

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY, Pro Se)
Plaintiff,)
)
v.) CIVIL ACTION NO. 97-11047-PBS
)
JAMES HESTER)
Defendant.)
)

MEMORANDUM AND ORDER

July 31, 2000

Saris, U.S.D.J.

I. INTRODUCTION

Pro se plaintiff Michael Elbery alleges that defendant James Hester, a Shrewsbury police officer, violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution, and state law, when he signed a complaint and procured a warrant to arrest him for intimidation of a witness without probable cause. Defendant has moved for summary judgment on all claims.¹ For the reasons stated below, defendant's motion is **ALLOWED**.

II. FACTUAL BACKGROUND

For the purposes of this motion, the Court treats the following facts as undisputed, except where otherwise noted.

¹ The Amended Complaint alleges malicious prosecution (Count One); abuse of process (Count Two); conspiracy (Count Three); and violation of civil rights, 42 U.S.C. § 1983 (Count Four).

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101

Elbery was charged with mayhem, assault and battery, and other charges stemming from his involvement in a bar fight with Westboro police officer Thomas King on September 28, 1992. Allegedly, Elbery tried to pull King's eye out by its socket. Jeffrey Schlener, who worked at the bar, witnessed the incident. On October 14, 1992, or October 15, 1992, at about 1:11 a.m., Schlener states he received a telephone call in which the caller threatened to kill him. The caller said: "Jeffrey, it's all lies. I'm going to kill you. You're going to die." Both Schlener and his wife claim they heard and identified plaintiff's voice.

Later in the morning of the same day that they received the threat, Schlener's wife reported the threatening telephone call to Detective Sergeant Dagle at the Shrewsbury Police Department. Dagle then spoke with Officer Tom King (the alleged bar fight victim) and with Michael Salloum, an Assistant District Attorney for the Worcester County District Attorney's Office. Salloum requested that the Shrewsbury Police Department file a criminal complaint against Elbery for intimidation of a government witness. Dagle then spoke to Sergeant James Hester of the Shrewsbury Police Department who was on duty at the Westboro District Court. Dagle repeated to Hester his conversations with Mrs. Schlener, Officer King, and Salloum. At Dagle's request, Hester signed a complaint and requested an arrest warrant for

Michael Elbery, charging intimidation of a witness pursuant to Mass. Gen. Laws ch. 28, § 13B. The clerk-magistrate issued an arrest warrant dated October 14, 1992. Elbery was arrested by another officer, not Hester, on October 17, 1992. Elbery had never met Hester prior to this time.

On November 4, 1992, Dagle prepared a Shrewsbury Police Department Incident Report regarding his investigation of the complaint of threats by Elbery to Jeffrey Schlener, which was edited on November 9, 1992.

On July 28, 1993, Elbery was tried at Westboro District Court and was found guilty. Hester did not testify. Elbery appealed the guilty verdict to the Worcester jury session. The Commonwealth sought to remand the case from the jury session to the Westboro District Court Bench Session, stating that the court lacked jurisdiction over the charge. The criminal case was continued for trial numerous times. A Motion to Dismiss was allowed on March 16, 1994. Although the record is unclear as for the basis of the dismissal, Elbery testified that the charges were dismissed at the request of the district attorney.

III. PROCEDURAL BACKGROUND

This case has had a complicated procedural history. Altogether, after filing the Hester action, plaintiff filed the following four civil cases:

1. Elbery v. Daniel Sklut, et al., Civ. Action No. 97-

11743-MLW. This action involves the arrest of plaintiff on firearms charges, which were eventually dismissed because he had a license for the guns. The Shrewsbury police discovered the guns during a fire in a storage facility in August, 1994. Plaintiff charges the Shrewsbury police with violating his civil rights by unlawfully arresting him and then engaging in a cover-up conspiracy.

2. Elbery v. Bradford Louison et al., Civ. Action No.98-10438-PBS. Among other things, this case alleges that, while representing the Sklut defendants, Louison entered into a conspiracy with the Shrewsbury police to frame Elbery for arson at the storage facility.

3. Elbery v. Linda Schlener et al., Civ. Action No. 98-12469-JLT. This case asserts a conspiracy by the Shrewsbury police involving the alleged intimidation of witness Jeff Schlener. This seems to be similar to the allegations in Hester. This action names as defendants; Linda Schlener, her attorney, state court judge Francis Crimmins, and various Shrewsbury employees and police officers. This case has been dismissed.

4. Elbery v. Robert Sheketoff and Kimberly Homan, Civ. Action No. 98-10163-MLW. Elbery sued his attorneys for violations of his "constitutional rights in conspiracy with the Shrewsbury Police and Worcester District Attorney's office." He claimed that Sheketoff allowed the Shrewsbury police to suborn perjury

and personally covered up exculpatory evidence.

5. Elbery v. Dennis Klug, Bradford Louison, et al. Civ. Action No. 98-12468-NG. Plaintiff alleges that the Shrewsbury police officers and others covered up the constitutional violations enumerated in the Louison suit.

