2015 IL App (1st) 133082-U
No. 1-13-3082
February 10, 2015

SECOND DIVISION



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

| | | |
|---|---|---|
| LEILA SKORUPA,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>KRISTEN GUZICK and CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS,<br><br>Defendants-Appellees. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court Of Cook County.<br><br><br>No. 09 L 14485<br><br>The Honorable James O'Hara, Judge Presiding. |

JUSTICE NEVILLE delivered the judgment of the court, with opinion.
Presiding Justice Simon and Justice Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held*: First, when a party fails to present evidence which establishes the elements of her cause of action for malicious prosecution, the circuit court does not err when it grants the defendant's motion for summary judgment. Second, when a party voluntarily enters into a stipulated judgment and fails to present evidence that the stipulated judgment was entered into as a result of fraud or violates public policy, a reviewing court will not set the judgment aside.

¶ 2 Plaintiff, Leila Skorupa (Skorupa), filed a second amended complaint against the defendants, Kristen Guzick (Guzick) and Cellco Partnership d/b/a Verizon Wireless (Verizon), for malicious prosecution. The circuit court granted Guzick and Verizon's motion for summary judgment. Skorupa filed a motion to reconsider the order granting Guzick and Verizon's motion for summary judgment which was denied. Skorupa then filed a fifth amended complaint asserting a claim for defamation against Guzick and Verizon, and the trial court entered a stipulated judgment in favor of Verizon and Guzick. Skorupa timely filed her notice of appeal.

¶ 3 We hold that when Skorupa failed to present evidence which established that Verizon or Guzick commenced the criminal proceedings against Skorupa, and thereby failed to establish an element of her cause of action for malicious prosecution, the circuit court did not err when it granted Verizon and Guzick's motion for summary judgment. We also hold that the stipulated judgment will not be set aside (1) because Skorupa voluntarily entered into the stipulated judgment, (2) because Skorupa failed to present evidence that the stipulated judgment was entered into as a result of fraud, and (3) because Skorupa failed to present evidence that the stipulated judgment violated public policy.

¶ 4 BACKGROUND

¶ 5 Skorupa was hired as a customer service representative by Verizon Wireless in Batavia, Illinois on September 1, 2007. Prior to opening the store on September 1, 2007, the Verizon employees performed a daily "box count" to confirm that the quantity of inventory on the shelves matched the quantity of inventory in Verizon's computer system. The box count on September 1, 2007 revealed that the number of devices in the store matched the

number of devices that should have been in the store according to Verizon's computer system.

¶ 6 Skorupa began her shift at 3:00 p.m. on September 1, 2007 and voluntarily resigned from Verizon that same day. Although Skorupa no longer performed inventories, she would enter the inventory room, if necessary, to assist customers, and she entered the inventory room where the devices were kept, on September 1, 2007.

¶ 7 On September 2, 2007, Guzick, the assistant manager, along with another employee, performed a "monthly physical" of the inventory, which entailed scanning the barcodes of each device and accessory in the store to compare with Verizon's electronic inventory system. The monthly physical revealed a discrepancy between the box count and the electronic inventory system on September 1, 2007, and revealed that several devices and accessories were missing.

¶ 8 Guzick contacted her regional manager, John Avitia, for instructions on how to document the missing inventory. Avitia told Guzick to send an incident report to Verizon's corporate security department and to contact the local police. After Guzick informed the Batavia Police Department that inventory was missing from Verizon, a Batavia police officer was dispatched to the store, where Guzick informed the officer that the store was missing inventory. Guzick believed that the information she shared with the police over the phone and in-person was true and accurate, and she never mentioned Skorupa's name in either the in-person or telephone conversations with the Batavia police.

