Circuit Court for Anne Arundel County
Case No. C-02-CV-16-000493

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 285

September Term, 2017

JERRY A. WILLIAMS

v.

STATE EMPLOYEES CREDIT UNION OF MARYLAND, INCORPORATED ET AL.

Meredith,
Fader,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 18, 2018

Jerry Williams, appellant, was an employee of State Employees Credit Union of Maryland ("SECU") from June 2004 until February 12, 2013. Exactly three years after Mr. Williams left his job at SECU, he filed a complaint in the Circuit Court for Anne Arundel County in which he named six defendants. The defendants were S3 Shared Service Solutions, LLC ("S3"); SECU; Rodney Staatz; Harry Florio; Peggy Thomas; and Joseli Wright. The individual defendants, at all times here pertinent, were employees of SECU. The original complaint had six counts that were captioned as follows: Count I – Constructive Discharge, against SECU and S3; Count II – Intentional Infliction of Emotional Distress, against all defendants; Count III – Tortious Interference with Contractual Relations, against Mr. Florio, Ms. Thomas and Ms. Wright; Count IV – Invasion of Privacy – Placing a Person in a False Light, against Mr. Florio; Count V – Negligent Hiring or Retention, against SECU and S3; and Count VI - Civil Conspiracy, against all defendants.

On August 29, 2016, Mr. Williams filed a first Amended Complaint ("the FAC") to correct the name of Ms. Peggy Thomas to Ms. Peggy Tucker. Otherwise, the FAC was the same as the original complaint.

The defendants, on September 27, 2016, filed a motion to dismiss the FAC in its entirety on the grounds that some of the claims were time-barred and none adequately stated a claim for which relief could be granted.

The motion to dismiss the FAC was accompanied by a detailed memorandum in support of defendants' contentions. Mr. Williams, on October 31, 2016, filed a brief response to the motion to dismiss the FAC in which he simply stated that he had filed a

Second Amended Complaint ("SAC"). He asserted that presently the "operative" complaint was the SAC and therefore the motion to dismiss the FAC was "moot."

The defendants, on November 15, 2016, filed a "Motion to Strike, or in the Alternative, to Dismiss" the SAC. In support of the motion to strike, defendants argued:

> **Plaintiff's Amendments are Outside the Scope of Md. Rule 2-341.**
>
> Plaintiff's Second Amended Complaint is nothing more than a strategic attempt to maneuver around Defendants' Motion to Dismiss. Indeed, Plaintiff pivots on his claim for constructive discharge by relying on completely different facts and legal theories from the constructive discharge claim in his original Complaint. Plaintiff also adds completely new causes of action for retaliation in violation of 11 U.S.C. § 525 and breach of fiduciary duty to credit union members.
>
> The type of amendments sought by Plaintiff in the Second Amended Complaint are beyond the scope of Rule 2-341 because they rely on entirely new theories of liability requiring different evidentiary proof and involve different measures of damages and loss from the claims in Plaintiff's original Complaint. *See Morrell v. Williams*, 279 Md. 497, 508, 366 A.2d 1040, 1045 (1976) (rejecting proposed amendment to complaint "because it introduced a new and additional predicate for recovery"); *see also Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 543, 378 A.2d 180, 183 (1977) (rejecting amended complaint which "set forth a new cause of action founded on a different legal theory, namely, negligence" where original complaint sounded in breach of warranty).
>
> Here, Plaintiff is not seeking to merely change the nature of his cause of action. *See* Rule 2-341(c)(1). Plaintiff's Second Amended Complaint does not "set forth a better statement of facts concerning any matter already raised in a pleading," "set forth transactions or events that have occurred since the filing of the pleading sought to be amended," "correct misnomer of a party," "correct misjoinder or nonjoinder of a party," nor add parties. *See* Rule 2-341(c)(2)-(6). Rather, the amendments completely change plaintiff's theories of liability – namely, constructive discharge and retaliation in violation of 11 U.S.C. § 525(b) and breach of fiduciary duty to Plaintiff as a member of the credit union. These amendments completely change Plaintiff's theories of liability and are not within the scope of Rule 2-341.

> For these reasons, the new claims in Plaintiff's Second Amended Complaint should be stricken.

Aside from the motion to strike, the defendants provided very detailed arguments as to why the SAC should be dismissed for failure to state a cause of action. In that regard, defendants contended, *inter alia*, that some of the counts, on their face, were barred by the applicable three-year statute of limitations and all failed to state a claim upon which relief could be granted. Defendants, pursuant to Md. Rule 2-311(f), asked for a hearing on their motion to strike/motion to dismiss the SAC.

Counsel for Mr. Williams, on December 5, 2016, filed a response to the defendants' motion to strike the SAC, or in the alternative, dismiss plaintiff's claims. In the memorandum, counsel for plaintiff "voluntarily dismisse[d] Counts Two, Three, Four (as to S3 only), and Five of the Second Amended Complaint."

