2017 IL App (1st) 162539-U

No. 1-16-2539

FIFTH DIVISION
November 17, 2017

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GARY R. FRIEDERICH, Plaintiff-Appellant, v. LAWRENCE DRAUS, TYRA BROWN, THOMAS J. DART, Sheriff of Cook County, and the COUNTY OF COOK, Defendants-Appellees.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 13 L 11044 The Honorable Larry G. Axelrood, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: Summary judgment was properly entered where plaintiff failed to sufficiently establish claims for malicious prosecution, intentional infliction of emotion distress, and *respondeat superior*.

¶2 Plaintiff, Gary Friederich, appeals the trial court's order granting summary judgment in favor of defendants, Lawrence Draus, Tyra Brown, Thomas Dart, Sheriff of Cook County, and the County of Cook, on his underlying claims of malicious prosecution, intentional infliction of

emotional distress, and *respondeat superior*. Plaintiff contends: (1) he presented sufficient evidence to establish a claim for malicious prosecution by demonstrating that the criminal charges filed against him lacked probable cause; and (2) he presented sufficient evidence to establish a claim of intentional infliction of emotional distress by showing defendants' abuse of power constituted extreme and outrageous conduct. Based on the following, we affirm.

¶3 FACTS

¶4 Plaintiff is a veterinarian who owned the Park Forest Animal Clinic (plaintiff's clinic) and Summit Animal Hospital. Defendants Lawrence Draus[1] and Tyra Brown worked in the Sheriff's Animal Crimes Unit of the Cook County Sheriff's Police Department at the relevant time. On October 4, 2013, plaintiff filed a complaint against defendants for, *inter alia*, malicious prosecution, intentional infliction of emotional distress, and *respondeat superior*.[2]

¶5 According to plaintiff's complaint, in February 2010, he provided an affidavit in support of two dog breeders challenging Officer Draus' warrant and raid of the breeders' business for purported animal mistreatment. Plaintiff alleged that defendant responded by initiating an investigation into his veterinarian practices, resulting in a raid of his clinic and the loss of his federal Drug Enforcement Agency (DEA) controlled substance license, the temporary suspension of his veterinary license, misdemeanor and felony charges against him, and three separate arrests, one of which included being held in custody overnight. Plaintiff was indicted by a grand jury for felony unlawful delivery of a controlled substance. However, following an evidentiary hearing on a second motion to dismiss the indictment, plaintiff's felony count was dismissed. The State then *nolle prossed* plaintiff's remaining misdemeanor charges for unknown

[1] In 2012, Draus resigned from the Sheriff's Office after pleading guilty to federal conspiracy to commit extortion charges.

[2] Plaintiff's complaint also contained a claim for conspiracy and common law claims against the County, which were dismissed.

reasons. In response, plaintiff filed his complaint and defendants filed a motion for summary judgment. The following evidence was submitted in conjunction with the summary judgment motion.

¶6 In June 2010, Carla Hubbs, the kennel manager at South Suburban Humane Society (South Suburban), complained to defendants that plaintiff failed to provide sufficient documentation at his clinic. More specifically, Hubbs reported that dogs would arrive at South Suburban with receipts from plaintiff's clinic stating they had received "shots," but the receipts failed to provide any further information regarding the actual medications administered. Also in June 2010, defendants received a telephone call from Emma Valdez-Briones, one of plaintiff's employees, complaining about plaintiff's clinic.

¶7 On July 29, 2010, defendants launched their official investigation into plaintiff's practices. On that date, defendants met with Valdez-Briones at plaintiff's clinic. Photographs were submitted depicting animals in dirty cages, used syringes with exposed needles in the sink, unsanitized surgical tools, and various pills mixed together in a glass container. Valdez-Briones informed defendants that animals brought to plaintiff's clinic for vaccinations had been sold rabies tags and certificates, but had not been vaccinated. Prior to launching the official investigation, defendants learned over the years that plaintiff's name was linked with dog fighting.

¶8 On August 4, 2010, Officer Draus received a copy of plaintiff's affidavit from the dog breeders' case. In the affidavit, plaintiff attested that, on January 14, 2010, he saw all of the breeders' dogs to provide rabies shots and he did not observe any signs of abuse or neglect at that time. During the subsequent investigation of the dog breeders, blood samples were taken from

four of the seized dogs. The results showed levels of less than 0.1 or no established rabies serology.

