Circuit Court for Montgomery County
Case No. 403868

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 825

September Term, 2016

BRETT KIMBERLIN

v.

NATIONAL BLOGGERS CLUB, et al.

Woodward, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 8, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

"No one would dispute that [Brett] Kimberlin [appellant] and the defendants bear a great deal of animosity toward one another, and their use of social media has effectively thrown gasoline on an already well-fueled fire." *Kimberlin v. Walker*, Nos. 1553 & 2099, Sept. Term 2014, at slip op. 1 (filed Feb. 2, 2016). So began our opinion in a prior case involving Kimberlin and several of the same defendants in this case. In that case, Kimberlin had sued the defendants for defamation, and we affirmed the judgments in favor of the defendants. *See id.* That animosity has continued into this case.

On April 4, 2015, Kimberlin filed a complaint in the Circuit Court for Montgomery County against several defendants, not all of whom are appellees.[1] Kimberlin alleged that the various defendants had made defamatory statements about him and committed various invasions of his privacy.[2] Essentially, Kimberlin averred that the defendants had embarked on a smear campaign to ruin his reputation and used various media platforms to accuse him

[1] The complaint names the following defendants: National Bloggers Club ("NBC"); Ali Akbar; Patrick Frey; Erick Erickson; Michelle Malkin; Glenn Beck; Aaron Walker; William Hoge; Lee Stranahan; Mandy Nagy; Breitbart.com, aka Breitbart Holdings ("Breitbart"); DB Capitol Strategies ("DBCS") (now known as political.law); Dan Backer; Mercury Radio Arts; The Blaze; Ace of Spades, the Blog; Ace of Spades, the Blogger; Redstate; and Twitchy.

[2] Specifically, Kimberlin named eight causes of action in the complaint: Count 1 – defamation against Akbar and NBC; Count 2 – false light invasion of privacy against all defendants; Count 3 – appropriation of name for unreasonable publicity against Walker, Akbar, Frey, DBCS, and Backer; Count 4 – interference with business relations against DBCS, Backer, Walker, and NBC; Count 5 – interference with economic advantage against all defendants; Count 6 – battery against Walker; Count 7 – intentional infliction of emotional distress against all defendants; and Count 8 – conspiracy to commit state law torts against all defendants.

of "swatting" prominent conservative bloggers and pundits.[3] By the time Kimberlin noted his appeal on June 17, 2016, after voluntarily dismissing some of the defendants, the court had granted motions to dismiss and/or for summary judgment to the other defendants. He seeks our review of the court's dismissals and grants of summary judgment, as well as the court's order that he pay attorney's fees following his failure to appear at a July 17, 2015 scheduling hearing. For the reasons to be discussed, we affirm.

Preliminarily, Walker contends that we should dismiss this case for various alleged shortcomings of Kimberlin's brief and record extract, including that Kimberlin failed to adequately cite factual assertions to the record extract, that he included argument and untrue assertions in his statements of fact, and that he added irrelevant material to his record extract. Although we agree that Kimberlin's brief and record extract are not models of appellate litigation, we decline to dismiss this appeal on that basis. *See Rollins v. Capital Plaza Assocs., L.P.*, 181 Md. App. 188, 202 (2008) (stating that ruling on the merits of an appeal is a "'preferred alternative'" to dismissing for procedural shortcomings (quoting *Joseph v. Bozzuto Mgmt. Co.*, 173 Md. App. 305, 348 (2007)).[4]

[3] According to the parties, "swatting" is the act of calling 911 and making a false report of a violent crime so that police will dispatch a Special Weapons and Tactics ("SWAT") team to the victim's address.

[4] We also note that Kimberlin has failed to include many documents and orders in his record extract, as required by Rule 8-501(c), which provides, in part: "The record extract shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal and any cross-appeal. It shall include . . . the judgment appealed from . . . ." Again, we are exercising our discretion to review the appeal on the merits, but we make clear that we do not countenance Kimberlin's failure to abide by the rules of appellate procedure.

ATTORNEY FEES

On July 17, 2015, the parties were to appear for a scheduling hearing. Kimberlin, however, failed to attend, but he claims to have spoken with the court via telephone. At a motions hearing on September 3, 2015, despite finding that Kimberlin had not acted intentionally or with malice by failing to appear in court on July 17th, the court awarded attorney's fees to several of the defendants, ruling that "the defendants should not have to pay for your [Kimberlin] mistake[.]"[5]

On appeal, Kimberlin contends that the court erred in awarding attorney's fees for his failure to appear at the scheduling conference because the court failed to make the requisite factual findings pursuant to Rule 1-341 for the award of fees.[6]

"Maryland generally follows the 'American Rule,' which provides that 'each party to a case is responsible for the fees of its own attorneys[.]'" *Henriquez v. Henriquez*, 185 Md. App. 465, 474 (2009) (quoting *Royal Inv. Grp., LLC v. Wang*, 183 Md. App. 406, 456 (2008)), *aff'd*, 413 Md. 287 (2010). There are exceptions, however. *See Ocean City, Md., Chamber of Commerce, Inc. v. Barufaldi*, 434 Md. 381, 384-85 & n.3 (2013).

Despite Kimberlin's failure to include the court's orders awarding attorney's fees in the record extract, the record and the transcript of the September 3rd hearing make apparent

[5] The court ordered $295 in fees to counsel for Breitbart, $315 for The Blaze, and $150 for Hoge. On appeal, Kimberlin states that he is not appealing the ruling as to the $315 for The Blaze defendants.