The SAC had two Count Threes: one alleging breach of fiduciary duty to SECU members, against SECU and Mr. Staatz; and the second Count Three (III) alleging invasion of privacy by placing plaintiff in a false light, against Mr. Florio only. In the memorandum that accompanied plaintiff's response, Mr. Williams's counsel made it clear that she intended to dismiss the second Count Three (III) alleging invasion of privacy. This meant that the only counts remaining in the SAC were; Count One – Constructive Discharge, against SECU and S3; Count Three – Breach of Fiduciary Duty, against SECU and Mr. Staatz; and Count IV – Negligent Hiring or Retention, against SECU. The bottom line was that as of December 5, 2016, Mr. Williams had dismissed all claims against all of the individual defendants except for Mr. Staatz.

The memorandum in opposition to the motion to strike/dismiss the SAC set forth lengthy arguments as to why the SAC should not be stricken; plaintiff's memoranda also set forth arguments in support of plaintiff's contention that the three remaining counts stated viable causes of action and why none was barred by limitations. Additionally, plaintiff asked for leave to amend the SAC if the court "determines that any . . . facts in [p]laintiff's [SAC] are unclear."

On December 27, 2016, a circuit court judge, without conducting a hearing, signed an order that read:

> UPON CONSIDERATION OF Defendant's Motion to Strike Second Amended Complaint or in the Alternative to Dismiss, docketed 11/15/2016
>
> it is hereby this 27th Day of December, 2016, ORDERED,
>
> that the Motion is hereby GRANTED, and accordingly, the Second Amended Complaint and Jury Trial Prayer docketed 10/31/2016 is hereby STRI[C]KEN.

The aforementioned order was docketed on December 31, 2016. At the bottom of the order, the judge appended a note that read as follows:

> *CIVIL CLERK: Please schedule the Motion to Dismiss [first amended complaint] docketed 9/27/2016 for 1 hour hearing before any judge.*

Based on the wording of the order plus the note, it appears that the motions judge was persuaded by the arguments of the defendants that the SAC should be stricken. Evidently, however, the motions judge did not consider the validity of defense counsel's arguments that the SAC should be dismissed because: 1) at least one of the claims was filed after the statute of limitations had expired or, alternatively; 2) none of the remaining counts

stated a claim for which relief could be granted. We believe that the motions judge did not consider the motions to dismiss the SAC because, if the judge had agreed with the defendants that all of the counts that had not been voluntarily dismissed failed to state a cause of action, or were otherwise barred, there would be no reason to have asked the clerk to schedule a hearing on the motion to dismiss the FAC. Put another way, if the judge intended to dismiss the SAC, the judge would have known that such a dismissal constituted a final judgment. *See Shapiro v. Sherwood*, 254 Md. 235, 239 (1969) (an amended pleading supersedes the former pleading and is no longer a part of the pleader's averments against his adversary.).[1] On the other hand, the FAC would still be viable if defendants were correct when they argued that the SAC should be stricken for one or more of the reasons espoused by defendants – which we have quoted at pages 2-3, *supra*.

A hearing on defendants' motion to dismiss the FAC on grounds that it did not state a cause of action upon which relief could be granted was held on February 1, 2017 before another motions judge. At the outset of the hearing, counsel for Mr. Williams voluntarily dismissed three of the counts in the FAC. Those were the counts alleging tortious interference with contract, against defendants Florio, Tucker and Wright; invasion of privacy, against Mr. Florio; and conspiracy, against all defendants. That left three counts: Count I – Constructive Discharge, against SECU and S3; Count III – Breach of Fiduciary

[1] As already mentioned, plaintiff admitted when he responded to the motion to dismiss the FAC, that the allegations in the FAC were "moot."

Duty against SECU and Mr. Staatz; and Count V – Negligent Hiring or Retention, against SECU and S3.

During oral argument, the motions judge made it clear that the litigants should focus on the allegations in the FAC and that she would not consider arguments as to whether the SAC should have been stricken or whether the SAC set forth one or more viable causes of action. The second motions judge evidently shared our view that the first motions judge had only ruled on the motion to strike the SAC.

Following argument, the second motions judge, on February 1, 2017, made an oral ruling from the bench granting the defendants' motion to dismiss the FAC in its entirety and with prejudice. That same day, a written dismissal order was docketed.

On February 13, 2017, a Monday, counsel for Mr. Williams filed an "Omnibus Motion to Alter or Amend Judgment, Motion for New Trial and Motion to Revise Judgment" (hereafter the "omnibus motion"). In his omnibus motion, Mr. Williams argued: 1) the first motions judge erred in striking his SAC; 2) the SAC adequately stated claims for relief; and 3) as to the constructive discharge claim, the second motions judge erred when she relied on *Green v. Brennan*, ____ U.S. ____, 136 S.Ct. 1769 (2016), in ruling that plaintiff's claim for constructive discharge was barred because it was not filed within three years of the date the plaintiff sent his letter of resignation to SECU.[2]

[2] Although the issue need not be decided, it is doubtful that the judge's reliance on

(continued . . .)

