asserts that, the decision in *MacDonald* notwithstanding, defendant Palace, "armed with advance knowledge that Durst had a practice of calling people out of their seats and with advance knowledge that this mass movement of people could be dangerous at the Palace, had both the duty and the ability to prevent this from taking place." However, by claiming that defendant Palace failed in some duty to prevent Durst from calling the fans to the floor, plaintiff attempts to transform what the evidence suggests was a matter of concern and policy into a legally enforceable duty. Indeed, Palace officials advised the promoters of the concert that they did not wish to aggravate the dangers inherent in a rock concert by allowing patrons to migrate to the floor en masse. Importantly, the evidence does not suggest that such a development itself created a sufficiently certain and unreasonable risk that such activity would include intentional criminal conduct.

[9] At oral argument in this case, we asked the parties to file supplemental briefs on the issue of whether there was any authority dealing with the issue of liability for an entertainer who allegedly incited an audience to commit wrongful acts. Having been provided with no such authority, we conclude that defendants had no duty to protect against third-party criminal acts, and that there is no question on this record that plaintiff was a victim of a third-party criminal act.

2004 WL 1459357

End of Document