2013 IL App (1st) 121201-U

THIRD DIVISION
July 24, 2013

No. 1-12-1201

ROBERT TALAMINE, Plaintiff-Appellant , v. APARTMENT FINDERS, INC., JUSTIN ELLIOTT, JOHN MCGEOWN, Individually and as agents of Apartment Finders, Inc., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 07 L 7270 Honorable Bill Taylor, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.

Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The court did not err in granting summary judgment to defendants. We have no jurisdiction to consider plaintiff's claim that the trial court improperly denied him the right to seek punitive damages because the court's order was not final and appealable.

¶ 2 Plaintiff, Robert Talamine, appeals from an order of the circuit court granting summary judgment to defendants, Apartment Finders, Inc., Justin Elliott, and John McGeown, on plaintiff's claims of malicious prosecution and false imprisonment, and preventing plaintiff from

seeking punitive damages. For the following reasons, we affirm in part and dismiss in part.

¶ 3 BACKGROUND

¶ 4 Plaintiff worked as a leasing agent for Apartment People since April of 2000. Defendant Elliott worked for Apartment People but left to start Apartment Finders. Defendant McGeown is Apartment Finders' marketing director. Apartment People and Apartment Finders are business competitors.

¶ 5 On November 28, 2006, two of Apartment Finders PT Cruisers were damaged when the rear tires were punctured. Each of the vehicles had the Apartment Finders name and logo printed on its side. Apartment Finders vehicles are important to the operation of the business as they are used regularly by leasing agents to drive clients interested in renting an apartment to available apartments around town.

¶ 6 One of the vehicles damaged was assigned to Apartment Finders leasing agent Robert Geniusz. On November 28, 2006, Geniusz parked the vehicle on Clark Street just south of the Apartment Finders office located at 906 W. Belmont Avenue. When he returned the next day, Geniusz discovered the left rear tire was flat and had a "gash on the side of the wall." Geniusz stated that this was the second time in the month of November that his assigned vehicle had been vandalized. The rear right tire had been slashed in mid-November.

¶ 7 The other Apartment Finders vehicle was assigned to Ben Treutler, and was parked around the corner of the Apartment Finders Belmont location on North Wilton Avenue. In Treutler's deposition, he stated that after he discovered his vehicle had a flat, he noticed a cut on the sidewall of the tire. The record shows that Treutler filed a police report of the incident on

November 30, 2006, after learning from Geniusz of his similar flat tire, along with information supplied to him by an Apartment Finders employee claiming a witness had potentially seen the incident.

¶ 8 On December 4, 2006, Cameron Southern visited Apartment Finders and asked to speak with management about witnessing a person vandalizing an Apartment Finders vehicle. The record shows that Southern came to Apartment Finders unsolicited, he had no connection to Apartment Finders or Apartment People, he was not a friend to anyone who worked for either company, and never used their services in the past. Southern testified that he met with defendants Elliott and McGeown at Apartment Finders and reported to them that on November 28, 2006, while walking on Clark Street, south of Belmont, he witnessed a white male crouching by the rear tire of an Apartment Finders' vehicle and saw him jerk a sharp object into the tire. Southern stated that he saw the man drive away in a silver vehicle and that he memorized the license plate number because he was suspicious about what he saw. After the man drove away, Southern approached the Apartment Finders vehicle and saw that the tire was flat. He then went home and recorded the license plate number in his school notebook. Southern stated he did not go to the police right away or to Apartment Finders because he did not want to get involved. Only after further reflection did he decide that the right thing to do was go to Apartment Finders and tell them what he witnessed. Southern stated that when he spoke to the defendants he supplied them with his contact information and the license plate number of the vehicle that he recorded.

¶ 9 Later that day, defendants contacted the Chicago Police. Officers Garcia and Palikij

arrived at the Apartment Finders location in response to defendants' call. They spoke with defendants who reported damage to the tires of two Apartment Finders vehicles. There is some question as to whether defendants told the officers that they personally witnessed plaintiff slashing their tires or that a witness informed them that he witnessed the tire slashing. However, it is clear that defendants supplied the license plate number they received from Southern to the officers. The officers informed defendants that the license plate traced to a vehicle registered to plaintiff. Defendants then informed the officers that plaintiff was a business competitor of theirs who worked down the street at Apartment People. Subsequently, defendant Elliott signed a misdemeanor criminal complaint against the plaintiff for causing property damage to the Apartment Finders vehicle located on N. Wilton Avenue. The police then went to plaintiff's place of business and arrested plaintiff.