(continued…)

The judge who dismissed the FAC issued an order on April 5, 2017 denying the omnibus motion in its entirety. Within thirty days of that last mentioned order, Mr. Williams filed an appeal in which he raises three issues, phrased as follows:

> I. Whether the Court Erred in Granting Appellees Motion to Strike Second Amended Complaint.
>
> II. Whether the Court Erred in Granting Appellees Motion to Dismiss Complaint.
>
> III. Whether the Court Erred in Denying Appellant's Omnibus Motion to Alter and Amend Judgment, Motion for New Trial and Motion to Revise Judgment.

I.

(. . . continued)

Green was justified. In *Green*, the Supreme Court emphasized that its interpretation of common law was that in a wrongful discharge action the statute of limitations starts to run on the date the employer notified the employee that he/she was going to be terminated, not on the last day of employment. ____ U.S. ____, ____, 136 S.Ct. 1769, 1782 (2016). The majority in *Green* held that an analogous rule should apply when the plaintiff brings a cause of action for constructive discharge; the rule being that in a constructive discharge case, the statute of limitations begins to run on the date the employee sends in his or her letter of resignation. *Id.*

In the subject case, defense counsel argued (based upon what had been learned in discovery) that appellant sent in his letter of resignation on January 29, 2013, which was two weeks before his last date of employment and more than three years before he filed his first complaint in this matter. But the common law in Maryland as to when limitations commence in a wrongful discharge case is different from that enunciated by the United States Supreme Court in *Green*. The Maryland Court of Appeals, in *Haas v. Lockheed Martin*, 396 Md. 469, 491-94 (2007), rejected the Supreme Court precedent, upon which the *Green* court relied, and held that in a wrongful discharge case, a discharge occurs on the "actual termination of an employee, rather than upon notification that such a termination is to take effect[.]" *Id*. at 494.

Preliminary Matter

The appellees claim that the only issue properly before this court is whether the second motions judge properly exercised her discretion in denying appellant's omnibus motion. In support of that contention, appellees argue:

> The record reflects that the Trial Court's Order striking Appellant's SAC was docketed on December 31, 2016. The Trial Court's Order granting Appellees' Motion to Dismiss and dismissing Appellant's FAC was issued and docketed on February 1, 2017. Twelve days later, on February 13, 2017, Appellant filed his [Omnibus] Motion. The Trial Court denied Appellant's [Omnibus Motion] by Order docketed April 5, 2017. Appellant filed the Notice of Appeal on April 27, 2017.
>
> A "notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken." Md. Rule 8-202(a); *see Furda v. State*, 193 Md. App. 371, 377 n.1, 997 A.2d 856, 860 n.1 (2010). Since Appellant did not file his [Omnibus] Motion within ten (10) days of February 1, 2017, it was treated solely as a motion under Maryland Rule 2-535 and "did not halt the running of the time for appeal" of the Trial Court's underlying ruling dismissing the FAC.
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> * * *
>
> Accordingly, since Appellant filed his Notice of Appeal on April 27, 2017, only the Trial Court's April 5, 2017 Order denying Appellant's [Omnibus] Motion is subject to review in this appeal, and is reviewed by this Court under the abuse of discretion standard.

(References to record extract omitted.)

The above argument is without merit. Md. Rule 1-203(b) reads:

> **Computation of time before a day, act, or event.** In determining the latest day for performance of an act which is required by these rules, by rule or order of court, or by any applicable statute, to be performed a prescribed number of days before a certain day, act, or event, all days prior thereto, including intervening Saturdays, Sundays, and holidays, are counted in the number of days so prescribed. The latest day is included in the determination

> unless it is a Saturday, Sunday, or holiday, in which event the latest day is the first preceding day which is not a Saturday, Sunday, or holiday.

In this case, the tenth day after February 1 was Saturday, February 11, 2017. Therefore, under Md. Rule 1-203(b), appellant had until Monday, February 13, 2017 to file a motion that would stop the thirty-day clock from running. Appellant met that deadline by filing the omnibus motion on February 13, 2017.

II.

Mr. Williams argues that the first motions judge erred when he granted defendants' motion to strike the SAC. We agree.

When the motions judge's order striking the SAC was docketed on December 31, 2016, that action was dispositive of at least one claim, i.e., the claim that SECU and Mr. Staatz had breached a fiduciary duty – a claim that had not been set forth in the FAC.

Md. Rule 2-311(f) provides:

> **Hearing – Other motions**. A party desiring a hearing on a motion, other than a motion filed pursuant to Rule 2-532, 2-533, or 2-534, shall request the hearing in the motion or response under the heading "Request for Hearing." The title of the motion or response shall state that a hearing is requested. Except when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held, but the court may not render a decision that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.

Under Md. Rule 2-311(f), a hearing is required if the movant asks for one, even if the opposing party does not. *See Adams v. Offender Aid & Restoration of Baltimore, Inc.*, 114 Md. App. 512, 517 (1997). *See also Karl v. Blue Cross*, 100 Md. App. 743, 747-48 (1994) ("appellant was entitled to an oral hearing on the motion, despite the fact that the hearing

was requested by appellee."). Thus, appellant is correct when he argues in his brief that he was entitled to a hearing. Accordingly, we hold that the first motions judge erred in ruling on the motion to strike the SAC without conducting a hearing. *Id.* at 748.