¶ 9 Verizon officially opened an investigation on September 21, 2007 and Dan Vogt, Senior Investigator in the Corporate Security Department, conducted the investigation. Vogt

interviewed Guzick and Avitia regarding the missing inventory and also reviewed video surveillance from September 1, 2007, the day before the inventory went missing. After reviewing the video tape on September 1, 2007, Vogt concluded that there was no evidence that a theft did or did not occur. Therefore, he did not preserve the video, but instead, documented what he observed in the video in his case report. Vogt identified the missing devices by their electronic serial numbers (ESN), and compared the ESNs that were shipped to Verizon with the ESNs that were currently in the store. Every ESN that was shipped to the store but missing from inventory was checked to determine whether the device had been exchanged, sold, or removed by some other legal method. Vogt determined that based on the ESN comparisons, there were five missing devices that were not legally removed from the store.

¶ 10 On October 12, 2007, Vogt discovered that one of the missing devices was activated as "customer owned equipment" on October 7, 2007, on William Skorupa's account, a Verizon customer and the plaintiff's husband. Vogt did not review nor did he preserve the video surveillance on October 7, 2007, but instead relied upon the electronic documentation that the missing phone, which was not sold to anyone, was now activated. For purposes of the Verizon system, "customer owned equipment" means the customer was changing the phone currently associated with his phone number to a different phone. However, it does not indicate how the customer gained ownership of the new phone. After reviewing Verizon's electronic records, including the "customer owned equipment" notation in the computer, and after completing his own investigation, Vogt determined that the missing phone was stolen.

¶ 11 Vogt informed Detective Nettnin at the Batavia Police Department that one of the devices that had been shipped to the store, but never sold or otherwise legally removed, had

been activated. Vogt provided the ESN for that device but did not inform the officer that the telephone had been activated in the store or that video surveillance on October 7, 2007, had not been preserved. Pursuant to a subpoena, Vogt released the electronic records he relied upon in his investigation to Detective Nettnin. Vogt had no further investigatory obligation, unless the police requested he take further action, or if new evidence surfaced which required his attention. Once Vogt contacted the police, Verizon considered the case closed. Vogt never met or spoke with Skorupa and had no knowledge of her prior to his investigation.

¶ 12 The Kane County State's Attorney's office approved the charges against Skorupa for felony theft of property from Verizon in March 2008. A warrant was issued for Skorupa's arrest, and during her arrest, the police recovered the telephone from Skorupa. Skorupa testified that Guzick told the police that she had stolen the telephone, and she also told Detective Nettnin that she had past difficulties with Guzick. In July 2008, Skorupa was indicted for felony theft, but was acquitted in June 2009 because the State failed to meet its burden of proving Skorupa guilty beyond a reasonable doubt.

¶ 13 On July 2, 2010, Skorupa filed a Second Amended Complaint for malicious prosecution, and on December 23, 2011, she filed a Third Amended Complaint and added additional allegations in support of her malicious prosecution claim. Verizon and Guzick filed a motion for summary judgment on May 25, 2012, and the trial court granted the motion on September 6, 2012, finding that "there is no evidence that Defendants caused the commencement of a criminal proceeding against Plaintiff. Specifically, no evidence exists that Defendants provided false information to law enforcement or that the Defendants took an active role in the criminal proceeding by directing or pressuring law enforcement to prosecute Plaintiff."

¶ 14 Skorupa filed a motion to reconsider the order granting summary judgment and also filed a motion for leave to file an amended complaint on October 9, 2012. The circuit court granted her motion for leave to file, but denied her motion to reconsider on February 13, 2013. Skorupa filed her fourth amended complaint on March 5, 2013 asserting one claim for libel and slander which was dismissed on June 27, 2013, pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615). On July 24, 2013, Skorupa filed her fifth amended complaint, which set forth a single defamation claim, and the trial court entered a stipulated judgment in favor of Verizon and Guzick on September 13, 2013.

¶ 15 Skorupa filed a timely notice of appeal on September 27, 2013 and an amended notice of appeal on October 11, 2013.

¶ 16 ANALYSIS

¶ 17 This matter comes before the appellate court to review the circuit court's order granting summary judgment in favor of Guzick and Verizon on Skorupa's malicious prosecution claim. "The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is only appropriate when “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.” *Williams*, 228 Ill. 2d at 417. A court must construe the "pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent" in determining whether a genuine issue as to any material fact exists. *Williams*, 228 Ill. 2d at 417.

