

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

KRYSTAL MOORE,

CASE NO.: 2012 CV 05943

Plaintiff(s),

JUDGE GREGORY F. SINGER

-vs-

ADAM DONALD PETTY,

**DECISION ORDER AND ENTRY
SUSTAINING DEFENDANT'S MOTION
TO DISMISS**

Defendant(s).

This matter comes before the Court on Defendant Adam Petty's Motion to Dismiss for Failure to State a Claim for Which Relief can be Granted ("Motion") filed on September 21, 2012. Plaintiff filed a Response to the Motion on December 20, 2012, alleging the Defendant's Motion had substantial legal defects, which are incurable and make it void on its face. (Plaintiff's Response to Defendant's Motion to Dismiss, "Response"). Defendant filed a Reply on December 28, 2012. (Defendant's Reply to Plaintiff's Response to Motion to Dismiss, "Reply"). Based on the following analysis, Adam Petty's Motion to Dismiss is Sustained.

I. STATEMENT OF FACTS

This case arises from the termination of a romantic relationship. From approximately October 2008 to April 2010, Plaintiff and Defendant were involved in a romantic relationship. Despite the fact that the relationship had ended, in May 2010, Defendant agreed to allow Plaintiff to move into his residence at 51 Shannon Street, Dayton, Ohio 45402. (Complaint ¶5). Plaintiff and Defendant agreed that Plaintiff was to live and receive her mail at the residence in exchange for compensation to Defendant, including upkeep of the residence from May 2010 until September 2010, while Defendant was interning in Colorado.. (Petty Aff. ¶¶11, 28).

On August 17, 2010, Plaintiff and Defendant had an argument inside of the residence. Defendant allegedly dragged, pushed, choked, punched, and threatened Plaintiff. (Complaint ¶6). To the court's knowledge, the argument resolved itself without intervention. Plaintiff alleges that Defendant had engaged in these acts on the following previous dates: May 7, 2010, and August 16, 2010. (Complaint ¶9). The next day, Plaintiff and Defendant engaged in another argument. (Complaint ¶16). Plaintiff walked towards a door in an effort to leave the residence, and alleges that Defendant pushed Plaintiff away from the door, then shut and locked the door. (*Id.*). Defendant allegedly became angry and yelled obscenities and threats at Plaintiff, stating that he would kill her if she left. (*Id.*) That same day, Plaintiff was treated at Grandview Medical Center in Dayton, Ohio for injuries sustained during the argument. (Complaint ¶10).

On August, 19, 2010 Plaintiff and Defendant had a third argument, during which, Plaintiff showed Defendant her injuries and said "Look at what you did to me!" (Petty Aff. ¶15). Defendant called the Dayton Police Department. (Petty Aff. ¶17). When the officers arrived, Defendant told the officers what had happened, and the officers advised Defendant to stay with a friend for the night. (*Id.*).

On August 20, 2010, the Defendant petitioned the Montgomery County Common Pleas Court for a temporary protection order against Plaintiff, stating there was an immediate danger of domestic violence, based on the repeated confrontations. (Petty Aff. ¶18). The Defendant was granted the order. (*Id.*). As a result of the protection order, Plaintiff was escorted from the residence by a Montgomery County Sheriff Deputy on August 21, 2010. (Complaint ¶34). The Deputy gave Plaintiff an opportunity to collect some of her personal belongings. (Petty Aff. ¶19). The rest of Plaintiff's property remained at Defendant's residence. (*Id.*). Defendant was given exclusive rights to the residence pursuant to the protection order. (Petty Aff. ¶20). Plaintiff was prohibited from coming to the residence or contacting Defendant. (*Id.*). Over the next six days, Plaintiff was able to enter the residence to collect the rest of her property. (Petty Aff. ¶21). Once the Plaintiff collected her property and was out of the residence, Defendant dismissed the twelve month protection order against the Plaintiff. (Petty Aff. ¶23).

On August 16, 2012, Plaintiff filed her Complaint against Defendant, claiming Assault and Battery, False Imprisonment, Intentional Infliction of Emotional Distress, Fraud and Abuse of Legal Proceedings, Wrongful Eviction, and Trespass to Chattel and Conversion. (Complaint pp.2-6). The Plaintiff requested damages in the amount of no less than \$30,000.00 to be determined at a trial by jury. (Complaint ¶¶38, 40).

