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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

KEITH STADWICK,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 08-L-1443
)	
MAFS, INC. OF ILLINOIS; THE LAW)	
FIRM OF ANDERSON AND WANCA;)	
BRIAN WANCA; and ROLAND KAESER,)	Honorable
)	Patrick J. Leston,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendants summary judgment on plaintiff's complaint for malicious prosecution: plaintiff failed to raise a factual issue as to lack of probable cause for a prior action against him, as despite plaintiff's argument defendants had not made a judicial admission that plaintiff had not sent an unsolicited fax that had supported the prior action; and plaintiff failed to raise a factual issue as to special injury, as the three prior actions to which he was subjected, which were largely unrelated suits for ordinary damages, did not constitute a "sustained onslaught of litigation."

¶ 2 In a suit for malicious prosecution, plaintiff, Keith Stadwick, appeals a grant of summary judgment (735 ILCS 5/2-1005(c) (West 2010)) to defendants, MAFS, Inc. of Illinois (MAFS); the

law firm of Anderson and Wanca (Anderson); Brian Wanca; and Roland Kaeser. Plaintiff contends that he raised genuine factual issues as to (1) whether MAFS' prior suit against him was brought without probable cause; and (2) whether he suffered special injury. We affirm.

¶ 3 Plaintiff formerly operated two companies as a franchisee of Snelling Personnel Services (Snelling). Stadwick Brothers, Inc. (Stadwick Brothers), had its office in Hoffman Estates. Stadwick Enterprises, Inc. (Stadwick Enterprises), had its office in Naperville. MAFS is an Illinois corporation; at all pertinent times, Kaeser was its president. Anderson is a law firm, in which Wanca is a partner. Plaintiff's original complaint, filed *pro se* on December 15, 2008, named as defendants MAFS; Anderson; Wanca; Kaeser; and John Pezl.

¶ 4 The complaint's first count, entitled "Conspiracy," alleged as follows. Wanca and Kaeser agreed to bring a "false lawsuit" in order to obtain an insurance settlement. On January 9, 2004, Wanca telephoned Stadwick Enterprises and spoke to Kim Crowley. At his request, Crowley faxed a "Top Candidates List" (TCL) to Wanca at (847) ***-1501, then called him and confirmed that he had received the TCL. Shortly afterward, as prearranged, Wanca furnished the TCL to MAFS. Anderson drafted a verified class-action complaint with MAFS as plaintiff, naming Lisa Keaton, doing business as Snelling, as the defendant. On February 25, 2004, Wanca filed the complaint in the circuit court of Du Page County (case No. 04-CH-308). The complaint asserted claims under the Telephone Consumer Protection Act (TCPA) (47 U.S.C. § 227(a) (2000)) and for statutory consumer fraud (815 ILCS 505/2 (West 2004)) and conversion. It attached the allegedly unsolicited TCL, which was marked "Code 11-IL" and addressed to "Human Resources *** ATTN: Hiring Manager."

¶ 5 Count I of plaintiff's complaint alleged that Stadwick Enterprises had never sent a fax to MAFS. However, on or about January 9, 2004, Anderson's and Wanca's names, and the number

(847) ***-1501, were entered into its database. As a direct result of MAFS' complaint, Stadwick Enterprises was forced to close and plaintiff, its sole shareholder, lost more than \$50,000 in profits.

¶ 6 Count II of plaintiff's complaint claimed malicious prosecution. It realleged the facts in count I and alleged further that, on June 23, 2004, plaintiff was named as a defendant in MAFS' amended complaint, but, on December 14, 2006, he was dismissed with prejudice. Count III, also for malicious prosecution, alleged that, on June 23, 2004, CE Design Ltd. (CE Design), whose president was Pezl, was added as a plaintiff in the MAFS action even though defendants knew that plaintiff had had permission to fax advertisements to CE Design.