Aside from the fact that no hearing was held, we also agree with appellant that the arguments made by defendants as to why the SAC should be stricken were not meritorious.

In the circuit court, defendants, in support of their motion to strike, relied on Md. Rule 2-341(c) which reads:

> **Scope**. An amendment may seek to (1) change the nature of the action or defense, (2) set forth a better statement of facts concerning any matter already raised in a pleading, (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended, (4) correct misnomer of a party, (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action, (6) add a party or parties, (7) make any other appropriate change. Amendments shall be freely allowed when justice so permits. Errors or defects in a pleading not corrected by an amendment shall be disregarded unless they affect the substantial rights of the parties.

In their brief, appellees assert that the first motions judge did not err in striking the SAC. Their argument in support of that assertion is similar to, but not exactly the same as, the argument made in the circuit court which is quoted at pages 2-3, *supra*. In their brief, they word their argument as follows:

> Appellant's proposed amendments went beyond the scope of Maryland Rule 2-341 because Appellant relied on completely different facts and legal theories to support his constructive discharge claim, added two completely new causes of action – retaliation in violation of 11 U.S.C. § 525 and breach of fiduciary duty to credit union members – and relied on entirely new theories of liability requiring different evidentiary proof and involving different measures of damages and loss from the claims asserted in Appellant's FAC. *See Morrell v. Williams*, 279 Md. 497, 508, 366 A.2d 1040, 1045 (1976) (rejecting proposed amendment to complaint "because it

> introduced a new and additional predicate for recovery"); *see also Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 543, 378 A.2d 180, 183 (1977) (rejecting amended complaint which "set forth a new cause of action founded on a different legal theory, namely, negligence" where original complaint sounded in breach of warranty).

It is true that as to two of the surviving counts in the SAC, appellant "relied on completely different legal theories," but this is explicitly allowed by Md. Rule 2-341(c)(1). As to Count One of the SAC, alleging constructive discharge, the plaintiff's legal theory was that he was targeted, harassed and forced to resign because he had spoken critically of SECU's illegal practice of terminating employees who had avoided payment of debt owed to SECU by filing for federal bankruptcy relief. In the FAC, Mr. Williams asserted that one of the reasons he was forced to resign was because of his complaints that SECU had been "targeting employees for retaliation" who, despite having debts owed to SECU, "had previously filed for [b]ankruptcy. . . ." *See* FAC, paragraphs 20-23 and 65. But in his FAC, as to the constructive discharge count, he listed numerous other reasons why he was forced to resign. By limiting his allegations (as to why he was constructively discharged) to a reason already alleged in the FAC, plaintiff did not violate Md. Rule 2-341(c).

The new Count Three of the SAC, alleging breach of fiduciary duty, relied on the same facts as those set forth in the FAC (see paragraph 19 of the FAC) although the legal theory as to why SECU and/or Mr. Staatz were liable was different. Nothing in Rule 2-341(c) justified the court's action in striking Count Three.

Count IV of the SAC, captioned "Negligent Hiring or Retention," is word-for-word the same as Count V in the FAC, and therefore nothing in Rule 2-341(c) could conceivably justify granting a motion to strike that count.

The two cases cited by appellees in support of their argument that the first motions judge did not err in striking the SAC have nothing to do with the issue of when a motions judge is justified in striking a pleading. *Morrell v. Williams*, 279 Md. 497 (1976), involved an amendment to a declaration that was filed after limitations had run. *Id.* at 505. The Court of Appeals held that the doctrine of relation back was inapplicable because the amended declaration stated a new cause of action and therefore a dismissal was properly granted because the new claim was barred by the statute of limitations. *Id.* at 507.

The second case cited by appellees, *Gensler v. Korb Roofers, Inc.*, 37 Md. App. 538, 543 (1977) likewise dealt with the issue of whether, for limitation purposes, the amended declaration set forth a new cause of action. This Court, in *Gensler*, said the amended complaint did state a new cause of action and was therefore barred by limitations. But, when deciding whether to strike an amended complaint, the issue as to whether an amended complaint states a new cause of action is irrelevant because Md. Rule 2-341(c)(1) permits such an amendment. If any count in an amended complaint shows on its face that it is barred by limitations, that defense can be raised by filing either a motion to dismiss – the modern day equivalent of a demurrer – or a motion for summary judgment.

For the above reasons, we hold that the first motions judge erred in striking the SAC. It follows that the first motions judge also erred when he failed to rule on the defendants' motion to dismiss the SAC.

The issue of whether the second motions judge erred by dismissing the FAC for failure to state a cause of action is moot because appellant, by filing a SAC, withdrew the FAC. *See Sherwood, supra*, 254 Md. at 239.