On September 21, 2012, Defendant filed a Motion to Dismiss, alleging that Plaintiff failed to state a claim upon which relief could be granted. (Motion p. 1). Defendant argues that the Assault and Battery and False Imprisonment claims are time barred. (Motion p. 2). Defendant also argues that the Intentional Infliction of Emotion Distress, Abuse of Process, and Trespass to Chattel claims are not supported by facts, and that Plaintiff's Fraud Claim was not pled with Particularity. (Motion pp. 3-13).

On December 20, 2012, Plaintiff filed her Response to Defendant's Motion to Dismiss, requesting that the Court deny Defendant's motion because Defendant's motion has substantial legal defects that make it void on its face. (Response p. 1). Plaintiff also stated that her claims in the initial Complaint are legally sound. (Response p. 2). Plaintiff also sought to amend her initial Complaint and expound her assault and battery claims. (Response p. 4). Finally, Plaintiff alleged there was an assault and battery on Plaintiff's person committed by Defendant as recently as May 2012. (*Id.*).

On December 28, 2012, Defendant filed his reply. (Reply p. 1). Defendant reiterates that Plaintiff's Complaint fails to state a claim for which relief can be granted, arguing that Plaintiff's assault, battery, and false imprisonment claims are time barred. (Reply p. 4). Defendant also stated that Plaintiff's abuse of process claim is not supported by the facts, Plaintiff's fraud claim does not warrant relief for alleged misrepresentations made to a third party, Plaintiff's wrongful eviction claim is not supported by the facts, and that Plaintiff's trespass to chattel claim is not supported by the facts. (Reply pp. 5-9). The Defendant also requests the Court to deny Plaintiff's Request for Leave to amend her Complaint, claiming that Plaintiff failed to make legally sufficient claims. (Reply p. 10).

II. LAW AND ANALYSIS

A. Standard for Review

Relief is available on a motion to dismiss under Civ.R.12(B)(6) where the party opposing the motion to dismiss is unable to prove any set of facts that would entitle him or her to the relief requested in the Complaint. *ABN AMRO Mtge. Group, Inc. v. Arnold*, 2nd Dist. No. 20530, 2005-Ohio-925. The court will look at the complaint to determine if the allegations are legally sufficient to state a claim. *Id.* When reviewing a complaint under this standard, the court must take all of the allegations in the complaint as true. *Id.* According to Ohio Civ. R. 8(A), "a pleading that sets forth a claim for relief whether an original claim,

counterclaim, cross-claim or third-party claim shall contain a short and plain statement of the claim showing that the party is entitled to relief.”

B. Assault and Battery and False Imprisonment.

Under the Ohio Revised Code Section 2305.111(B), “an action for assault or battery shall be brought within one year after the cause of the action accrues.” R.C. 2305.111(B). An action for false imprisonment also must be brought within one year after the cause of action occurred. R.C. 2305.11(A). While affirmative defenses such as statute of limitations are not usually challenged by a Civ.R. 12(B)(6) motion because they require more evidence than what is given in the complaint, a Civ.R.12(B)(6) motion is proper when the statute of limitations is evident from the face of the complaint. *Steiner v. Steiner*, 85 Ohio App.3d 513, 519 (1993).

Here, Plaintiff listed several days in which Defendant allegedly assaulted her: May 7, 2010, and August 16, 17, and 18, 2010. Plaintiff also alleges in her Complaint that Defendant falsely imprisoned her on August 18, 2010. The Complaint was filed on August 16, 2012, two years after the cause of action for these claims occurred. It is evident from the face of the Complaint that Plaintiff’s action for assault and battery and false imprisonment are time barred. Therefore, Defendant’s Motion to Dismiss is SUSTAINED.

C. Intentional Infliction of Emotional Distress.

For a claim for intentional infliction of emotion distress to be established, a plaintiff must prove that: (1) the defendant either intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotion distress to the plaintiff; (2) the defendant’s conduct was so extreme and outrageous as to go “beyond all possible bounds of decency”; (3) the defendant’s actions were the proximate cause of plaintiff’s psychic injury; and (4) the mental anguish suffered by plaintiff is serious and of a nature that no reasonable man could be expected to endure it.” *Pyle v. Pyle*, 11 Ohio App.3d 31, 463 N.E.2d 98 (1983), citing Restatement of Torts 2d (1965) 73, Section 46, comment d.