On August 8, 1997, this Court held a scheduling conference in which the Court set a discovery deadline of April 1, 1998 and a motion for the filing of summary judgment on May 1, 1998. There were various discovery skirmishes, in particular, one involving a motion filed by Assistant District Attorney Salloum to quash a deposition subpoena. On March 13, 1998, Hester filed a motion for summary judgment. On April 8, 1988, plaintiff opposed the motion. On March 24, 1998, April 9, 1998 and again on June 2, 1998, Elbery filed motions for continuances to complete discovery. On September 9, 1998, the Court permitted a telephone deposition of Mr. Salloum, ordered that the deposition occur within fifteen days, and gave plaintiff an additional two weeks to oppose summary judgment. The magistrate judge resolved other discovery disputes.

On January 7, 1999 the Court allowed the motion to require plaintiff to seek approval of the Court before filing further actions. The Court ordered:

"I order Michael Elbery not to file any additional lawsuits against the Shrewsbury Police Department, its members, Bradford Louison, or any of the attorneys who have

filed an appearance in these suits without obtaining advance court approval. Defense counsel may file a motion to deem any such case as 'related.'"

A notice of appeal was filed on February 5, 2000. Mandate issued on February 22, 2000. On March 29, 2000, the Court held a conference on the case, and counsel informed the Court that a motion for summary judgment was still pending. The Court took the motion under advisement.

IV. DISCUSSION

Summary judgment is appropriate if "[t]he pleadings, depositions, answers to interrogatories, 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." Fed. R. Civ. P. 56(c).

"To succeed, the moving party must show that there is an absence of evidence to support the nonmoving party's position." Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990). If this is accomplished, the burden then "shifts to the nonmoving party to establish the existence of an issue of a fact that could affect the outcome of the litigation and from which a reasonable jury could find for the [nonmoving party]." Id. (citations omitted).

"Summary judgment may be appropriate if the nonmoving party rests [its case] merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" Therrien v. Hamilton,

849 F. Supp. 110, 114 (D. Mass. 1994) (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)). Federal Rule 56(e) "requires nonmovants to submit evidence that would be admissible at trial to oppose properly supported motions for summary judgment." FDIC v. Fonseca, 795 F.2d 1102, 1110 (1st Cir. 1986) (citations omitted). "There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted.'" Rogers, 902 F.2d at 143 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)).

A. Section 1983 Malicious Prosecution Claim

Elbery asserts a malicious prosecution claim under 42 U.S.C. § 1983, on the ground that Hester violated his Fourteenth Amendment rights by seeking an arrest warrant without probable cause. The First Circuit has held that "a § 1983 claim for malicious prosecution as a deprivation of procedural due process is barred where, as here, the state's tort law recognizes a malicious prosecution cause of action." Meehan v. Town of Plymouth, 167 F.3d 85, 88 (1st Cir. 1999) (citations omitted). Further, it held, there is no substantive due process right under the Fourteenth Amendment to be free from malicious prosecution. Id. Therefore, the Section 1983 claim under the Fourteenth Amendment is **DISMISSED**.

Elbery also alleges that Hester violated his Fourth Amendment rights. The Supreme Court left open the possibility that a malicious prosecution claim might be actionable under § 1983 on the basis of the Fourth Amendment. Id., citing Albright v. Oliver, 510 U.S. 266, 269 (1994) (plurality opinion) ("We hold that it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim [under § 1983 that he was prosecuted without probable cause] must be judged."). A § 1983 malicious prosecution action based upon a deprivation of Fourth Amendment rights requires a showing of the absence of probable cause to initiate proceedings. Meehan, 167 F.3d at 89.

The undisputed facts demonstrate that Hester had probable cause to initiate proceedings. Hester relied on information provided by Dagle that Jeffrey Schlener witnessed the original bar fight involving the plaintiff; that this fight resulted in criminal charges against Elbery; and that Schlener's wife told police officer Dagle she heard the plaintiff make a telephone call threatening Jeffrey's life. After consulting with King and the Assistant District Attorney, Dagle instructed Hester to initiate prosecution. The Clerk-Magistrate issued an arrest warrant based on the facts as presented.

Elbery's sole contention in support of his position is that the arrest warrant was dated a day before the police said they were told about the threatening telephone call. This

discrepancy, he urges, demonstrates that the defendant acted without probable cause. Although the date on the arrest warrant differs from the date of the reported incident, that discrepancy is not sufficient to create an inference of malicious prosecution. Rather, the undisputed evidence is that Hester had probable cause to believe Elbery had been intimidating a witness and to initiate a criminal charge.