¶9 Then, on September 4, 2010, Officer Brown went undercover to plaintiff's clinic with a German Shepard named Cookie. Brown requested rabies shots for the dog. He paid $55 for the service. Cookie's blood was subsequently tested and the results indicated that no rabies vaccination had been administered.

¶10 Officer Brown again appeared at plaintiff's clinic in an undercover capacity on September 16, 2010. On the second occasion, Brown presented a female pit bull named Dory, who had wounds consistent with dog fighting. Specifically, Dory's left side of her face was torn up and her left ear was torn off. When he arrived at plaintiff's clinic, Brown was told to bring Dory to the back door of the clinic. Officer Brown informed plaintiff that Dory had been in a dog fight and plaintiff inquired if the dog won the fight. Brown left Dory under plaintiff's care with instructions to pick her up on September 28, 2010. When Brown arrived to retrieve Dory, plaintiff failed to provide paperwork for any of the dog's treatments while at the clinic, including no rabies certificate or tag despite affirmations that the vaccination had been administered. Officer Brown transported Dory to South Suburban where Hubbs observed that plaintiff had only stitched half of Dory's ear. Hubbs also discovered Dory had an upper respiratory cough, fleas, and had lost weight. In addition, blood tests revealed Dory did not, in fact, receive a rabies shot. Hubbs had to euthanize Dory. Plaintiff did not report the suspected dog fighting. In fact, plaintiff testified that he has never reported suspected animal abuse or dog fighting.

¶11 Then, Officer Brown again appeared undercover at plaintiff's clinic on October 21, 2010. Brown reported that his dog, who was not present, was experiencing seizures. Brown requested Phenobarbital and a rabies tag. Plaintiff provided Brown with pills in an envelope and sold him a

rabies tag. The envelope contained the handwritten word "seizures." Lab tests later revealed that the pills were Phenobarbital.

¶12 On November 4, 2010, investigators from the federal DEA and the Illinois Department of Financial and Professional Regulations (IDFPR) met with plaintiff and conducted compliance checks at his clinic and at his Summit Animal Hospital (animal hospital). The investigators concluded that plaintiff did not maintain accurate records of his drug inventory and failed to maintain sanitary conditions of his facility. As a result, plaintiff was asked to voluntarily surrender his DEA registration. Plaintiff complied. In a November 10, 2010, IDFPR report, the acting director stated "having examined the Petition and evidence presented, finds that the public interest, safety and welfare imperatively require emergency action to prevent the continued practice of [plaintiff], the Respondent, in that Respondent's actions constitute an imminent danger to the public."

¶13 On November 18, 2010, Officer Brown yet again returned to plaintiff's clinic in an undercover capacity. Brown requested additional Phenobarbital for the dog purportedly experiencing seizures. The dog was not present at the time. Plaintiff informed Brown that he did not have any of the requested pills at the clinic, but had some at his animal hospital. Plaintiff requested and received $20 and Brown's address. Two days later, Officer Brown received a mailed envelope with plaintiff's clinic as the return address. The envelope contained another white envelope holding pills that appeared to be the same as the previous Phenobarbital provided by plaintiff. The interior envelope bore the handwritten words "Belladonna alkaloids/Phenobarbital tabs, for seizures." Testing by the Illinois State Police revealed the pills contained Phenobarbital, a class IV substance. Following a hearing with the IDFPR, on November 23, 2010, plaintiff's veterinary license was temporarily suspended.

¶14 Then, on December 2, 2010, defendants arrested plaintiff and charged him with six misdemeanor counts of violations of the Veterinary Medicine and Surgery Practices Act of 2004 (the Act) (225 ILCS 115/1 *et seq.* (West 2010)), including "knowingly engag[ing] in dishonorable and unprofessional conduct of a character likely to deceive, defraud or harm the public" by purportedly administering rabies vaccinations which were proven not to be given, purportedly administering rabies vaccinations in exchange for payment which were proven not be given, failing to report a case of suspected dog fighting, and failing to keep the facility in a clean and sanitary condition. On February 7, 2011, a complaint was filed by the State for felony unlawful delivery of a controlled substance. Plaintiff subsequently was arrested and indicted by the grand jury.