Plaintiff fails to plead the substance of Defendant’s conduct by failing to describe her deepest fears or how Defendant used her deepest fears against her. Plaintiff merely comes to the legal conclusion that Defendant’s conduct was indeed outrageous. Without further pleading as to the nature of Defendant’s

“outrageous” conduct, this Court is unable to find that the nature of Defendant’s conduct was normal within a domestic relationship. Therefore, Defendant’s Motion to Dismiss, with regard to intentional infliction of emotion distress, is SUSTAINED.

D. Fraud and Abuse of Legal Proceedings

Fraud requires proof of the following elements: (1) a representation or, where there is a duty to disclose, omission of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Reinglass v. Morgan Stanley Dean Witter*, 2006-Ohio-1542, citing *Cohen v. Lamko, Inc.* (1984) 10 Ohio St.3d 167, 10 Ohio B. 500, 462 N.E.2d 407). Furthermore, Civil Rule 9(B) states that while pleading fraud, “the circumstances constituting fraud shall be stated with particularity.” Civ.R. 9(B). The typical requirements for particularity include “the time, place, and content of the false representation, the facts misrepresented, and the nature of what was obtained or given as a consequence of the fraud.” *Id.*, citing *Baker v. Conlan*, 66 Ohio App.3d 454, 458, 585 N.E.2d 543 (1990).

However, for a valid claim for abuse of process to be established, a plaintiff must show “(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process.” *Yaklevich v. Kemp, Schaeffer & Rowe*, 68 Ohio St.3d 294 (1994). “[T]here is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.” *Id.* at 298, ft.2, citing *Prosser v. Keeton*, *The Law of Torts* (5Ed.1984) at 898. The Supreme Court specifically found that seizure of person or property is not an element of the tort of abuse of process. *Id.* at ft.3. It further described the ulterior motive as “usually tak[ing] the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.” *Robb v. Chagrin Lagoons Yacht Club, Inc.*, 75 Ohio St.3d 264, 271, 1996 Ohio 189, 662 N.E.2d 9. “The gravamen of the misconduct for which the liability stated in this Section is imposed is not

the wrongful procurement of legal process or the wrongful initiation of criminal or civil [**11] proceedings; it is the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to accomplish." *Clermont Environmental Reclamation Co. v. Hancock*, 16 Ohio app.3d 9,11, 474 N.E.2d 357 (1984).

The relevant portions of the Complaint pertaining to fraud and abuse of process state:

- “ 22. On or about August 20, 2010, Defendant committed fraud in order to obtain an ex parte civil protective order against Plaintiff.
23. Defendant gave contradicting sworn testimony as to his reasoning for obtaining an ex parte civil protective order.
24. In order to obtain an ex parte civil protective order, defendant made statements that he knew to be false.
25. Defendant wrongfully instituted legal proceedings against plaintiff.
26. Defendant filed for a civil protective order in order to avoid criminal prosecution and to eject Plaintiff from the residence.
27. Defendant admitted that he did not institute legal proceedings, specifically, filing for an ex parte civil protective order, against Plaintiff until after he became aware of Plaintiff’s injuries to her arm. Thus, fearing criminal prosecution, for his actions and misconduct, he immediately filed for a civil protective order.
28. Defendant immediately dismissed his ex parte civil protective order at the 12 month hearing in front of the sitting magistrate.
29. Plaintiff prays for general and specific damages in the amount of not less than \$30,000.00, to be determined at trial. Including, actual damages, and in the alternative, nominal damages, for each and every claim. Plaintiff also requests punitive damages, for Defendant Petty’s malicious conduct.”

(Complaint, ¶¶22-29).

Plaintiff’s Complaint does not meet the necessary elements to plead fraud by failing to allege a representation, a known falsity, justifiable reliance upon the representation, and damages, nor does Plaintiff’s claim for fraud meet the requirements for particularity. In this case, Plaintiff failed to allege a specific fraudulent statement, an approximation as to when the statement was made, and/or an allegation that the defrauded party justifiably relied on the statement. None of these elements are present.