¶ 7 On October 30, 2009, plaintiff filed a first amended complaint, alleging as follows. On November 6, 2003, Wanca filed a purported class action in the circuit court of Cook County on behalf of CE Design against Advanced Processing Systems, Inc. (Advanced Processing), alleging that, "[on] or about early October 2003," Advanced Processing faxed a letter coded 10-IL to CE Design, "ATTN: John Pezl." On or about December 17, 2003, plaintiff's attorney told Wanca that the responsible party was Stadwick Brothers. Wanca was soon told that CE Design had permitted Stadwick Brothers to fax the TCL and that Stadwick Brothers did not intend to settle the suit.

¶ 8 Plaintiff's first amended complaint continued as follows. On January 8, 2004, Wanca telephoned Stadwick Enterprises. He told Kim Crowley that he needed a temporary legal secretary, and he asked her to fax information to (847) ***-1501. The next day, Crowley confirmed that Wanca had received the requested fax. To pressure plaintiff into settling the CE Design suit, Wanca and Kaeser agreed to "create a new class action complaint," and they followed the scheme described in plaintiff's original complaint. On June 18, 2004, CE Design's action was voluntarily dismissed. The amended MAFS complaint, filed September 30, 2004, added CE Design as a plaintiff and

named as defendants Lisa Keaton, plaintiff, and “Stadwick Brothers.” It alleged that CE Design and MAFS both received the TCL at issue in October 2003. However, every TCL had a code showing the month of its creation, and the code on the TCL at issue was for November 2003; thus, it could not have been sent in October 2003. Stadwick Enterprises had never faxed a TCL to MAFS, and MAFS had never appeared in its database. However, on or about January 9, 2004, Anderson’s and Wanca’s names, and the number (847) 368-1501, were entered into the database. On January 7, 2008, Wanca filed a complaint in Cook County circuit court on behalf of Ira Holtzman and against “Robert Stadwick D/B/A Harvard Resource Group, Inc [HRG].”

¶ 9 The first amended complaint attached a “Market Data Report” with handwritten notes listing the report’s date as January 8, 2004; the requesting company as Anderson; the contact person as Wanca; and the request as one for a legal secretary to serve two or three months.

¶ 10 Defendants moved to dismiss the first amended complaint as time-barred (see 735 ILCS 5/2-619(a)(5) (West 2010)) and failing to state a cause of action (see 735 ILCS 5/2-615 (West 2010)). The trial court denied the motion.

¶ 11 Defendants moved for summary judgment. Their motion stated that plaintiff’s theory of the complaint was that the TCL underlying the MAFS suit was sent to Wanca, at his request, in January 2004, but that the MAFS complaint maliciously alleged that the TCL was sent in October 2003. Defendants contended that the theory was not viable because the allegation that the TCL was sent to Wanca in January 2004 was refuted by (1) plaintiff’s deposition testimony; and (2) evidence that the TCL was sent to MAFS in fall 2003. Also, defendants contended, plaintiff could not show the special injury needed to recover for malicious prosecution.

¶ 12 Defendants contended specifically, in part, that plaintiff could not show that the MAFS suit had been filed without probable cause. In his deposition, plaintiff had testified that a TCL would not be generated without a contact name and that his companies never used the same TCL in different months. Further, he had stated in an affidavit that a TCL would never be faxed without a header. Also, plaintiff was contending that, because the TCL in the MAFS suit was coded for November, MAFS could not have received it in October 2003; that, because MAFS was not in a database, it could not have received the TCL at issue; and that Wanca received the TCL in January 2004 and used it to create the MAFS suit.

¶ 13 Defendants contended that these assertions were untenable. First, had the TCL been sent out in January 2004, it would have been coded “01-IL”: plaintiff himself had said that he never used the same TCL in different months. Second, Wanca had filed an affidavit stating that MAFS had received a TCL coded “10-IL” and provided it to Anderson, but Anderson had misplaced it and inadvertently failed to attach it to the MAFS complaint. Thus, the MAFS complaint had correctly alleged that the TCL was faxed in October 2003. This was consistent with Kaeser’s deposition testimony that he received the TCL sometime in fall 2003 and then showed it to Wanca.

¶ 14 Third, plaintiff could not rely on his assertion that MAFS had not been listed in his database. Although he had testified that a TCL would not be faxed without a contact name, the November TCL faxed to MAFS was a “generic” one sent to “Human Resources, Attn: Hiring Manager.”