The issue of whether the SAC states one or more viable causes of action has been thoroughly briefed by both parties. In the interest of judicial economy, and for the guidance of the circuit court, we make the comments set forth in Part III. As will be seen, as presently worded, none of the three remaining counts in the SAC state a viable cause of action. We shall remand the case to the Circuit Court for Anne Arundel County for that court to decide, after conducting a hearing, whether plaintiff should be granted leave to amend his complaint.

III.

A. Constructive Discharge

In Count One of the SAC, plaintiff contends that he was discharged in contravention of a clear mandate of public policy that is set forth in 11 U.S.C. § 525(a) (which is a part of the bankruptcy code). Section 525(b) reads:

> No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt, solely because such debtor or bankrupt - - (1) is or has been a debtor under this title or a debtor or bankrupt under the Bankruptcy Act; (2) has been insolvent before the

> commencement of a case under this title or during the case but before the grant or denial of a discharge; or (3) has not paid a debt that is dischargeable in a case under this title or that was discharged under the Bankruptcy Act.

In the statement of facts portion of appellant's SAC, five paragraphs deal, at least in part, with the actions of SECU as it relates to the aforementioned bankruptcy code provisions. Those paragraphs read:

> 14. . . . [various "frivolous" spending decisions by SECU were] particularly galling [to plaintiff], especially when he considered the fate of his former colleague, Mr. Devon Galanos. Mr. Galanos was employed at SECU as a [sic] in [p]laintiff['s] same department. Mr. Galanos sought protection under the United States Bankruptcy Code. October 8, 2010 Mr. Devon Galanos was sent home after being summoned to a meeting with Ms. Vamos and Harry Florio, Senior Human Relations Business Partner. It had been explained to Mr. Galanos, that due to a financial situation with himself and SECU, that he would no longer be employed with SECU.
>
> 15. Plaintiff had been informed by Mr. Galanos that Defendant Florio forcefully and violently stated to him ***how do*** **[you]** ***think that we (SECU) should, feel about*** **[you]** ***driving around in a fancy new car, and not paying us our money?*** And that Mr. Florio tried to force Mr. Galanos [to] sign an agreement of sorts, in reference to the Bankruptcy that he filed. On or about October 14, 2010 it was announced by Ms. Vamos, to the organization that Mr. Galanos was no longer employed with State Employees Credit Union of Maryland, Incorporated (SECU).
>
> 16. Plaintiff states the day that Mr. Galanos was unlawfully terminated, [he] spoke with me in reference to the situation and after speaking with him he informed me that he was going to file a complaint with the Equal Employment Opportunity Commission (Charge#531-2011-00165) and speak with his attorney in reference to the unlawful termination, and he wanted to have Plaintiff to be a witness to the situation, as well as the ongoing discriminatory action(s), that he, Plaintiff, and other African American employees have had to endure under the supervision and management, by Ms. Vamos.
>
> 17. Plaintiff agreed to be a witness about the unlawful termination of Mr. Galanos, as well as the continuous unfair treatment that was showed on a consistent basis. Being in his position and department, Plaintiff was well

aware of other employees that had previously filed for Bankruptcy and were either terminated, or harassed to the point of quitting.

18. On or about October 15, 2010 Ms. Vamos conducted a private conversation with Plaintiff. Ms. Vamos informed me that she wanted to tell me ***"her side of the story."*** Plaintiff informed her that ***"I wasn't involved and that whatever transpired between SECU and another employee is between SECU and that employee and that I was not involved."*** Ms. Vamos then started to cry and informed plaintiff that ***"I was involved, more so than anyone else"*** and proceeded to attempt to discuss the situation regarding the termination of Mr. Galanos. After ten minutes of refusing to speak with Ms. Vamos, Plaintiff informed her that he no longer felt comfortable with the conversation, and left her office.

Count One of the SAC also contains the following relevant assertions:

54. Plaintiff incorporates the aforementioned paragraphs as if herein restated for reference.

55. Plaintiff's complaints of SECU and its employees targeting employees for retaliation that had previously filed for Bankruptcy respecting a SECU loan in violation of Section 525(b).

56. The sole basis of the Defendants actions was to humiliate, disparage and harm the Plaintiff in retaliation for the aforementioned Complaints.

57. At all times relevant to this matter, Plaintiff fully and competently performed all of the duties assigned to him.

58. The Defendants, through its agents, harassed and humiliated Plaintiff with the intent on causing Plaintiff to resign his position.

59. The Plaintiff was forced to resign due to the treatment he received as a result of the aforementioned conduct, which impacted his health.

60. As a direct and the proximate result of the Defendants' acts and/or omissions the Plaintiff sustained economic injuries, humiliation, embarrassment, unnecessary pain, and a loss of employment for which the Defendant has not but is required by law to provide a remedy.

WHEREFORE, Plaintiff prays for judgment to exceed $75,000.00 in compensatory damages and attorney's fees, pursuant to 11 U.S.C. 105(a).