Further, Plaintiff attempts to plead fraud in combination with abuse of process. Plaintiff claims that Defendant defrauded the court which granted the civil protective order, and that such fraud was done for the purpose to avoid criminal prosecution. However, these two claims are inapposite. Abuse of process requires that the proceeding be set forth *in proper form* and with *probable cause*. If fraud is existent, then the proceeding is not properly formed, nor could Defendant have probable cause. Additionally, Plaintiff alleges that Defendant initiated the legal proceedings for the ulterior motive of evading criminal prosecution, but does not articulate how or by what means this legal proceeding afforded Defendant an escape from criminal

prosecution. Finally, Plaintiff's claim fails to articulate the elements for malicious prosecution because she has not alleged or shown that the civil protection order terminated in her favor. Thus, Plaintiff has failed to properly plead either of her claims. Therefore, Defendant's Motion is SUSTAINED.

E. Wrongful Eviction

In order to claim an unlawful eviction, the plaintiff must have possessory right in the property, commonly a tenancy. *Lee v. Wallace*, 186 Ohio App.3d 18, 923 N.E.2d 328, 2010-Ohio-250 (2010). Section 5321.01(A) of the Ohio Revised Code defines a tenant as "a person entitled under a rental agreement to the use and occupancy of residential premises to the exclusion of others." For an eviction to occur, a landlord may bring an action for possession of the premises against a tenant which has entered into a rental agreement. *See* §5321.03. "Landlord" is "the owner, lessor, or sublessor of residential premises, the agent of the owner, lessor, or sublessor, or any person authorized by owner, lessor or sublessor to manage the premises or to receive rent from a tenant under a rental agreement." §5321.01(B). A rental agreement is "any agreement or lease, written or oral, which establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of residential premises by one of the parties." §5321.01(D). An individual who lives in a residence with another without a rental agreement and without the payment of rent is not a tenant and cannot maintain an action for wrongful eviction. *Ogle v. Disbrow*, 6th Dist. Nos. L-04-1373, L-05-1102, 2005 Ohio 4869, at P17. R.C. 3113.31(E)(1)(b) and (c) provide conditions to a CPO, and allows the trial court to: (1) grant the petitioner sole occupancy of the residence if the residence is solely owned or leased by the petitioner, (2) grant the petitioner sole occupancy of the residence if the residence is jointly owned or leased by the petitioner and the respondent, or (3) grant the petitioner sole occupancy of the residence even though the residence is solely owned or leased by the respondent only if the respondent has a duty to support the petitioner or other family or household member living in the residence.

Plaintiff's Complaint as it relates to wrongful eviction states:

"30. On or about August 21, 2010, Plaintiff was served with an ex parte civil protective order and was wrongfully evicted from her residence, at the time.

31. From May 2010 through September 2010, Plaintiff received mail at 51 Shannon Street, Dayton, Ohio 45402, the residence.

32. From May 2010, through August 21, 2010, Plaintiff resided at 51 Shannon Street, Dayton, Ohio 45402, and paid compensation for the same, including upkeep of the residence.

33. Plaintiff prays for general and specific damages in the amount of no less than \$30,000.00 to be determined at trial. Including, actual damages, and in the alternative, nominal

damages, for each and every claim. Plaintiff also requests punitive damages, for Defendant Petty's malicious conduct."

(Complaint, ¶¶30-33).

Plaintiff states that she was wrongfully evicted from the premises when she was served with the ex parte civil protection order. However, this Court finds that there can be no wrongful eviction where eviction is pursuant to a valid legal proceeding. Here, Defendant was granted sole access to the residence pursuant to a legal protection order. This precludes Plaintiff's action for wrongful eviction. Further, any tortious harm or injury stemming from this protection order would be recoverable under a malicious prosecution or abuse of process claim, which this Court has already dismissed. Therefore, Defendant's Motion is SUSTAINED.