¶15 Plaintiff filed a motion to dismiss the indictment, which, after oral argument, was denied by the circuit court. Plaintiff filed a second motion to dismiss the indictment, arguing the drug at issue was not a controlled substance under the federal or Illinois Controlled Substances Acts. Plaintiff's expert testified at an evidentiary hearing that the drug is "an exempt controlled substance, not a scheduled controlled substance." Plaintiff's expert added that, in order to determine whether the drug at issue was exempt, an individual was required to look at section 215 of the Illinois statute, which specifically referred to the federal exempt procedure list and then proceed to review the accepted list. According to plaintiff's expert, there was no general list within the federal or Illinois statutes listing belladonna alkaloids with Phenobarbital as an exempt drug. Following the hearing, the circuit court concluded that the drug at issue was exempt from the prescription products list and, therefore, plaintiff was not required to have a DEA license to prescribe it. As a result, the circuit court dismissed plaintiff's felony indictment. As stated, plaintiff's remaining misdemeanor counts were *nolle prossed* for unknown reasons.

¶16 The circuit court ultimately granted summary judgment in favor of defendants. In its August 30, 2016, written order, the circuit court found that plaintiff failed to show an absence of probable cause and, therefore, could not establish a claim for malicious prosecution. The court further found plaintiff failed to establish the level or degree of extreme and outrageous conduct and distress necessary to support a claim for intentional infliction of emotional distress. Because the court found plaintiff failed to establish his claims against defendant employees, plaintiff could not establish his claim for *respondeat superio*r. This appeal followed.

¶17 ANALYSIS

¶18 Plaintiff contends the circuit court erred in granting summary judgment in favor of defendants where there was sufficient evidence to support his claims for malicious prosecution, intentional infliction of emotional distress, and *respondeat superior*.

¶19 Summary judgment is appropriate only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The circuit court must view the documents and exhibits in a light most favorable to the nonmoving party. *Banco Popular North America v. Gizynski*, 2015 IL App (1st) 142871, ¶ 36. Summary judgment is a drastic measure and may be granted only if the movant's right to judgment is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). The purpose of summary judgment is not to try an issue of fact but, rather, to determine whether a triable issue of fact exists. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002). We review the granting of summary judgment *de novo*, meaning we perform the same analysis that the circuit court performed. *Bowman v. Chicago Park District*, 2014 IL App (1st) 132122, ¶ 45.

¶20 " 'A malicious prosecution action is brought to recover damages suffered by one against whom a suit has been filed maliciously and without probable cause.' " *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 11 (quoting *Miller v. Rosenberg*, 196 Ill. 2d 50, 58 (2001)). In order to establish a cause of action for malicious prosecution, a plaintiff must demonstrate: (1) the commencement or continuation by the defendant of an original judicial proceeding against the plaintiff; (2) the termination of the original proceeding in favor of the plaintiff; (3) the absence of probable cause for the proceeding; (4) malice; and (5) special damages. *Id*.

¶21 Plaintiff argues he presented sufficient evidence to establish the criminal charges filed against him lacked probable cause. In a malicious prosecution action, probable cause is " 'a state of facts that would lead a person of ordinary care and prudence to believe or to entertain an honest and sound suspicion that the accused committed the offense charged.' " *Id.* ¶ 13 (quoting *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 642 (2002)). Our court has advised that the complainant "must have an honest belief at the time of initiating the action that another is probably guilty of the offense, and it is immaterial whether the accused is thereafter found not guilty.' " *Id* (citing *Howard v. Firmand*, 378 Ill. App. 3d 147, 150 (2007)). Indeed, at issue is the state of mind of the individual commencing the prosecution, and not the actual facts of the case or the guilt or innocence of the accused. *Id*.

¶22 We find, based on the evidence, that plaintiff failed to establish a claim for malicious prosecution where the charges filed by defendants were supported by probable cause. During defendants' investigation of plaintiff, they received complaints from plaintiff's employee regarding the conditions of his clinic, viewed photographs depicting dirty and unsanitary conditions at the clinic, and observed the facility. In addition, after being informed by Valdez-Briones and Hubbs that plaintiff was failing to provide requested and paid for rabies shots,

Officer Brown appeared in an undercover capacity with two different dogs requesting rabies shots and paying for the shots. In both cases, testing on the animals revealed that neither actually received the rabies shots. Further, the IDFPR investigated plaintiff's clinic, confirming the facility was unsanitary and concluded plaintiff failed to provide accurate records for his practice. In fact, the IDFPR's subsequent report found plaintiff's "actions constitute imminent danger to the public."

¶23 Moreover, after learning prior to the initiation of plaintiff's formal investigation that he was linked to dog fighting, Officer Brown again appeared undercover to the clinic with a dog that sustained purported dog fighting injuries. Officer Brown informed plaintiff that the animal had been in a dog fight, which plaintiff acknowledged by asking if the dog "won," and plaintiff instructed him to bring the dog to the back door for treatment. Plaintiff treated the dog, albeit poorly, but never reported the suspected dog fighting to the proper authorities.

