UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY Plaintiff v. DANIEL SKLUT et al. Defendants	CIVIL ACTION NO. 97cv11743-MLW DEFENDANTS' OPPOSITION TO PLAINTIFF'S POST-MORTEM MEMORANDUM

The defendants oppose the "Plaintiff's Post-Mortem Memorandum & Written Memorialization of Plaintiff's 5-22-02 Verbal Trial Motion." Plaintiff Michael Elbery asks the District Court "to determine whether the defendants had probable cause to charge the plaintiff with C. 269 s. 10a a **month after** the arrest." Plaintiff's Post-Mortem Memorandum 3 (emphasis in original). If the District Court treats this request as a renewed motion for judgment as a matter of law, such a motion should be denied because

- the motion which the plaintiff is apparently trying to renew was properly denied because the defendants had not yet had an opportunity to present their case
- after striking the plaintiff's testimony on direct examination, which is appropriate because he denied the defendants an opportunity to cross examine him, the evidence does not allow a judgment for the plaintiff as a matter of law (a) that probable cause to arrest the

plaintiff was lacking or (b) that probable cause to criminally prosecute the plaintiff was lacking

- during trial, the plaintiff did not advance anything resembling a motion for judgment as a matter of law that probable cause to criminally prosecute the plaintiff was lacking.

In addition, the plaintiff's abandonment of the prosecution of his action makes a determination of the existence or non-existence of probable cause not only moot, but also inappropriate.

PROCEDURAL BACKGROUND

The plaintiff claimed that the defendant Shrewsbury police officers and the defendant Town of Shrewsbury were liable to him for the Friday, August 5, 1994 search of the plaintiff's storage unit at a storage facility, for the plaintiff's August 5, 1994 arrest and for the plaintiff's criminal prosecution which was commenced on Monday, August 8, 1994. The plaintiff also complained that the defendants conspired against him.

The plaintiff moved for summary judgment against the defendants, which the District Court denied.

On May 20, 2002, trial of the plaintiff's claims began. The plaintiff represented himself.

Dennis Arinella, M.D., an ophthalmologist, testified about his September 29, 1992, emergency room treatment of one Thomas King, whom the plaintiff was expected to describe as an off-duty Westborough police office with whom the plaintiff had a 1992 fight in Worcester. Dr. Arinella was the only witness whose testimony was completed.

The plaintiff testified on direct examination. During the plaintiff's direct examination on May 22, 2002, the Court sustained an evidentiary objection by the defendants. The plaintiff argued about the evidentiary ruling from the witness stand, ignoring the Court's order to go to the sidebar. The plaintiff demanded that the Court rule on whether probable cause existed to arrest him under Mass. G.L. c. 269, §10(a)(criminal penalties for possession of short barreled firearms in certain circumstances). The Court excused the jury and continued the discussion of the plaintiff's demand for a ruling as a matter of law.[1] The plaintiff suggested he might leave. The District Court warned the plaintiff that if he left, the Court would entertain a motion by the defendants for a directed verdict.[2] After further

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[1]After the jury left the court room, it became clear that the plaintiff intentionally continued arguing from the witness stand not only in defiance of the Court's specific order to come to sidebar, but also purposefully contrary tothe Court's previous order that discussions with the Court on evidentiary issues would be at sidebar. The plaintiff expressly stated that he wanted the jury to hear this argument.

[2]The 1991 amendments to the Rules of Civil Procedures renamed motions for directed verdict as motions for judgment as a matter of law. Fed.R.Civ.P. 50(a). When presented at the close of a party's evidence, the former motion for a

discussion, the plaintiff left the court room, making clear his dissatisfaction with the Court.

After the plaintiff left the court room, the Court asked the defendants' counsel if he had a motion. The defendants moved

- that the Court grant judgment as a matter of law for the defendants[3]
- that the plaintiff be defaulted because the plaintiff abandoned the prosecution of the action[4].
- that the Court strike the plaintiff's direct examination because the defendants had no opportunity to cross examine the plaintiff[5]

After a twenty minute recess, the plaintiff had not returned. In a lengthy decision from the bench, the District Court first considered the plaintiff's request for a ruling that probable cause to arrest him under Mass. G.L. c. 269, §10(a) did

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directed verdict and a motion for judgment as a matter of law are so similar that if a party calls its motion a motion for directed verdict, the motion should be treated as a motion for judgment as a matter of law. Advisory Committee Notes to 1991 Amendment to Fed.R.Civ.P. 50.

[3]See Fed.R.Civ.P. 50(a)

[4]"For failure of the plaintiff to prosecute ..., a defendant may move for dismissal of an action or any claim against the defendant." Fed.R.Civ.P. 41(b).