Maryland recognizes a cause of action for constructive discharge, under certain circumstances, when an employee's resignation was involuntary due to coercion. *See Beye v. Bureau of National Affairs*, 59 Md. App. 642, 653 (1984). A resignation will be found to be involuntarily only if "the employer has deliberately caused or allowed the employee's working conditions to become so intolerable that a reasonable person in the employee's place would have felt compelled to resign." *Id.*

To state a viable cause of action for wrongful or abusive discharge, a plaintiff must allege "that (1) [ ]he was discharged; (2) [his] discharge violated a clear mandate of public policy; and, (3) there is a nexus between the employee's conduct and the employer's decision to fire the employee." *King v. Marriott Int'l, Inc.*, 160 Md. 689, 700 (2005). In regard to the second element (that his constructive discharge was a result of a breach of a clear violation of public policy) appellant relies exclusively on section 525(b) of the bankruptcy code.

Appellees contend that appellant is not afforded protection under § 525(b) because he does not allege that he "is or has been a debtor under the Bankruptcy Act[.]" Appellant responds to that argument as follows.

> The Appellees . . . argue, that the Appellant failed to specify that he is entitled to the protections of the Bankruptcy Act and therefore cannot satisfy the second element of his constructive discharge claim. The Appellees correctly noted that 11 U.S.C. § 525(b), applies to [Debtors who have filed for Bankruptcy] and not to persons that [complain regarding retaliation] of those employees, which bolstered Appellant's argument that the appropriate remedy is a constructive discharge claim.

Appellant's admission that § 525(b) does not protect him is fatal to his wrongful discharge claim. To pursue a wrongful discharge case, a plaintiff must point to an established public policy recognized in Maryland that his or her employee violated. In *King*, 160 Md. App. at 700-03, we said:

> ***Public Policy Element of Wrongful Discharge Action***
>
> A public policy is a "principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good." *Adler* [*v. American Standard Corp.*], 291 Md. [31,] 45 [(1981)], 432 A.2d 464. Maryland courts have found a violation of a clear mandate of public policy only under very limited circumstances: where an employee has been fired for refusing to violate the law or the legal rights of a third party, and where an employee has been terminated for exercising a specific legal right or duty. Ordinarily, as the case law illustrates, the public policy must be reasonably discernible from statutory or constitutional mandates. Maryland courts have stated that in order for a public policy to be considered sufficiently established to form the basis of a wrongful discharge action,
>
> > there must be a preexisting, unambiguous, and particularized pronouncement, by constitution, enactment, or prior judicial decision, directing, prohibiting, or protecting the conduct in question so as to make the Maryland public policy on the topic not a matter of conjecture or even interpretation.
>
> *Sears, Roebuck & Co. v. Wholey*, 139 Md. App. 642, 661, 779 A.2d, 408 (2001), *cert. granted*, 367 Md. 88, 785 A.2d 1292 (2001), *aff'd*, 370 Md. 38, 803 A.2d 482 (2002). By requiring that there be a demonstrable mandate, Maryland "limits judicial forays into the wilderness of discerning 'public policy' without clear direction from a legislature or regulatory source." *Milton* [*v. IIT Research Institute*], 138 F.3d [519,] 523 [4th Cir. (1998)]. Such unguided forays are to be avoided by the judiciary, as they are more properly the province of the legislative branch. *Adler*, 291 Md. at 45, 432 A.2d 464.

(Footnotes omitted.)

The conduct that appellant contends in Count One to be protected is: 1) complaining to his supervisor about SECU's practice of firing employees who owed SECU money when they filed for bankruptcy protection; and 2) agreeing to be a witness for at least one co-employee who had filed a complaint with the EEOC after he (the co-employee) had been fired for avoiding repayment of a debt owed to SECU by filing a bankruptcy petition.

In Re Majewski, 310 F.3d 653, 655-56 (9th Cir. (2002)), the court held that section 525(b) of the bankruptcy statute does not forbid an employer from firing someone who was not and had not been, a debtor in bankruptcy, and reasoned that any broader reading of the law would be "both inconsistent with the statute's text and incompatible with its purpose."

Appellant points to no "preexisting, unambiguous, and particularized pronouncement, by constitution, enactment, or prior judicial decision, directing, prohibiting or protecting the conduct in question[.]" *Wholey*, 139 Md. App. at 661. Thus, he did not state a valid claim for wrongful discharge.[3]

B. Breach of Fiduciary Duty

We turn next to Count Three of the SAC alleging breach of fiduciary duty by SECU and Mr. Staatz. In that regard, appellant alleges that SECU and Mr. Staatz breached a fiduciary duty owed to him by:

[3] Although the matter need not be decided, it is doubtful that Count One adequately pleads the third element of a wrongful discharge claim, viz., a nexus between the conduct of the employee and the discharge. Appellant attempted to cover that element in Paragraph 55 of the SAC, [quoted *supra* at page 15], but that paragraph consists of an incomplete sentence. Also, Mr. Williams, in Count One of the SAC, sues S3 for wrongful discharge but never alleges that he was ever employed by S3 or that S3 in any way participated in his termination. For those reasons alone, no viable cause of action was pled as to S3.