¶ 15 Defendants contended next that plaintiff could not show special injury beyond that usually incurred in defending a lawsuit. See *Cult Awareness Network v. Church of Scientology International*, 177 Ill. 2d 267, 280-81 (1997). The MAFS suit had never been certified as a class action, so plaintiff had faced at most \$1,500 damages (see 47 U.S.C. § 227(b)(3)(B), (b)(3)(C))

(2000)). Also, attorney fees and lost profits were not special injury. See *Levin v. King*, 271 Ill. App. 3d 728, 733-34 (1995).

¶ 16 Defendants' summary-judgment motion attached plaintiff's February 9, 2011, deposition, in which he had testified as follows. Each month, his companies faxed TCLs to both existing and potential customers. His companies "would never use the same one in different months," but, in some months, they "did not send out any." Shown the TCL addressed to Pezl at CE Design, plaintiff testified that the use of a specific address showed that Pezl and CE Design had been in his database at the time. The TCL was coded 10-IL, meaning that it had been sent in October (of some year) to a location in Illinois. Shown a "generic" TCL addressed to "Human Resources, Attn: Hiring Manager," plaintiff explained that it had not been generated in a "fax blast," but that each office kept a "generic copy" to be included "in any faxes sent out to companies or new businesses that calls [*sic*] in." A customer could be listed in a database even absent a signed agreement.

¶ 17 Plaintiff testified that, by January 1, 2005, he had decided to close down the companies, principally because, after receiving the MAFS complaint, he stopped all fax advertising, fearing liability for unsolicited faxes. HRG was an employment agency that his brother ran. Plaintiff knew that his companies had never faxed MAFS, as (1) after receiving the MAFS complaint, he checked the databases and did not find MAFS or its fax number; and (2) the MAFS complaint alleged that the TCL was faxed in October 2003, but the TCL was created in November 2003.

¶ 18 In an affidavit signed July 25, 2007, plaintiff stated that Stadwick Enterprises never faxed the allegedly improper TCL to MAFS; that Stadwick Enterprises never had MAFS' name in its database; and that the TCL at issue was not created until November 2003.

¶ 19 The next exhibit pertinent here is Kaeser's deposition, taken January 26, 2011. Asked whether he could "now make the claim" that he received the improper TCL in October 2003, Kaeser responded, "Yes, I did." He did not know whether he received a similar TCL at any other time. Asked whether he might have received the offending TCL in either September or November 2003, Kaeser responded, "It's possible." The MAFS complaint might have been mistaken about exactly *when* the TCL had been faxed to MAFS, but not about *whether* it had been faxed to MAFS.

¶ 20 In an affidavit, Kaeser stated as follows. In 2004, he gave Wanca TCLs that he had received from Snelling in fall 2003. To the best of his knowledge, MAFS received both a TCL coded 10-IL and one coded 11-IL; he provided both to Wanca. The TCLs were attached to the affidavit. Both were addressed to "Human Resources" and the attention of "Hiring Manager."

¶ 21 In an affidavit, Wanca stated as follows. He had represented CE Design in its suit and MAFS in its suit. The MAFS complaint had alleged that MAFS received an unsolicited TCL, which was coded 11-IL, in October 2003. In preparing the MAFS complaint, counsel had "inadvertently not included" a faxed TCL coded 10-IL that Kaeser had provided Anderson. Anderson had kept the TCL "in a separate file in a separate office," and it was located "during the week of October 10, 2011." Wanca did not provide Kaeser the TCL coded 11-IL.

¶ 22 Plaintiff responded to the summary-judgment motion as follows. Neither he nor his companies ever faxed a TCL to MAFS. Every TCL that his companies sent had a heading that identified the sender, but the TCLs at issue did not. During discovery in the MAFS suit, Wanca admitted that Kaeser had provided him only one TCL. In a letter dated May 6, 2005, to plaintiff's attorney, Sam Smith, Wanca stated, "I have provided you with two faxes received; one by John Pezl

at CE Design, Ltd., the other by Roland Kaeser at MAFS ***. My office also received a fax advertisement which was unsolicited. However, I have been unable to locate that facsimile.”