¶ 10 After learning that Officer Garcia and Office Palikij were going to arrest plaintiff, defendant McGeown, the marketing director of Apartment Finders, headed to Apartment People to photograph the arrest. When plaintiff was brought outside in handcuffs, defendant McGeown took a series of pictures of the police arresting the plaintiff and escorting him into the squad car. McGeown than went back to Apartment Finders, uploaded the pictures to his computer, and posted three ads with pictures of the defendant being arrested on Craigslist. McGeown stated that he showed his postings to a few of his colleagues in the office, but did not show them to his bosses, one of which is defendant Elliott. Sometime later, defendant Elliott spoke with McGeown about the postings and criticized him for posting them.

¶ 11 A fourth posting, which McGeown denies creating, purports to be from a customer who

witnessed plaintiff's arrest at work, describes plaintiff as having a "creepy, kiddie-porn vibe about him." The record shows that this posting came from the Apartment Finders location, but the owner of the email address that originated the posting, michelleanderson1980@gmail.com, is unknown. McGeown also contacted media outlets about the incident and news reports and articles were run on the allegations and the arrest of the plaintiff.

¶ 12 Ultimately, the States Attorney's office dismissed the charges against plaintiff because Southern, the eyewitness, did not appear on two occasions. The prosecutor moved the court to strike the case with leave to reinstate. The case was not timely reinstated and was dismissed.

¶ 13 The prosecutor, Assistant State's Attorney Aakre, stated that defendants never informed her that they personally witnessed the incident and she always knew that Southern's testimony was essential to prosecute the case. Further, she also testified that had the case proceeded to trial, she would have amended the charge to reflect it dealt with the vehicle located on Clark Street, which is where Southern indicated he witnessed the tire being slashed, rather than the vehicle damaged on N. Wilton Ave.

¶ 14 Following the conclusion of the criminal case, plaintiff filed a civil suit against defendants. In his fourth amended complaint, plaintiff alleged: count I malicious prosecution, count II false imprisonment, count III defamation, and count IV false light invasion of privacy. Thereafter, defendant filed a motion for summary judgment. Relevant to this appeal, defendants argued as to count I, that the police had probable cause to arrest plaintiff based on the information provided by the independent witness and therefore they acted without malice. As to count II, defendants argued that they had a good faith basis to believe that plaintiff had

committed a crime given the eyewitness account and that plaintiff's arrest was not solely procured based on information supplied by them. The circuit court granted summary judgment on the malicious prosecution and false imprisonment claim and barred plaintiff from seeking punitive damages on the defamation and false light claims[1]. It is from this judgment that plaintiff now appeals.

¶ 15 ANALYSIS

¶ 16 Plaintiff first contends that the circuit court erred in granting summary judgment in favor of defendants on the malicious prosecution count because genuine issues of material fact exist with respect to probable cause and malice. Specifically, plaintiff argues there are factual questions as to whether the defendants knowingly commenced a criminal proceeding against the plaintiff without having probable cause and with malicious intent.

¶ 17 Summary judgment is appropriate where "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 a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010); *Barnes v. Washington*, 56 Ill. 2d 22, 26 (1973). The court, in making this determination, views the record materials in the light most favorable to the non-movant. *Shuttlesworth v. City of Chicago*, 377 Ill. App. 3d 360, 365 (2007). We review *de novo* an order granting summary judgment. *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001).

¶ 18 This court generally disfavors malicious prosecution actions because public policy seeks

[1]After the entry of this order, plaintiff voluntarily dismissed counts III and IV. They are not presently before this court.

to encourage cooperation from people with knowledge about a crime to come forward and expose that crime. *Aguirre v. City of Chicago*, 382 Ill. App. 3d 89, 96 (2008). In order to state a claim of malicious prosecution, the plaintiff has the burden of proving five elements: (1) the commencement of the criminal proceeding was caused by the defendant; (2) the termination of the proceeding was in favor of the plaintiff; (3) there was an absence of probable cause for such a proceeding; (4) the presence of malice on the part of defendant; and (5) damages resulting to the plaintiff. *Johnson v. Target Stores, Inc*., 341 Ill. App. 3d 56, 72 (2003). All these elements must be satisfied and if one element is found to be lacking, a malicious prosecution claim cannot be maintained as a matter of law. *Id*. The fact that an accused is not convicted of the alleged crime will not make the person initiating the proceeding liable for malicious prosecution *per se. Mangus v. Cock Robin Ice Cream Co., Inc*., 52 Ill. App. 3d 110, 116 (1977).