> a. Frivolous decisions, to make $10,000.00 purchases on a single all white couch for the lobby at SECU Columbia Branch;
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> b. making other very costly decisions such as completely renovating single branches of SECU on numerous occasions without an evident basis of why a second, and even third renovation in back to back fashion;
>
> c. [holding] costly corporate events; and
>
> d. [spending SECU's money on] personal items that benefited Defendant Staatz: such as the rewriting of his benefits package with SECU in order for him to upgrade to a newer vehicle, which SECU had been paying for, although he had not finished out the required time frame on the contract for the vehicle that SECU had already provided for his benefit.

Earlier in the SAC, at Paragraph 13, plaintiff alleged that he discovered all the aforementioned misdeeds in his capacity as a fraud investigator in the "Corporate Security Department" of SECU. In Paragraph 44 of the SAC, he alleges he left his job in the security department and took a job with SECU as a "[l]ead [c]ustomer [s]ervice [r]epresentative" in April 2012. *See* Paragraph 44. He filed suit in this matter on February 12, 2016.

Assuming, arguendo, that Mr. Staatz or his employer, SECU, breached a fiduciary duty owed to Mr. Williams, the SAC makes it clear that Mr. Williams knew about each of those alleged breaches more than three years before the date he filed his initial complaint. Count Three, assuming it otherwise states a cause of action, is therefore barred by the three-year statute of limitations set forth in Md. Code (2013), Courts and Judicial Proceedings Article, § 5-101.[4]

C. Negligent Hiring or Retention

[4] Additionally, we note that an alleged breach of fiduciary duty, standing alone, does not constitute a cause of action. *Wassermon v. Kay*, 197 Md. App. 586, 631 (2011).

In Count IV of the SAC, Mr. Williams sued SECU for "negligent hiring or retention." The employees that were allegedly negligently hired or retained were Harry Florio, Peggy Tucker, and Joseli Wright. In this appeal, appellant claims that as a result of the "Defendant's negligent hiring and retention of Harry Florio, Peggy Tucker and Joseli Wright," he suffered injuries.

To successfully bring a cause of action for negligent hiring/negligent retention, the plaintiff "must prove, not only that some negligence of the fellow-servant caused the injury, but also that the master had himself been guilty of negligence, either in the selection of the negligent fellow-servant in the first instance, or in retaining him in the service afterwards." *Norfolk and Western R.R. Co. v. Hoover*, 79 Md. 253, 261 (1894). To properly plead a cause of action for negligent hiring or retention, a plaintiff must allege the following elements:

> (1) The existence of an employment relationship; (2) The employee's incompetence; (3) The employer's actual or constructive knowledge of such incompetence; (4) The employee's act or omission causing the plaintiff's injuries; and (5) The employer's negligence in training or supervising the employee as the proximate cause of the plaintiff's injuries.

Williams v. Wicomico County Board of Education, 836 F.Supp.2d 387, 400 (D.Md. 2011) (applying Maryland law).

As mentioned, two of the SECU employees that were allegedly negligently hired or retained were Peggy Tucker and Joseli Wright. The only mention of these two women was in Paragraph 12 of the SAC:

> Plaintiff states that it appeared that many of these senior management employees were incentivized monetarily, with specially created positions,

> which increased their rates of pay and in some cases increased their scope of authority and granted them what also appeared to be unilateral power, within the organization. One such employee, by the name of Joseli Wright, whom [sic] worked previously with SECU in a low ranking position, left the SECU, only to return to SECU Credit Union at a later date, under a newly created position. This employee had a very close, and what appeared to be personal relationship with both the CEO Mr. Rod Staatz, as well as the Vice President Ms. Peggy Tucker. Ms. Wright was allowed to oversee important decisions, many of which were financial.

Nowhere in the SAC does appellant allege facts that indicate that anything Ms. Wright did, or failed to do, was negligent nor does plaintiff allege fact showing that anything that Ms. Wright did, or failed to do, had any affect, whatsoever, on plaintiff. The same can be said as to Peggy Tucker. Other than being identified as Vice President of SECU, plaintiff does not allege facts that show that anything Ms. Tucker did affected plaintiff. Nor does plaintiff allege facts that showed that either Ms. Tucker or Ms. Wright, when hired, were incompetent for the job that they were given or that, during the period when plaintiff worked for SECU, they were incompetent at their jobs. Finally, plaintiff alleges no facts that would indicate that SECU was negligent in retaining them. In summary, plaintiff did not allege facts sufficient to adequately plead any of the five necessary requirements as set forth in *Williams*, except for requirement one, i.e., the existence of an employment relationship. Therefore, Count IV of the SAC does not state a viable cause of action insofar as the allegations regarding Ms. Wright or Ms. Tucker, are concerned.