F. Trespass to Chattel and Conversion

Plaintiff also attempts to make a claim for trespass to chattel. Although such an actionable tort apparently exists in Ohio, case law regarding such claims is "extremely meager" and rather sparse. *Dryden v. Cincinnati Bell Tel.*, 135 Ohio App.3d 394, 404, citing *CompuServe Incorporated v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1020, (S.D. Ohio 1997), citing cases. It seems that the common law still governs in the application of the elements of trespass to chattels. *Springfield Bank v. Caserta*, 10 Bankr. 57 (Bankr.S.D. Ohio 1981). The general rule is that the action will not support a claim for nominal damages. *Dryden*, at 404. According to the Restatement 2d, Torts, a trespasser to chattel is liable if one of the following occurs: (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the processor, or harm is caused to some person or thing in which the possessor has a legally protected interest. *Id.*

Plaintiff's Complaint as it relates to the trespass to chattels states:

"34. On or about August 21, 2010, Plaintiff was served with an ex parte civil protection order, which Defendant obtained through fraudulent means, in order to avoid criminal prosecution for his assault and battery, and to eject Plaintiff from the residence. At that time, Plaintiff was required to leave the residence at approximately 1:00 a.m. and had to leave her furniture, clothes, and other personal items and belongings.

35. Plaintiff was not able to enter the residence to collect her property, with a 24 foot moving truck, until days later.

36. Plaintiff prays for damages for the time elapsed between the wrongful separation, and for the converted items, that Defendant retained in his control, or wrongfully discarded.

37. Defendant's acts were done knowingly, willfully, and with malicious intent, and Plaintiff is entitled to punitive damages in an amount to be determined by proof at trial.

(Complaint, ¶¶34-37).

Plaintiff plainly states that her removal from the premises was via a civil protection order, not by the tortious conduct of Defendant. Plaintiff alleges that Defendant obtained such civil protection order through fraud and deceit, however, that is not an issue in dispute. Here, Plaintiff's separation from her chattel stems from a presumed rightful civil action, thus her separation was the result of legal process, not tort, and her claims for trespass to chattels are barred. This does not bar Plaintiff from recovering damages from any alleged wrongful destruction which occurred between her removal from the premises and the collection of her property days later. But again, Plaintiff's removal was through legal process, not a wrongful exercise of dominion. The only statement which Plaintiff makes in relation to converted chattel is her prayer for damages "for converted items, that Defendant retained in his control, or wrongfully discarded," but also fails to identify whether she demanded the return of the property after Defendant exercised dominion, and that Defendant refused to deliver the property to Plaintiff. Without a fully pleading either trespass to chattels or conversion, Plaintiff's claims fail. Therefore, Defendant's Motion is SUSTAINED.

G. Motions for Sanctions

After reviewing both Plaintiff and Defendant's Motions for Sanctions, the Court finds the sanctions are inappropriate in this case. To address Plaintiff's concern for the documents which were originally filed under seal, this Court has put an Order to Restrict Access to Filed Documents preventing the general public from reviewing Defendant's motion. Therefore, both Plaintiff and Defendant's Motions for Sanctions are OVERRULED.

H. Plaintiff's Request to Amend Complaint

Because the Defendant's Motion to Dismiss was sustained in full, Plaintiff's Motion to Amend her pleadings is OVERRULED as moot.

III. CONCLUSION

By the forgoing analysis, Defendant's Motion to Dismiss is **SUSTAINED**, both Plaintiff and Defendant's Motions for Sanctions are **OVERRULED**, and Plaintiff's Motion to Amend her Complaint is **OVERRULED** as moot.

THIS IS A FINAL APPEALABLE ORDER, AND THERE IS NO JUST REASON FOR DELAY FOR PURPOSES OF OHIO RULE OF CIVIL PROCEDURE 54. PURSUANT TO OHIO APPEALATE RULE 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.

SO ORDERED:

JUDGE GREGORY F. SINGER

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

KRYSTAL MOORE
404423427
Attorney for Plaintiff, Krystal Moore

Copies of this document were sent to all parties listed below by ordinary mail:

ADAM DONALD PETTY
51 SHANNON STREET
DAYTON, OH 45402
Defendant

BIRAN (IKE) ISENBLETT, Bailiff (937) 225-4376 isenbleb@montcourt.org



General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Case Title: KRYSTAL MOORE vs ADAM DONALD PETTY

Case Number: 2012 CV 05943

Type: Order:

So Ordered

A handwritten signature in black ink, appearing to read "Gregory F. Singer". The signature is written in a cursive style with a prominent initial "G" and a long, sweeping tail.

Gregory F. Singer