[6] Rule 1-341(a) permits a court to order a party to pay the attorney's fees of another in a civil proceeding "if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification[.]"

that the court sanctioned Kimberlin for his failure to appear at the scheduling conference, not pursuant to Rule 1-341. This is certainly within the trial court's authority. *See Station Maint. Solutions, Inc. v. Two Farms, Inc.*, 209 Md. App. 464, 476 (2013) (remarking that "'the case law of Maryland makes the imposition of sanctions for the violation of a scheduling order appropriate'" (quoting *Manzano v. S. Md. Hosp.*, 347 Md. 17, 29 (1997))). Accordingly, the court was within its discretion to award attorney's fees to various appellees' counsel for Kimberlin's failure to attend the scheduling conference.

PRETRIAL MOTIONS

Additionally, at the September 3rd motions hearing, the court granted motions to dismiss filed by Breitbart, Malkin, Beck, Mercury Radio Arts, The Blaze, and Twitchy. As to these defendants, the court ruled that it lacked personal jurisdiction based on *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). The court also determined that, even if it had jurisdiction, it would grant the motions to dismiss on the grounds stated in their memoranda, which were not included in the record extract. Shortly after this hearing, Kimberlin filed an amended complaint – which is also not in the record extract.

The court held another motions hearing on December 8, 2015. Following that hearing, on January 14, 2016, the court granted Walker's motion to dismiss and/or for summary judgment. The court determined that Kimberlin's claims against Walker in the present litigation were the same as those in the first lawsuit, and that *res judicata* barred the suit for all claims except for Count 3. The court then dismissed Count 3 for failure to state a claim upon which relief may be granted.

On April 7, 2016, the court granted motions to dismiss filed on behalf of Hoge, Stranahan, DBCS, and Backer on the grounds of *res judicata* and/or lack of personal jurisdiction.

On appeal, Kimberlin contends that the court erred in granting these motions. He argues that the court should not have dismissed several defendants for a lack of personal jurisdiction prior to any discovery to determine what contacts those defendants had with the State of Maryland. Kimberlin also asserts that *Young* is distinguishable from the present case. Moreover, he argues that, because he alleged the defendants were co-conspirators, then the court could properly exert jurisdiction over all of the defendants. Kimberlin also maintains that the doctrine of *res judicata* is inapplicable because this case concerned several different defendants and began in federal court, where the defendants did not initially assert the defense of *res judicata*. Furthermore, he contends that his complaint properly stated causes of action against the several defendants.

We note that Kimberlin failed to include his amended complaint in the record extract, as required by Rule 8-501(c). His amended complaint, however, is in the record and is not markedly different from his original complaint. Kimberlin deleted some paragraphs concerning many of the dismissed defendants, added some paragraphs containing more details about Hoge's purported activities, and included assertions that the various defendants had sufficient contacts with the State of Maryland for the court to exercise its jurisdiction over the defendants.

Kimberlin has attempted to level similar claims against some of the same defendants in this lawsuit as in the first one, which was adjudicated to a final decision on the merits.

Accordingly, the doctrine of *res judicata* is applicable. *See Spangler v. McQuitty*, 449 Md. 33, 65 (2016) ("The doctrine of *res judicata* consists of three elements: '(1) the parties in the present litigation are the same or in privity with the parties to the earlier litigation; (2) the claim presented in the current action is identical to that determined or that which could have been raised and determined in the prior litigation; and (3) there was a final judgment on the merits in the prior litigation." (quoting *Cochran v. Griffith Energy Servs., Inc.*, 426 Md. 134, 140 (2012))).

In the first lawsuit, Kimberlin alleged that the defendants were defaming him by calling him a pedophile. In this lawsuit, covering the same time period and activities, Kimberlin claimed that the defendants were defaming him by accusing him of swatting. Kimberlin's second suit is, therefore, barred by *res judicata*. *See Gonsalves v. Bingel*, 194 Md. App. 695, 709 (2010) ("*Res judicata* . . . is 'an affirmative defense [that] bar[s] the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.'" (quoting *Anne Arundel Cnty. Bd. of Educ. v. Norville*, 390 Md. 93, 106 (2005))). As to Kimberlin's argument that the various appellees are barred from raising *res judicata* as a defense because they did not initially argue that in federal court, there is no such requirement. Indeed, a court may *sua sponte* raise the doctrine of *res judicata*. *See Holloway v. State*, 232 Md. App. 272, 282-83 (2017).

We also find no error in the circuit court's dismissal of Count 3 against Walker for failure to state a claim. In moving to dismiss a complaint for failure to state a claim, "the [moving] party is asserting that, even if the allegations are true, the opposing party is not

entitled to relief as a matter of law." *Tri-Cnty. Unlimited, Inc. v. Kids First Swim Sch., Inc.*, 191 Md. App. 613, 619 (2010). The only specific claim that Kimberlin makes in Count 3 that post-dates his complaint in the prior lawsuit – and would not be barred by *res judicata* – is against Akbar, not Walker.[7] Accordingly, there are no specific allegations against Walker, which is required to state a claim for false light. *See Piscatelli v. Van Smith*, 424 Md. 294, 305-06 (2012) (discussing pleading requirements of defamation and false light allegations).

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[7] Akbar was never properly served and was dismissed without prejudice.