We turn next to the allegations in the SAC against Harry Florio, who is identified in the SAC as SECU's "Senior Human Relations Business Partner." The SAC alleges the following in regard to Mr. Florio:

- On October 8, 2010, Mr. Florio attended a meeting with Mr. Galanos [the employee that was later dismissed for filing a bankruptcy claim] and a Ms. Vamos [first name not given]. At the meeting, either Ms. Vamos or Mr. Florio (the SAC does not say which) explained "to Mr. Galanos, that due to a financial situation with himself and SECU, that he would no longer be employed with SECU."
- After the October 8, 2010 meeting, Mr. Galanos told plaintiff that Mr. Florio had "forcefully and violently" asked Galanos "how do [you] think that we (SECU) should feel about [you] driving around in a fancy new car and not paying us our money."
- Mr. Galanos told the plaintiff that Mr. Florio had tried to force him to sign "an agreement of sorts, in reference to the Bankruptcy" that Mr. Galanos had filed.
- On January 14, 2011, plaintiff received a bad performance review from Ms. Vamos and was told by Ms. Vamos that he "didn't qualify for a raise." One week later he filed a letter of appeal "issued" to Mr. Florio and two other SECU officials. In that letter of appeal he expressed his view that the performance review by Ms. Vamos was "derogatory" and that he had received a bad review from Ms. Vamos in retaliation for being a witness for Mr. Galanos.
- On February 1, 2011, plaintiff attended a meeting concerning his appeal of his bad review. At that meeting, plaintiff told Mr. Florio that his (plaintiff's) "issues" with Ms. Vamos were not new and that "over the last three years . . . he . . . had to endure being called a homosexual" and had been "harassed for wearing suits" and had been "accused of having a sexual relationship with one of his co[-]workers."
- On March 30, 2011, plaintiff attended another meeting that Mr. Florio also attended. At the meeting, the subject of plaintiff's poor performance review was discussed and he was told that "Ms. Vamos was not able to provide [plaintiff] with specific dates [concerning poor work performance], but could only recall certain events 'to the best of her recollection[.]'"
- At the March 30, 2011 meeting, plaintiff told Mr. Florio, in front of a witness, that Ms. Vamos had given him an unsatisfactory review because he had been a witness "to the [u]nlawful termination" of Mr. Galanos and that he (plaintiff) felt that Mr. Florio and Ms. Vamos "were making various efforts to ensure that this matter [presumably the bad performance review] wasn't investigated[.]"
- During the March 30, 2011 meeting plaintiff asked that a "Mr. Palmer" be present so that plaintiff "would be able to state in front of another member of senior management, his request for a formal investigation to be conducted[.]" He also complained in front of Mr. Florio that "discriminatory actions" were still taking

place at SECU. Lastly, at the meeting, plaintiff pointed out to Mr. Florio that of the $170,000 recovered by the fraud recovery unit, which plaintiff led, he (plaintiff) was responsible for $130,000 of the recovery.

- At the March 30, 2011 meeting, Mr. Florio yelled at plaintiff and told him to "Sit Down!" and made that command using "a very authoritarian tone." Because of the hostility in the room, plaintiff left the meeting.
- In January 2012, plaintiff applied for a job in SECU's contact center and shortly thereafter he received an email from Mr. Florio inquiring about that application. In that email, Mr. Florio told plaintiff that the new position started at a lower pay grade and that he would most likely be placed toward the midpoint of the pay grade. Plaintiff disagreed with Mr. Florio in this regard but Mr. Florio was adamant that plaintiff would not be able to make a "lateral move" earning the same pay.
- In April 2012, plaintiff transferred to the contact center where he worked as a lead customer service representative, at lower pay. Prior to that transfer, Mr. Florio and a "Mr. Jones" told plaintiff that the reason he would have to take a pay reduction instead of making a lateral move at the same pay was "to ensure that he had room to grow within [the] position." Mr. Florio and Mr. Jones made that statement even though they were "both aware" for many years previously that plaintiff's new position "would be eliminated and that he wouldn't have the opportunity to even reach his previous pay rate" and the two men were also "aware that his previous position and previous department [was] not going to [be] affected" by SECU's plan to downsize and restructure the organizations.

In regard to Mr. Florio, plaintiff failed to allege facts showing four of the five elements that must be pled to properly state a cause of action for negligent hiring/retention. Appellant failed to allege facts showing that Mr. Florio was incompetent (element 2), or that SECU had actual or constructive knowledge that Mr. Florio was incompetent (element 3), or that the plaintiff was injured by Mr. Florio's incompetence (element 4), or that SECU was negligent in training or supervising Mr. Florio (element 5).

CONCLUSION

After plaintiff voluntarily dismissed certain counts in the SAC, only three remained. None of them, as presently worded, state a viable cause of action against any defendant.

Moreover, the SAC, as presently written, contains literally scores of paragraphs that have nothing, whatsoever, to do with the three counts that were not dismissed.

Plaintiff, in his opposition to the motion to dismiss, asked the circuit court for leave to amend the SAC. On remand, the appellant is entitled to have the circuit court consider that request. In the event that the circuit court allows appellant to file a third amended complaint, that complaint should comply with the requirement set forth in Md. Rule 2-303(b), which requires, *inter alia*, that averments contained in a pleading shall be "simple, concise, and direct" without inclusion of "immaterial, impertinent, or scandalous matter."

JUDGMENT REVERSED; CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION; COSTS TO BE PAID 50% BY APPELLANT AND 50% BY APPELLEES.