¶ 19 Defendants argue that summary judgment was proper in this case where plaintiff could not establish the third and fourth elements of malicious prosecution: absence of probable cause and malice. Plaintiffs argue that genuine issues of material fact existed with respect to both of these elements precluding the entry of summary judgment in defendant's favor. We discuss each element in turn.

¶ 20 The want of probable cause is an indispensable element of a malicious prosecution cause of action. *Johnson*, 341 Ill. App. 3d at 72. Conversely, the failure by the plaintiff to establish a question as to whether there may have been a complete absence of probable cause is fatal to any claim of malicious prosecution. *Id*. Indeed, the mere fact that there appears to have been probable cause to institute a criminal proceeding, alone, is sufficient to establish an absolute bar

to a malicious prosecution action. *Mangus*, 52 Ill. App. 3d at 116.

¶ 21 In the context of a malicious prosecution action, probable cause is defined as the existence of a "state of facts that would lead a person of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the person arrested committed the offense charged." *Burghardt v. Remiyac*, 207 Ill. App. 3d 402, 405 (1991). The existence of a state of facts and suspicions may be obtained and relied upon through information provided by third parties, such as an independent witness. *Harpham v. Whitney*, 77 Ill. 32, 40 (1875). A mistake or error not amounting to gross negligence will not affect the question of probable cause when there is an honest belief by the complainant, at the time of subscribing a criminal complaint, that another is probably guilty of an offense. *Turner v. City of Chicago*, 91 Ill. App. 3d 931, 935 (1980).

¶ 22 Here, at the very least, there is the indicia of probable cause. The record shows the defendants were supplied reliable information, *i.e.*, the offender's license plate number, from eyewitness Southern. From the information provided by Southern, the police were able to link plaintiff to the offense by way of his license plate number. Subsequently, defendants signed a criminal complaint alleging that plaintiff damaged property. The record shows that on December 4, 2006, Southern went to the Apartment Finders and reported to the defendants that, on November 28, 2006, he witnessed a man slash a tire of an Apartment Finders vehicle parked on Clark Street and flee in a silver vehicle. In his deposition, Southern stated that he recorded the license plate number of the silver vehicle shortly after witnessing the crime and provided that same number to the defendants. It was only after defendants Elliott and McGeown received this

information that they contacted the police. It was not until after the officers informed defendants that the license plate number traced to a vehicle owned by the plaintiff, whom defendants knew as business competitor, did Elliott sign the criminal complaint, commencing the criminal proceeding against plaintiff. Under these circumstances, at the time of commencing the criminal proceeding, the defendants exhibited an honest and reasonable belief that plaintiff was the person who slashed the tires on the Apartment Finders' vehicle. Therefore, no genuine issue of material fact exists that defendants had probable cause to commence a criminal proceeding against the plaintiff.

¶ 23 Plaintiff argues several other issues of material fact exist with respect to his claim for malicious prosecution, including that the criminal complaint only charged him with allegedly slashing the tire of defendants' vehicle located at 3205 N. Wilton, and that Southern did not observe this incident based on his testimony that he witnessed a vehicle being vandalized on Clark Street. Also, given the history of animosity Apartment Finders had displayed against Apartment People, the defendants falsely told police that they had witnessed plaintiff slashing tires. However, these arguments do not change our conclusion that defendants had probable cause to institute criminal proceedings. The independent eyewitness account of Southern and the police investigation that connected plaintiff to the license plate information provided by Southern would lead defendants to entertain an honest and strong suspicion that plaintiff criminally damaged the vehicle. This finding alone is sufficient to affirm the circuit court's granting of summary judgment to defendants on this claim. "If it appears that there was probable cause to institute the proceedings, such fact alone constitutes an absolute bar to an action for malicious

prosecution." *Johnson*, 341 Ill. App. 3d at 73.

¶ 24 Given our finding on probable cause, we need not examine whether there are questions of fact as to malice and we affirm the circuit court summary judgment ruling as to plaintiff's malicious prosecution count.

¶ 25 Plaintiff next contends that the circuit court erred in granting summary judgment on the false imprisonment count because genuine issues of material fact exist as to whether defendants had reasonable grounds to direct officers to arrest plaintiff, or, alternatively, that defendants' complaint was the sole basis for plaintiff's arrest.

¶ 26 False imprisonment is defined as an unreasonable restraint of an individual's liberty, against his will, that is caused or procured by the defendant. *Hajawii v. Venture Stores*, Inc., 125 Ill. App. 3d 22, 25 (1984). In Illinois, an arrest by an officer caused or procured by a private citizen is the same as if the private citizen made the arrest. *Carey v. K-Way, Inc.*, 312 Ill. App. 3d 666, 669 (2000). Liability may be held against a private citizen if it is found that he caused an unwarranted arrest of a third-party. *Id*.