[5]See *United States v. Bartelho*, 129 F.2d 663, 673-674 (1st Cir.1997); *United States v. Colon-Miranda*, 992 F.Supp. 86 (D.P.R.1998). See also *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir.1990)(affirming the striking of an affidavit submitted in opposition to motion for summary judgment, because affiant refused to testify at deposition).

not exist as a matter of law. The District Court considered this request as a motion for judgment as a matter of law under Fed.R.Civ.P. 50(a). Noting that the such a motion may be made when the opposing "party has been fully heard on an issue," and that the defendants did not have an opportunity to present their case, the District Court re-affirmed that it would have been inappropriate to make the ruling the plaintiff requested.

Continuing the lengthy decision from the bench, the District Court then allowed the defendants' motion for judgment as a matter of law in favor of all defendants, on all claims. As a secondary ground, the District Court dismissed the plaintiff's claims for failure to prosecute. The plaintiff still had not returned to the court room.

The Court then addressed the jury at length and dismissed the jurors. The plaintiff still had not returned to the court room.

ARGUMENT

I. MOTION FOR JUDGMENT AS A MATTER OF LAW NOT PERMITTED BEFORE OPPOSING PARTIES FULLY HEARD ON ISSUE AT TRIAL

The Rules of Civil Procedure protect a party from having rulings made against them at trial as a matter of law before they have had an opportunity to present their evidence. Judgment as a matter of law may occur only when "a party has been fully heard on an issue ...." Fed.R.Civ.P. 50(a)(1).

Plaintiff Michael Elbery requested the Court to rule as a matter of law on whether probable cause to arrest under G.L. c. 269, §10(a) existed not only before the defendants had an opportunity to begin their case, but before the defendants had an opportunity to cross examine the only witness who arguably had testified on the issue, the plaintiff himself. The plaintiff essentially asked the Court to decide that no probable cause existed to arrest him on August 5, 1994 under G.L. c. 269, §10(a) after part of the plaintiff's own direct examination and no other testimony related to the issue.[6] The Rules of Civil Procedure allow such a motion only after the opposing parties have had an opportunity to present their evidence on the issues.

Now, the plaintiff also states he was not charged with violation of G.L. c. 269, §10(a) until a month after his arrest. When the plaintiff asked for a ruling from the District Court, the defendants had not had an opportunity to provide evidence contrary to this assertion. In addition, no defendant or other witness (other than the plaintiff himself) had a chance to testify on the investigation of Mr. Elbery, on his arrest, on the continuation of the investigation after Mr. Elbery's

[6]The testimony of the only other witness, Dennis Arinella, M.D., had nothing to do with whether probable cause existed to arrest Mr. Elbery on August 5, 1994. Dr. Arinella testified about his emergency room treatment of another person on September 29, 1992, the severity of that person's injuries and the likelihood of possible causes of those injuries.

arrest, on the application for a criminal complaint against him or on the criminal complaint itself.

Without the defendants having an opportunity to present evidence (or even to cross examine the plaintiff) the District Court could not have allowed a plaintiff's motion for judgment as a matter of law during trial. A renewal of the plaintiff's request for a ruling of law during trial, after the plaintiff stopped the trial himself, must similarly be denied.

II. THE EVIDENCE DID NOT REQUIRE A JUDGMENT AGAINST THE DEFENDANTS ON PROBABLE CAUSE TO ARREST OR PROBABLE CAUSE TO PROSECUTE.

Because the plaintiff walked out of the trial during his direct examination, the defendants had no opportunity to cross examine him. Because the plaintiff was not subject to cross examination, the District Court correctly struck his direct examination. See *United States v. Bartelho*, 129 F.2d 663, 673-674 (1st Cir.1997); *United States v. Colon-Miranda*, 992 F.Supp. 86 (D.P.R.1998). See also *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir.1990)(affirming striking of affidavit submitted in opposition to motion for summary judgment, because affiant refused to testify at deposition).

With the striking of the plaintiff's direct examination, the only trial testimony was the testimony of Dr. Arinella about the severity of a eye injury to a non-party two years before the August 1994 events pertinent to the present civil

action. With Dr. Arinella as the only witness, the evidence did not require judgment as a matter of law was that in favor of the plaintiff on any issue.

The plaintiff alludes to the defendants' position before trial that with the plaintiff's willingness to stipulate that on August 5, 1994 (the day of his arrest) he possessed at least one firearm to which G.L. c. 269, §10(a) applied, probable cause to arrest and seek a criminal complaint existed as a matter of law, because the plaintiff possessed one or more such firearms without a "license to carry firearms," neither in his residence nor at his place of business. The defendants did not stipulate to more.

III. A MOTION FOR JUDGMENT AS A MATTER OF LAW RENEWED AFTER TRIAL CANNOT RAISE AN ISSUE NOT ASSERTED IN A MOTION FOR JUDGMENT AS A MATTER OF LAW DURING TRIAL

District Court addressed the plaintiff's request for a ruling of law on probable cause to arrest as a motion for judgment as a matter of law under Fed.R.Civ.P. 50(a). The Rules of Civil Procedure allow a motion for judgment as a matter of law to be renewed after trial. Fed.R.Civ.P. 50(b).

