

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30037
Summary Calendar

GREGORY J. AVERY,

Plaintiff-Appellant,

VERSUS

EMILE L. TURNER, JR., JEAN O. TURNER,
and TURNER, YOUNG, HEBBLER,
The Professional Law Corporation,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 93-2806 "M" (3))

(October 21, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:¹

Gregory J. Avery appeals from the district court's dismissal, pursuant to Fed. R. Civ. P. 12(b)(6), of his action premised on malicious prosecution. We **AFFIRM**.

I.

In 1985, Avery, a practicing attorney, filed for protection under Chapter 7 of the Bankruptcy Code. Appellee Jean O. Turner was appointed trustee of the bankruptcy estate, and Appellees Emile

¹ Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

L. Turner, Jr., and his law firm were appointed as attorney for the trustee.

In 1990, Avery obtained a large judgment for his client in a personal injury action. Upon learning of this judgment the trustee filed an action in federal court seizing that portion of the judgment representing Avery's fee. The bankruptcy court approved this seizure, and the district court affirmed on appeal. On appeal to this court, we vacated and remanded to the bankruptcy court for further proceedings. See **Turner v. Avery**, 947 F.2d 772, 774-75 (5th Cir. 1991) (remanding for determination of value of Avery's services at date of bankruptcy filing), *cert. denied* ___ U.S. ___, 112 S. Ct. 2966 (1992).

In April 1991, during the appeal of the seizure action, Avery was discharged by his client in the personal injury action while it was on appeal. Avery instituted legal proceedings to protect his right to collect a fee from the judgment, and obtained a favorable ruling.

In response to the efforts to seize his fee, Avery filed three separate actions against the Appellees, each claiming malicious prosecution, intentional infliction of emotional distress, intentional abuse of process, and intentional interference with contract. Two of these actions were dismissed by the United States District Court for the Eastern District of Louisiana, Section "M", for failure to state a claim. The remaining action, at issue here, was originally filed in state court, but was removed to the United States District Court for the Eastern District of Louisiana. On

notice by Appellees that the subject matter of Avery's action was related, indeed identical, to Avery's other two actions before Section "M" of the Eastern District, the action was transferred from Section "F" to Section "M" pursuant to Uniform District Court Rule 1.051E.

Thereafter, Avery moved to set aside the transfer. Also pending was, *inter alia*, appellees' Rule 12(b)(6) motion to dismiss for failure to state a claim. After a hearing on both motions, the district court upheld the transfer and granted the motion to dismiss. On appeal, Avery challenges both rulings.

II.

A.

As noted, Avery's case was transferred pursuant to Uniform District Court Rule 1.051E, which requires that actions described in Rule 1.05, to wit, those involving "subject matter that either comprises all or a material part of the subject matter or operative facts of another action" be transferred to the section to which that other, prior action was assigned.² The Rule promotes efficiency by requiring that related cases be heard by the same section of the court.

² Uniform District Court Rule 1.051E provides:

In order to promote judicial economy and conserve judicial resources, and to avoid the potential for forum shopping and conflicting court rulings, all actions described in paragraph 1.05 [actions based on all or a substantial part of the operative facts of another action either pending, dismissed or decided] shall be transferred to the section to which the matter having the lowest docket number has been allotted.

Section "M" ruled on at least two prior cases between these parties. Each case involved the same allegations and were based on the same operative facts. Avery does not dispute, indeed does not even address, this fact. Instead, he contends that the transfer was an improper consolidation of his action with an earlier bankruptcy matter, also before Section "M". We need not address this contention. The basis for the transfer, as well as the basis for the refusal to set it aside, was the relationship between the three intentional tort actions. Avery's two prior similar actions before Section "M" provided ample justification for the transfer.

B.

The district court's Rule 12(b)(6) dismissal is subject to *de novo* review. ***Cinel v. Connick***, 15 F.3d 1338, 1341 (5th Cir. 1994). We review all well-pleaded facts in the light most favorable to the plaintiff, and will affirm a dismissal only if the allegations support no possible theory of relief. ***Id.***

Under Louisiana law a major component of a cause of action for malicious prosecution is the favorable "termination of the civil proceedings which are contended to have been maliciously prosecuted". ***Hibernia Nat'l Bank v. Bolleter***, 390 So. 2d 842, 846 (La. 1980); ***Robinson v. Goudchaux's***, 307 So. 2d 287, 289 (La. 1975); ***Ortiz v. Barriffe***, 523 So. 2d 896, 897 (La. Ct. App. 1988).

Addressing Avery's contention that this requirement does not apply to his intentional tort claims, we note the Louisiana Supreme Court's recent suggestion that the requirement applies "with equal force to situations where a non-client files an intentional tort

claim against his adversary's attorney based on a pending lawsuit". **Montalvo v. Sondes**, 637 So. 2d 127, 131-32 (La. 1994). As **Montalvo** explains, the policy behind the "favorable termination" requirement is to limit the danger that suits brought against an adversary's attorney might divide the attorney's loyalty to the client. **Id.** at 132. This policy extends the requirement to Avery's intentional tort claims, all of which are essentially based on his malicious prosecution claim.

In response to the "favorable termination" requirement, Avery points to the favorable ruling he received in the legal proceeding to protect the attorney's fee due from his former client in the personal injury action. He contends that this ruling represents a favorable termination of the "underlying litigation", and, that therefore, the requirement is satisfied. But, although Avery's right to collect his fee is perhaps of underlying significance to the parties before this court, the legal dispute over this fee between Avery and his former client is not the "underlying litigation".

The "underlying litigation" can only be the "proceedings which are contended to have been maliciously prosecuted". **Hibernia Nat'l Bank**, 390 So. 2d at 846. Here, that litigation is Appellees' action to seize Avery's attorney's fees. It is this action, and only this action, which Avery contends is a malicious prosecution and on which he bases his other intentional tort claims. As noted, Appellees' seizure action was reviewed by this court and the case was remanded to the bankruptcy court where, at present, it is still

pending. Thus, there has been no termination of the matter in Avery's favor; and, consequently, he has failed to plead a major component of his cause of action. Therefore, the district court correctly dismissed Avery's action pursuant to Rule 12(b)(6).

III.

For the foregoing reasons, the judgment is

AFFIRMED.