¶ 23 Plaintiff noted that, in June 2008, MAFS and Wanca were sanctioned for naming Keaton as a defendant without any reason to believe that she had ever operated a Snelling franchise. Plaintiff argued that the sanctions award established that the MAFS complaint had lacked probable cause and that *res judicata* barred MAFS from relitigating this finding.

¶ 24 Plaintiff argued further that defendants had misapplied his testimony that his companies never used the same TCL in different months. Drawing on an affidavit filed with his response, he explained as follows. The “primary marketing campaigns” had been conducted by faxing TCLs monthly to clients who had given permission. “Mail merge” technology was used to insert the names of the client and the contact person, and TCLs were faxed only to companies for whom Snelling had a named contact person. Almost monthly, however, his offices created a “generic” TCL that named “Human Resources” as the company and “Hiring Manager” as the contact person. Thus, in January 2004, a generic copy of the 11-IL TCL was sent to Wanca.

¶ 25 Responding to defendants’ claim that the 10-IL TCL had been inadvertently omitted from MAFS’ complaint, plaintiff noted that MAFS’ complaint had not alleged that two TCLs had been faxed but only that MAFS had received one TCL, coded 11-IL, in October 2003. On special injury, he argued that, as the trial court had previously denied defendants’ motion to dismiss, which had made the same argument, the law-of-the-case doctrine barred defendants from rearguing the point.

¶ 26 Defendants replied that the law-of-the-case doctrine did not bar summary judgment, as it states only that a trial court is bound by a prior ruling on an issue that has been decided on appeal. Moreover, the denial of the motion to dismiss did not foreclose a later grant of summary judgment.

On probable cause, defendants contended that plaintiff contradicted himself: he alleged that Wanca had received the TCL at issue in January 2004, yet he conceded that the TCL was not coded 1-IL. Although plaintiff tried to explain the discrepancy by testifying that his offices had faxed no TCLs in January 2004, that contradicted his claim that Crowley did fax the TCL then. Further, plaintiff had not rebutted Wanca's sworn statement that the 10-IL TCL had been inadvertently omitted from the MAFS complaint. Next, the sanctions order in the MAFS suit was based on the improper naming of Keaton as a defendant, not on any finding that the complaint was frivolous. Finally, *res judicata* did not apply to an interlocutory order involving a claim not raised in the present case and a party (Keaton) not involved in the present case.

¶ 27 Plaintiff filed a "supplemental response" on special injury, stating in part that, although the Holtzman complaint alleged that, on January 4, 2008, HRG sent Holtzman an unsolicited fax, HRG did not even start doing business as a personal-services agency until after February 2008. Also, Holtzman had apparently abandoned the suit. Plaintiff contended that he had raised a factual basis for special injury, because the three meritless suits Wanca had filed amounted to harassment.

¶ 28 The trial court granted defendants summary judgment. Plaintiff timely appealed.

¶ 29 On appeal, plaintiff contends that summary judgment was improper, because he raised genuine issues of material fact on the elements of malicious prosecution at issue here: (1) lack of probable cause; and (2) special injury. Summary judgment is proper if the pleadings, depositions, and other matters on file establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). Although a plaintiff opposing summary judgment need not prove his case at this preliminary stage, he must furnish a factual basis that would arguably entitle him to judgment. *Allegro Services, Ltd. v.*

Metropolitan Pier & Exposition Authority, 172 Ill. 2d 243, 256 (1996). Our review is *de novo*. *Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995).

¶ 30 To recover for malicious prosecution, a plaintiff must prove that (1) the defendant instituted the prior action maliciously and without probable cause; (2) the prior action was terminated in the plaintiff's favor; and (3) the plaintiff suffered a special injury beyond the usual expense, time, and annoyance in defending the prior action. *Howard v. Firmand*, 378 Ill. App. 3d 147, 149 (2007). Plaintiff makes three arguments against the judgment. The first goes to the element of probable cause; the last two go to special injury.