¶ 18 Summary judgment is precluded where "the material facts are disputed or where, the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts." *Williams,* 228 Ill. 2d at 417. Summary judgment should be allowed "only where the right of the moving party is clear and free from doubt." *Williams,* 228 Ill. 2d at 417, citing *Adams v. Northern Illinois Gas Co*., 211 Ill. 2d 32, 43 (2004) (and cases cited therein).

¶ 19 Summary judgment is proper if the plaintiff "fails to establish any element of the cause of action." *Williams,* 228 Ill. 2d at 417, citing *Bagent v. Blessing Care Corp*., 224 Ill. 2d 154, 163 (2007) and *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335 (2004). This court reviews appeals from orders granting summary judgment *de novo*. *Williams*, 228 Ill. 2d at 417.

¶ 20 I. Malicious Prosecution

¶ 21 First, we must determine whether Skorupa presents sufficient evidence to establish each element of her cause of action for malicious prosecution. In order to succeed on a claim for malicious prosecution, the plaintiff must allege facts showing: "(1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such a proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff." *Meerbrey v. Marshal Field and Co. Inc,* 139 Ill. 2d at 455, 473 (1990); *Joiner v. Benton Community Bank*, 82 Ill. 2d 40, 45 (1980). If any one of these elements is lacking, recovery is barred. *Misselhorn v. Doyle,* 257 Ill. App. 3d 983, 986 (1994).

¶ 22 A. Commencement or Continuance of a Criminal Proceeding by Defendant

¶ 23 A criminal proceeding in Illinois is commenced in one of three ways: by filing a complaint, an information, or an indictment. 725 ILCS 5/111-1 (West 1998); *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 346 (2000). A citizen does not commence a prosecution solely by giving false information to the proper authorities (*Rodgers*, 315 Ill. App. 3d at 346), "unless the person takes an active part in instituting criminal proceedings, by requesting, directing, or pressuring the prosecuting officer into instituting the proceedings. [Citations.]" *Allen v. Berger*, 336 Ill. App. 3d 675, 678 (2002). When a person makes a "knowingly false report to a prosecuting officer, the resulting prosecution is attributable to that person." *Allen*, 336 Ill. App. 3d at 678. Therefore, a citizen is only liable for a claim of malicious prosecution if the citizen (1) knowingly provides false information to the prosecuting officer, or (2) requests, directs, or pressures the prosecuting officer into instituting the proceedings. *Allen*, 336 Ill. App. 3d at 678; *Pratt v. Kilborn Motors, Inc.*, 48 Il. App. 3d 932, 935 (1977); see also *Odorizzi v. A.O. Smith Corp.*, 452 F.2d 229, 231 (7th Cir.1971).

¶ 24 1. Knowingly Providing False Information

¶ 25 Skorupa argues that Guzick knowingly provided false information to Detective Nettnin when Guzick admitted that Skorupa was innocent, yet testified against her. Skorupa further argues that because this knowledge is attributable to Verizon, both are liable for malicious prosecution.

¶ 26 The Illinois Supreme Court has held that the word "'knowingly' describes a conscious and deliberate quality which negatives accident or mistake." *People v. Raby*, 40 Ill.

2d 392, 395, (1968). Similarly, "knowledge", as defined by Black's Law Dictionary, is "an awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact. Cf. intent (1); notice (1), (2); scienter." Black's Law Dictionary (9th ed. 2009).