During trial, the plaintiff requested a ruling as a matter of law on probable cause to arrest him under G.L. c. 269, §10(a) on Friday, August 5, 1994. In the plaintiff's Post-Mortem Memorandum, the plaintiff requests a ruling of law on probable cause to charge him under G.L. c. 269, §10(a) on Monday, August 8,

1994.[7] The factual basis for arresting a person and the factual basis for requesting the commencement of a criminal prosecution days later can be different. Further police work between arrest and commencement of the criminal action can yield additional information providing probable cause to criminally prosecute a the arrestee. The plaintiff's request for a ruling of law on probable cause to charge him in Westborough District Court is not the mere renewal of his request for a ruling of law on probable cause to arrest him.

A party may not raise an issue in a post-trial motion for judgment as a matter of law that the party did not raise in a motion for judgment as a matter of law during trial. *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 723 (1st Cir.1994). The moving party cannot use a renewed motion for judgment as a matter of law to introduce a legal theory not distinctly articulated in its motion during trial. *Correa v. Hospital San Francisco*, 69 F.3d 1184, 1196 (1st Cir.1995). The District Court should deny the plaintiff's new request.

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[7]The plaintiff claims he was charged under G.L. c. 269, §10(a) even later.

IV. THE PLAINTIFF ABANDONING THE PROSECUTION OF THIS ACTION MAKES BOTH MOOT AND INAPPROPRIATE HIS REQUEST FOR A RULINGS ON PROBABLE CAUSE TO ARREST HIM AND HIS REQUEST ON PROBABLE CAUSE TO CHARGE HIM.

The plaintiff abandoned this action in the middle of trial. The District Court ruled that the plaintiff's abandonment of his case was a secondary ground for dismissal.

Non-attendance at trial is a ground for dismissal. *Darms v. McCulloch Oil Corp.*, 720 F.2d 490 (8th Cir.1983)(dismissal for announcing to District Court intention not to appear for trial three days later); *Theilman v. Rutland Hospital, Inc.*, 455 F.2d 853 (2d Cir.1972)(dismissal after jury empanelment followed by plaintiff's counsel refusing to proceed); *Thompson v. Fleming*, 402 F.2d 266 (5th Cir.1968)(dismissal after plaintiff's counsel appeared but declined to proceed with trial); *Pack v. South Carolina Wildlife & Marine Resources Dept.*, 92 F.R.D. 22 (D.S.C.1981)(pro se plaintiff's action dismissed for failure to appear for trial). The plaintiff's conduct in the present civil action, which included walking out of the trial in the middle of the presentation of evidence, is worse than the conduct in any of the cases just cited. Dismissal for lack of prosecution was an appropriate course for the District Court to take.

Once a court dismisses an action for failure to prosecute, the correctness of earlier rulings becomes irrelevant. If "the plaintiff's lack of diligence in litigation deserves to be sanctioned by having [his] complaint ejected from the courts,

regardless of the merits of his case," the correctness of rulings on the merits before the plaintiff's abandonment of the litigation does not matter. See *John's Insulation, Inc. v. L. Addison and Associates, Inc.*, 156 F.3d 101, 107 (1st Cir.1998)(adopting majority position that interlocutory rulings before dismissal for lack of prosecution are not appealable).

The present situation is similar that before the appellate court in *John's Insulation, Inc., supra*. Although the plaintiff's abandonment of his action during trial resulted in the dismissal of his action, he now seeks to have the District Court make rulings of law in the very civil action he abandoned.

It is not just that the dismissal of this action for failure to prosecute provides a complete basis for the resolution of the plaintiff's claims, making a ruling on whether probable cause to arrest or prosecute the plaintiff under G.L. c. 269, §10(a) pointless. *John's Insulation, Inc., supra* (after dismissal for failure to prosecute, no appellate review of earlier interlocutory rulings because any error in interlocutory rulings irrelevant); *Al-Torki v. Kaempen*, 78 F.3d 1381, 1386 (9th Cir.1986)("there is no good reason to allow [a] plaintiff to revive his case in the appellate court after letting it die in the trial court"). Where, as here, a plaintiff dramatically and definitively abandons his action during trial after failing to get the District Court to make a ruling he requested, the District Court should not reward such behavior by making the ruling the plaintiff demanded the District

Court make just before the plaintiff walked out of the court room. "The failure to prosecute a claim should carry no such reward ...." *DuBose v. Minnesota*, 893 F.2d 169, 171 (8th Cir.1990)(denying appellate review of interlocutory rulings after dismissal for plaintiff's failure to appear at trial).

CONCLUSION

The District Court should give the plaintiff no relief as a consequence of the Plaintiff's Post-Mortem Memorandum, the plaintiff's attempts to renew, memorialize or re-assert any motion he made earlier, or the plaintiff's attempts to assert any new requests for relief from the District Court.

Defendants James Carlin, Stephen Faucher, Carl Hanson, James Hurley, Chester Johnson, A. Wayne Sampson, Daniel Sklut and Town of Shrewsbury

By their attorneys

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I hereby certify that I served a true copy of the above document upon the party appearing pro se by mail on June 5, 2002.

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