¶ 31 Plaintiff argues first that the trial court erred in considering the statement in Wanca's affidavit that, in 2011, Anderson located a TCL coded "10-IL" that it had inadvertently failed to attach to the MAFS complaint. Plaintiff asserts that this account contradicts the "judicial admissions" in the MAFS complaint that, in October 2003, plaintiff faxed MAFS the TCL coded 11-IL. We disagree.

¶ 32 An admission in a verified pleading, unless it is the product of mistake or inadvertence, is a binding judicial admission that withdraws a fact from issue and " 'makes it unnecessary for the opposing party to introduce evidence in support thereof.' " *Nissan Motor Acceptance Corp. v. Abbas Holding I Inc.*, 2012 IL App (1st) 111296, ¶ 19 (quoting *L.D.S., LLC v. Southern Cross Food, Ltd.*, 2011 IL App (1st) 102379, ¶ 35). However, a verified statement from a pleading in one case, when used in another case, is an ordinary evidentiary admission and may be controverted or explained. *In re Marriage of O'Brien*, 247 Ill. App. 3d 745, 749 (1993).

¶ 33 The judicial-admission doctrine does not rescue plaintiff's complaint. At most, the statement in the MAFS complaint that plaintiff faxed the 11-IL TCL in October 2003 was an ordinary

evidentiary admission that defendants could contradict in this action. Of course, the contradiction itself might do no more than raise a conflict in the evidence, creating a genuine issue of material fact. However, Wanca's affidavit stated that Kaeser supplied him with a faxed TCL, coded 10-IL, which Anderson misplaced and therefore failed to attach to the MAFS complaint. Thus, defendants also established that the "judicial admission" in the MAFS complaint was a product of inadvertence or mistake. Therefore, the trial court properly considered Wanca's affidavit, and the MAFS complaint's allegations—even if inconsistent with the affidavit—do not invalidate the judgment.

¶ 34 Plaintiff also appears to argue that Wanca's letter of May 6, 2005, to Smith, plaintiff's attorney in the MAFS action, binds defendants to the allegation that plaintiff never faxed MAFS the 10-IL TCL. Aside from not meeting the requirements for a judicial admission, the letter is not inconsistent with Wanca's affidavit. The letter did not state that plaintiff had faxed only one TCL to Kaeser; it noted "the two faxes received," one by CE Design and one by Kaeser, but added, "My office also received a fax advertisement which was unsolicited. However, I have been unable to locate that facsimile." Thus, Wanca's letter did not rule out, and indeed foreshadowed, the statement in his affidavit that Kaeser provided him with a TCL, coded 10-IL, that plaintiff had faxed to Kaeser.

¶ 35 In any event, even were we to hold that plaintiff raised a genuine factual issue on probable cause, we would still affirm the judgment, because plaintiff did not raise a genuine factual issue on special injury. On this score, plaintiff first invokes the law-of-the-case doctrine. He notes that, when defendants moved for summary judgment, the trial court had previously denied their motion to dismiss the first amended complaint (see 735 ILCS 5/2-615 (West 2010)), partly on the ground that plaintiff's complaint did not allege facts showing special injury. Plaintiff reasons that, because the trial court had rejected this contention, defendants may not relitigate it. We disagree.

¶ 36 Under the law-of-the-case doctrine, questions decided on a prior appeal bind both the trial court and the appellate court. *Combs v. Schmidt*, 2012 IL App (2d) 110517, ¶ 40. A prerequisite to applying the doctrine is a prior appeal. *Id.* As there is no prior appeal in this case, the doctrine does not apply. See *id.* ¶ 41. Moreover, the motion to dismiss put into issue only the facial sufficiency of the first amended complaint, whereas the motion for summary judgment required the trial court to decide whether, considering the entire file, there were any genuine issues of material fact (see 735 ILCS 5/2-1005(c) (West 2010)). Thus, the court’s holding that the complaint alleged facts showing special injury did not require it to hold later that plaintiff had supported those allegations. See *Drinane v. State Farm Mutual Auto Insurance Co.*, 222 Ill. App. 3d 805, 810 (1991).