¶ 27 In order for Guzick and Verizon to have knowingly provided false information to the police, there must have been an awareness or belief in the falsity of the information at the time it was provided to the police. Guzick's belief that the devices were stolen was based on the fact that Verizon's inventory showing the devices that were shipped to Verizon's store differed from the devices actually found in Verizon's store, and the missing devices had not been properly exchanged, sold or removed by some legal method. Skorupa has failed to present any evidence which establishes that there were no discrepancies between Verizon's electronic inventory of devices shipped to the store and the devices that were actually in the store. Skorupa has also failed to present evidence which establishes that Guzick's belief that Skorupa did not steal the cell phone, after Skorupa's criminal trial, was Guzick's belief at the time the Batavia police were informed that a missing telephone might be stolen. Guzick's belief of Skorupa's innocence after her trial, does not negate her belief or knowledge at the time she presented the electronic records to the police indicating that telephones were illegally removed from the store because of the discrepancy between Verizon's electronic inventory and the telephones actually in the store. Therefore, we find that Skorupa failed to present evidence which established that Guzick knowingly provided false information to the prosecuting officer. *Allen*, 336 Ill. App. 3d at 678.

¶ 28 Skorupa also argues that Verizon's employee's statements to the police that one of the "stolen phones" was in her possession was false. We note that the standard for determining

liability for malicious prosecution is not whether false information is conveyed to law enforcement, but whether the party making the statement knows the information is false. *Rodgers*, 315 Ill. App. 3d at 346; *Allen*, 336 Ill. App. 3d at 678. Upon our review of the record, we find that Skorupa has failed to present any evidence which establishes that the information Guzick conveyed to the police – that there was a discrepancy between Verizon's electronic inventory and the devices that were actually in the store -- was false. Therefore, we find that Skorupa is unable to establish that Guzick or Verizon knew that the information provided to law enforcement authorities was false when the information was based on a comparison of Verizon's electronic inventory to its store inventory, which indicated that missing telephones were not legally removed from the store. *Allen*, 336 Ill. App. 3d at 678.

¶ 29 Skorupa argues that Detective Nettnin was lied to when he was told that video footage was unavailable when Vogt allegedly intentionally destroyed the only copies. The record reflects that Vogt did not testify that he intentionally destroyed the video footage, but rather that, after reviewing the footage on September 1, 2007, he determined that there was no evidence that a theft did or did not occur, and therefore, he did not preserve the video tape. Further, Vogt relied on the computer records which revealed that "customer owned equipment" was activated on October 7, 2007. Skorupa has not offered any evidence which establishes that Vogt's decision not to preserve the tapes establishes that he intentionally destroyed the tapes, and she offers no evidence to rebut Vogt's statement that the tapes were not available when they were requested by law enforcement. Therefore, we find that Skorupa has failed to present evidence which establishes that Vogt's failure to preserve the tapes establishes that Guzick knowingly provided false information to law enforcement authorities regarding the videotapes. *Allen*, 336 Ill. App. 3d at 678.

¶ 30 2. Requested, Directed or Pressured Officer to Institute Proceedings

¶ 31 Next, Skorupa argues that the "multiple calls" made to the police created an inference that Verizon and Guzick were pushing the police into action, and that Verizon and Guzick cannot be protected by the "independent investigation defense" because they knowingly provided false information to the prosecuting officer. She relies on *Randall v. Lemke*, 311 Ill. App. 3d 848, 851 (2000); *Pratt v. Kilborn Motors, Inc*., 48 Ill. App. 3d 932, 935 (1977); and *Frye v. O'Neil*, 166 Ill. App. 3d 963, 979 (1988) to support her position. We find *Randall* and *Pratt* instructive.

¶ 32 Both cases rely upon Section 653, comment g of the Restatement (Second) of Torts, which provides in pertinent part:

> "When a private person gives to a prosecuting officer information that he *believes to be true*, and the officer in the exercise of his *uncontrolled discretion* initiates criminal proceedings based upon that information, the informer is not [subject to liability for malicious prosecution.] The exercise of the officer's discretion makes the initiation of the prosecution his own and protects [the informer] from liability * * *. If, however, the information is known by the giver to be false, an intelligent exercise of the officer's discretion becomes impossible, and a prosecution based upon it is procured by the person giving the false information." (Emphasis added.) *Randall*, 311 Ill. App. 3d at 851 (citing Restatement (Second) of Torts § 653, Comment g, at 409 (1977)); *Pratt*, 48 Ill. App. 3d at 935-36.