¶ 27 The essential elements of a cause of action for false imprisonment against a private citizen are: (1) the plaintiff was or caused to be arrested by the defendant; and (2) the defendant acted without having reasonable grounds to believe that the plaintiff committed an offense. *Karow v. Student Inns, Inc.*, 43 Ill. App. 3d 878, 881, (1976). In other words, when the defendants are private citizens, as in this case, false imprisonment actions cannot be maintained when the citizens had reasonable grounds to believe that the plaintiff committed the offense commenced. The fact that the private citizen provided information that was the sole basis for an

arrest is inconsequential if the defendants' actions were reasonable. *Randall v. Lemke*, 311 Ill. App. 3d 848, 852 (2000).

¶ 28 As previously discussed, the record shows that prior to signing the criminal complaint against the plaintiff, defendants were contacted by an eyewitness who observed the vehicle being damaged, saw the offender leave in a car and provided the license plate number of the vehicle he saw leave the scene. After a search of that license plate number, the police informed defendants it traced to the plaintiff's vehicle. As a result, defendants commenced criminal proceedings against plaintiff and plaintiff was arrested.

¶ 29 We have previously found that there was probable cause to overcome a charge of malicious prosecution as a matter of law. As we have found that there was sufficient evidence to give defendants probable cause to have commenced a criminal proceeding against the plaintiff, we conclude, as a matter of law, that defendants acted with reasonable grounds to believe plaintiff committed the offense charged. Conseqeuntly, no genuine issue of material fact exists to preclude the entry of summary judgment in favor of defendants as to planitff's false imprisonment count. Accordingly, we affirm the circuit court granting the defendants summary judgment.

¶ 30 Finally, plaintiff argues that the circuit court erred in prohibiting him from seeking punitive damages on his defamation and false light claims, counts III and IV respectively. The court granted summary judgment in favor of defendants on counts I and II, and denied defendant's summary judgment motion as to counts III and IV, defamation and false light invasion of privacy, respectively. In the same order, the circuit court denied plaintiff the right to

seek punative damages as to counts III and IV. Thereafter, the trial court refused to enter a finding pursuant to Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) relative to its ruling on counts I and II. Plaintiff elected to voluntarily dismiss counts III and IV in order to pursue this appeal.

¶ 31 Although neither party has raised the issue, we do not have jurisdiction to consider plaintiff's argument on this issue because the order denying plaintiff the right to seek punitive damages on counts III and IV was not a final appealable order. See *Adoption of S.G. v. S.G.*, 401 Ill. App. 3d 775, 780 (2010) (quoting *Physicians Insurance Exchange v. Jennings*, 316 Ill. App. 3d 443, 453 (2000)) (parties cannot confer jurisdiction on this court as " 'appellate jurisdiction cannot be conferred by agreement.' ").

¶ 32 An order is final and appealable if it terminates the litigation between the parties on the merits or disposes of the rights of the parties either on the entire controversy or on a separate part thereof. Revolution Portfolio, LLC v. Beale, 332 Ill. App. 3d 595, 598 (2002). A voluntary dismissal renders all final orders immediately appealable; however, an otherwise non-final order does not become final and appealable upon voluntary dismissal of a suit. Hernandez v. Bernstein, 2011 IL App (1st) 102646, ¶ 10.

¶ 33 Here, the order denying plaintiff the right to seek punitive damages on counts III and IV was an interlocutory order that did not terminate the litigation between the parties on the merits or dispose of the rights of the parties on part or all of the controversy. The order dealt with one aspect of plaintiff's claim for relief on the two remaining counts. There is nothing in the record that indicates plaintiff could not replead or otherwise attempt to pursue recovery of punitive

damages, assuming proper pleading and proof, going forward. Therefore, that part of the trial court's order was not a final order. It necessarily follows then, that because it was not a final order, it did not become a final order simply because plaintiff voluntarily dismissed counts III and IV. Consequently, we have no jurisdiction over plaintiff's prayer for relief on punitive damages and this portion of the plaintiff's appeal is dismissed.

¶ 34 CONCLUSION

¶ 35 Based on the foregoing, we affirm the judgment of the circuit court granting summary judgment in favor of defendants on counts I and II. We have no jurisdiction to consider plaintiff's claim regarding punitive damages.

¶ 36 Affirmed in part; dismissed in part.