¶24 Finally, Officer Brown appeared undercover yet again requesting Phenobarbital for a dog that allegedly suffered seizures. The dog was never brought to plaintiff's clinic. Plaintiff never examined the animal, yet he prescribed the requested medication. Less than one month later, after having surrendered his DEA license, plaintiff acquiesced in providing Officer Brown with more medication for the dog allegedly experiencing seizures. Again, plaintiff did not observe or examine the animal. Notwithstanding, plaintiff sold Officer Brown the requested pills and mailed them in an envelope denoted as "Belladonna alkaloids/Phenobarbital." Later testing confirmed the presence of Phenobarbital in the pills, which, only upon a second motion to dismiss the subsequent grand jury-indicted felony charges related thereto, established that the pills were "exempt" from the prescription products list for which plaintiff was required to have a DEA license in order to prescribe.

¶25 In sum, the evidence established defendants had probable cause to support the charges against plaintiff. Because we have determined plaintiff failed to establish an element of malicious prosecution, we need not address his remaining contentions related to the claim.

¶26 Plaintiff next argues he presented sufficient evidence to establish a claim for intentional infliction of emotional distress.

¶27 In order to establish a claim for intentional infliction of emotional distress, a plaintiff must show: (1) the conduct involved was truly extreme and outrageous; (2) the actor either *intended* that his conduct inflict severe emotional distress or knew that there was at least a high probability that his conduct would cause severe emotional distress; and (3) the conduct in fact caused *severe* emotional distress. (Emphasis in original.) *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988). " 'The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity.' " *Id*. (quoting Restatement (Second) of Torts § 46, comment *j*, at 77-78 (1965)). In determining whether conduct is extreme and outrageous, courts use an objective standard based on all the facts and circumstances in the case. *Duffy v. Orlan Brook Condominium Owner's Ass'n*, 2012 IL App (1st) 113577, ¶ 36.

¶28 Following our review of the record, we find plaintiff failed to provide a sufficiently supported claim for intentional infliction of emotional distress. Plaintiff argues that defendants intentionally acted in retaliation against him because of the adverse affidavit he provided in the case against the dog breeders. According to plaintiffs, defendants launched their investigation against him upon learning of his adverse testimony and raised unsupported charges against him in an effort to destroy his credibility, reputation, and career. Plaintiff adds that defendants'

extreme and outrageous conduct was demonstrated *vis a vis* his three separate arrests and the officers' repeated abuse of power. We disagree.

¶29 Plaintiff did not plead, and the record does not support, a finding that he suffered emotional distress so great that no reasonable man could be expected to endure it. In fact, plaintiff failed to demonstrate the first element of a claim for intentional infliction of emotional distress, namely, that defendants' conduct was extreme and outrageous. As stated, the results of the investigation demonstrated that defendants had probable cause to support the charges raised against plaintiff. Even assuming the truth of plaintiff's allegation that defendants initiated their investigation only after learning of plaintiff's involvement in the dog breeders' case, the evidence does not establish that defendants' conduct during that investigation was extreme and outrageous. While true the degree of power or authority a defendant has over a plaintiff can impact whether behavior is deemed outrageous (*McGrath*, 126 Ill. 2d at 86-87), the circumstances of this case do not rise to the level required to state a claim. *Cf. Bianchi v. McQueen*, 2016 IL 150646, ¶ 84 (where the first element of an intentional infliction of emotional distress claim was satisfied because the plaintiffs alleged that the defendants fabricated and manufactured evidence and concealed exculpatory evidence for the purpose of falsely and maliciously detaining, arresting, and charging the plaintiffs). Because plaintiff failed to establish the first element of his claim for intentional infliction of emotional distress, we conclude the circuit court properly granted summary judgment in favor of defendants.

¶30 Finally, plaintiff cannot sustain his claims of *respondeat superior* against Sheriff Dart and Cook County. Section 2-109 of the Local Governmental and Governmental Employees Tort Immunity Act provides that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109 (West

2010). As a result, because plaintiff failed to establish claims against defendants Draus and Brown, his claims for *respondeat superior* fail as well.

¶31 CONCLUSION

¶32 We affirm the order of the circuit court granting summary judgment in favor of defendants where plaintiff failed to support his claims for malicious prosecution and intentional infliction of emotional distress.

¶33 Affirmed.