According to *Pratt*, the informer is not liable under this rule even if the "information proves to be false" or "his belief therein was one which a reasonable man would not entertain." *Pratt*, 48 Ill. App. 3d at 935.

¶ 33 The question in this case is whether Detective Nettnin exercised uncontrolled discretion after receiving information from Guzick and Verizon that Verizon's electronic inventory differed from the in store inventory. After Vogt informed Detective Nettnin that one of the missing devices from the store had been activated, and after providing Detective Nettnin with all of the electronic records that he relied upon in his investigation, Vogt took no further steps, and left the criminal investigation to the judgment of Detective Nettnin. Upon our review of the record, we find that Skorupa has failed to provide any evidence that would establish that Verizon and Guzick's reports to the police were false or controlled Detective Nettnin's discretion during his independent investigation. We find that there was no false information provided by the defendants that clouded Detective Nettnin's discretion such that Verizon and Guzick are liable for malicious prosecution. Moreover, even if the information provided to Detective Nettnin was actually false or if Verizon and Guzick's belief that the telephone had been stolen was unreasonable, this alone does not subject Guzick or Verizon to liability for malicious prosecution because there is no evidence in the record that either believed or knew that the information was false. *Pratt*, 48 Ill. App. 3d at 935. Accordingly, we find that Skorupa failed to proffer any evidence which establishes that Verizon or Guzick requested, directed or pressured the officer to institute proceedings or that the officer's independent discretion was controlled by the defendants. *Randall*, 311 Ill. App. 3d at 851; *Pratt*, 48 Ill. App. 3d at 935-36.

¶ 34 We find that Skorupa failed to establish the first element of her cause of action for malicious prosecution: the commencement of a criminal proceeding by the defendant. We also find that the criminal proceeding was commenced by the officer exercising his own uncontrolled discretion. Skorupa's inability to establish the first element makes it unnecessary for this court to consider the remaining elements of a malicious prosecution action. Skorupa failed to present evidence which established that Verizon or Guzick knowingly provided false information to the prosecuting officer or that the defendants requested, directed or pressured the officer to institute proceedings against Skorupa such that his discretion was controlled by them. Therefore, we hold that the trial court did not err when it granted Guzick and Verizon's motion for summary judgment.

¶ 35 II. Defamation

¶ 36 Skorupa also asks this court to reverse the September 13, 2013 "Stipulated Final Judgment" order, which was entered on the defamation claim in her Fifth Amended Complaint. This court has held that:

> "A stipulation is an agreement by the parties with regard to an issue before the court. [Citation omitted.] Courts generally favor stipulations which simplify litigation. They generally will enforce them unless the stipulation is unreasonable, the result of fraud, or violative of a public policy. [Citation omitted.] Generally, a party *cannot* dispute stipulated matters on appeal. The parties, however, cannot bind the court by stipulating to a question of law or the legal effect of facts." (Emphasis added.) *Dawdy v. Sample*, 178 Ill. App. 3d 118, 127, (1989).

¶ 37 We find that the stipulated judgment in this case was not unreasonable but was voluntarily entered into by the parties. We also failed to find evidence in the record that the stipulated judgment was entered into as result of fraud or that it violates public policy. Skorupa voluntarily agreed to the stipulated judgment and has not provided this court with a reason to set it aside. Therefore, we affirm the judgment of the circuit court.

¶ 38 CONCLUSION

¶ 39 We find that Skorupa failed to present evidence which established that Verizon or Guzick commenced the criminal proceedings against Skorupa. Therefore, we hold that the circuit court did not err when it granted Verizon and Guzick's motion for summary judgment. In addition, we hold that the stipulated judgment will not be set aside (1) because Skorupa voluntarily entered into the stipulated judgment, (2) because Skorupa failed to present evidence that the stipulated judgment was entered into as a result of fraud, and (3) because Skorupa failed to present evidence which establsihed that the stipulated judgment violated public policy. Accordingly, we affirm the circuit court's order granting the defendant's motion for summary judgment, and we affirm the order granting the stipulated judgment.

¶ 40 Affirmed.