B. Conspiracy Claim

Elbery alleges that defendant Hester conspired with the Schleners and other Shrewsbury police officers to violate his civil rights pursuant to 42 U.S.C. § 1985(3). In order to state a claim for a conspiracy under § 1985(3), the plaintiff must allege facts that show "(1) two or more persons conspired, (2) to deprive, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, (3) one or more of the conspirators must have done or caused to be done an act in furtherance of the object of the conspiracy, and (4) the plaintiff must have suffered either an injury to person or property or a deprivation of a constitutionally protected right or privilege as a result of the conspiracy." Andrade v. Jamestown Housing Authority, 82 F.3d 1179, 1192 (1st Cir. 1996) (citations omitted). The Supreme Court construed the second element to require that "there must be some racial or perhaps

otherwise class-based invidiously discriminatory animus behind the conspirators' claims." Id. citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). There is no allegation of any racial or class-based invidious discrimination.

C. Malicious Prosecution

Elbery's malicious prosecution claim (Count I) alleges that there was no probable cause for an arrest warrant because the criminal case was terminated in his favor. In order to establish a claim for malicious prosecution, plaintiff must prove the defendant, acting with malice, brought a criminal action without probable cause and that the criminal action concluded in favor of the plaintiff. See Britton v. Maloney, 196 F.3d 24, 30 (1st Cir. 1999), cert. denied, 120 S.Ct. 2198 (2000) (citations omitted). Because there was probable cause for the arrest warrant, the claim fails. It is also worth pointing out that there is not a scintilla of evidence from which malice on the part of Hester can be inferred.

D. Abuse of Process

Plaintiff Elbery alleges that Defendant Hester abused the legal process by seeking the arrest warrant for the "sole purpose of harming the plaintiff," which he deems an "ulterior and illegitimate purpose." "The essential elements of the tort of abuse of process are: '(1) process was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage.'" Vittands v.

Sudduth, 49 Mass. App. Ct. 401, 405 (2000) (citations omitted).

Again Elbery argues that the date on the warrant is evidence of an ulterior motive because the warrant was dated before the incident occurred; however, Elbery has failed to produce factual evidence to suggest that Hester had an ulterior motive.

E. Civil Conspiracy

Plaintiff Elbery alleges that Defendant Hester conspired with the Schleners and other Shrewsbury police officers to file a false complaint, to falsely arrest him, and to maliciously prosecute him. Massachusetts law recognizes two kinds of civil conspiracy. See Kurker v. Hill, 44 Mass. App. Ct. 184, 188 (1998). With respect to one kind, plaintiff must allege that defendants, acting in unison, had a power of coercion over plaintiff that they would not have had if they acted independently. See Id. (citing Neustadt v. Employers' Liab. Assur. Corp., 303 Mass. 321, 325 (1939)). The plaintiff must show that:

[the defendants were] part of a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another, and an overt act that results in damages to the plaintiff.

Therrien, 849 F. Supp. at 115 (quoting Earle v. Benoit, 850 F.2d 836, 844 (1st Cir. 1988)).

Under the concerted action theory, a person may be liable in

tort if he "knows that the conduct of another person constitutes a breach of duty and gives substantial assistance or encouragement to the other" to engage in tortious conduct. Kurker, 44 Mass. App. Ct. at 189 (quoting Restatement (Second) of Torts § 876(6) (1977)). "Key to this cause of action is a defendant's substantial assistance, with the knowledge that such assistance is contributing to a common tortious plan." Id.

Elbery has not submitted any factual evidence that suggests Hester agreed with any of the parties involved to do anything unlawful or knowingly rendered substantial assistance to another person to commit a tort.

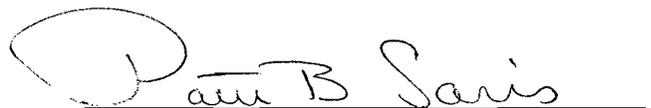
F. Immunity

Defendant Hester argues that he is entitled to absolute prosecutorial immunity because he was acting in the role of "police prosecutor." The Supreme Court rejected this argument. See Malley v. Briggs, 475 U.S. 335, 343 (1986) (holding that a police officer who secures an arrest warrant without probable cause cannot assert an absolute immunity defense). A police officer may, however, be extended qualified immunity. When applying for a warrant, the officer may be subject to liability if his actions are objectively unreasonable. See Kalina v. Fletcher, 522 U.S. 118, 128, 118 S.Ct. 502, 509, 139 L.Ed.2d 471 (1997). An analysis of qualified immunity has two components. First, the court must determine "whether the right asserted by

the plaintiff was clearly established at the time of its alleged violation". Miller v. Kennebec County, 2000 WL 960505 *2 (1st Cir. 2000) (quoting Burns v. Loranger, 90 F.2d 233, 235 (1st Cir. 1990)). Second, the court must determine whether a "reasonable officer situated in the same circumstances should have understood that the challenged conduct violated that established right." Id. Here, the defendant is entitled to qualified immunity, because his actions in seeking the arrest warrant for Elbery were objectively reasonable as they were supported by probable cause and comported with proper police procedures.

V. ORDER

For the foregoing reasons, defendant's motion for summary judgment (Docket No. 25) is **ALLOWED**.

A handwritten signature in cursive script that reads "Patti B Saris". The signature is written in black ink and is positioned above a horizontal line.

PATTI B. SARIS
United States District Judge