¶ 37 Plaintiff’s second argument on special injury is that he raised a genuine factual issue on this element. As noted, special injury is something more than “the usual expense, time or annoyance in defending a lawsuit.” *Levin*, 271 Ill. App. 3d at 730. Thus, plaintiff’s claimed damages, attorney fees, and costs do not amount to special injury. See, e.g., *Equity Associates, Inc. v. Village of Northbrook*, 171 Ill. App. 3d 115, 118-19 (1988). Plaintiff does not contend otherwise. Instead, he argues that he raised a factual basis to find the type of harassment that *Cult Awareness Network* recognized as special injury. We agree with the trial court that plaintiff fell short of raising a factual basis for fitting this case within the narrow rule of *Cult Awareness Network*.

¶ 38 In *Cult Awareness Network*, the plaintiff alleged, as pertinent here, that, over 17 months, various members of the defendant church filed a total of 21 lawsuits against the plaintiff, a nonprofit corporation; that all but one of the lawsuits alleged that the plaintiff had violated various laws by denying the complainant membership in the plaintiff’s organization or access to its meetings, and the other complaint alleged that the plaintiff had induced him to do volunteer work; and that all 21

lawsuits had ended in the plaintiff's favor. The trial court dismissed the complaint, holding that it had failed to plead facts showing special injury. *Cult Awareness Network*, 177 Ill. 2d at 269-70.

¶ 39 In reversing, the supreme court held that the case fit within the narrow category of cases presenting special injury. Among these were *Norin v. Scheldt Manufacturing Co.*, 297 Ill. 521 (1921), in which the plaintiff won an action for malicious prosecution. The defendant had petitioned to declare him bankrupt and had obtained a default judgment that was later vacated. Affirming, the supreme court explained that the bankruptcy judgment, although eventually vacated, had had severe, far-reaching consequences unique to bankruptcy proceedings. *Id.* at 525-26; see *Cult Awareness Network*, 177 Ill. 2d at 282-83. Also within the special-injury category was *Shedd v. Patterson*, 302 Ill. 355 (1922), in which the court held that the plaintiff had suffered special injury. The defendant had filed nine successive lawsuits against him, all based on the same facts. The *Cult Awareness Network* court explained that, “after a party has ‘had his day in court and his right has been conclusively determined,’ he may not return to court to ‘harass’ the same opponent about the same issues.” *Cult Awareness Network* at 282, quoting *Shedd*, 302 Ill. at 360.

¶ 40 Turning to the case before it, the court explained that, because the 21 meritless suits against the plaintiff had been brought by 21 different parties in multiple jurisdictions, *Shedd* was factually inapposite. *Cult Awareness Network*, 177 Ill. 2d at 284-85. Nonetheless, the defendants had upset the “delicate balance” between “preventing harassing suits” and “permitting the honest assertion of rights in our court rooms [*sic*].” *Id.* at 284. Allegedly, a “large national corporation” had induced “a national campaign of simultaneous malicious prosecution.” *Id.* at 285. This “sustained onslaught of litigation,” if undertaken maliciously, could “hardly be deemed ‘ordinary.’ ” *Id.*

¶ 41 Here, we agree with defendants and the trial court that plaintiff has not raised a factual basis upon which he could arguably be entitled to judgment. To support his claim of “harassment,” plaintiff cites a total of three actions—those by CE Design, MAFS, and Holtzman—that were filed in 2003, 2004, and 2008. The plaintiffs in each action were mostly different, although CE Design was involved in two actions; the underlying facts were different; and, as far as the record shows, plaintiff was not even a party in the Holtzman suit. Each action was an ordinary suit for damages, not nearly resembling a bankruptcy proceeding in its possible effect. We have already held that plaintiff has failed to raise a factual issue as to whether the MAFS suit was filed without probable cause. But even had the MAFS suit lacked probable cause, it would have been at most the second suit filed against plaintiff by any defendant in this case. Of the Holtzman suit, we know only that Wanca represented Holtzman and that Holtzman apparently did not pursue the action. We recognize that Wanca’s participation is common to all three prior actions. But, even so, that does not make his conduct comparable to that of the defendants in *Cult Awareness Network*. We cannot say that plaintiff established any factual basis arguably satisfying the special-injury requirement. Therefore, summary judgment was proper on this basis.

¶ 42 For the foregoing reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 43 Affirmed.