STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION Docket No. 368-7-19 Wncv
Jacob Carnelli, Plaintiff v. Michelle Butler, Mathew Dupuis, Casey Otis, Defendants	

Opinion and Order on Motion to Dismiss or for Summary Judgment

In this action, Plaintiff seeks damages under various theories against Defendants, who had made complaints about Plaintiff to the police. Those complaints resulted in Plaintiff's arrest and the filing of criminal charges against him. Ultimately, Plaintiff was found not guilty following a trial. Defendants move to dismiss or for summary judgment. The Court makes the following determinations.

I. The Standard

The Vermont Supreme Court disfavors Rule 12(b)(6) motions to dismiss. "Dismissal under Rule 12(b)(6) is proper only when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle Plaintiff to relief." *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576 (mem.) (quoting *Union Mut. Fire Ins. Co. v. Joerg*, 2003 VT 27, ¶ 4, 175 Vt. 196, 198)). In

considering a motion to dismiss, the Court "assume[s] that all factual allegations pleaded in the complaint are true, accept[s] as true all reasonable inferences that may be derived from plaintiff's pleadings, and assume[s] that all contravening assertions in defendant's pleadings are false." *Mahoney v. Tara, LLC*, 2011 VT 3, ¶ 7, 189 Vt. 557, 559 (mem.) (internal quotation, brackets, and ellipses omitted).

A motion to dismiss is typically limited to the allegations set out in the complaint. There are two exceptions to that rule. First, the Court can consider documents that are attached to the Complaint, that are subject to judicial notice, or that are so integral and interwoven with the Complaint that they must rightly be considered along with the Complaint. *See Shahi v. Standard Fire Ins. Co.*, No. 5:10-CV-15, 2010 WL 11610419, at *3 (D. Vt. Aug. 31, 2010); 5C Charles Wright, Arthur Miller, Mary Kane, and A. Benjamin Spencer, *Fed. Prac. & Proc. Civ.* § 1366 nn.32–34 (3d ed.) (collecting cases holding same).

Second, the Court may consider materials in addition to those noted above if it converts the motion for judgment on the pleadings into a motion for summary judgment. Vt. R. Civ. P. 12(b); *Concord Gen. Mut. Ins. Co. v. Madore*, 2005 VT 70, ¶ 8, 178 Vt. 281, 284; *see Sira v. Morton*, 380 F.3d 57, 66 (2d Cir. 2004). If it does make that conversion, the "court must notify the parties as to the changed status of the motion, and give them a reasonable opportunity to submit extra-pleading materials." *Fitzgerald v. Congleton*, 155 Vt. 283, 293 (1990). The decision of whether to rely upon materials dehors the pleadings is committed solely to the discretion of the trial judge. *Isquith for & on Behalf of Isquith v. Middle S. Utilities,*

Inc., 847 F.2d 186, 194 (5th Cir. 1988) (rule "gives a district court complete discretion to determine whether or not to accept any material beyond the pleadings" (internal quotation omitted); *Harper v. Lawrence Cty.*, 592 F.3d 1227, 1232 (11th Cir. 2010) ("A judge need not convert a motion to dismiss into a motion for summary judgment as long as he or she does not consider matters outside the pleadings.").

II. Analysis

Defendants attach to their motion a number of documents from the underlying criminal proceeding in support of their view of the facts. They maintain that the evidence establishes the veracity of their factual assertions, that their versions of events were found to support probable cause, and that their conduct was privileged under law as reportage to law enforcement. The Plaintiff counters that the Court should not consider materials outside of the complaint; that discovery is needed; and that the claimed defenses do no insulate Defendants from his allegations, which include assertions that Defendants acted with malice and made knowingly false statements to the police. For a number of reasons, the Court agrees with Plaintiff.

First, while a finding of probable cause can be a defense to the malicious prosecution and false imprisonment claims and there is likely a qualified privilege from libel and slander for making an honest report to the police, Plaintiff correctly argues that the Complaint's allegations, if proven, take Defendants' conduct outside the confines of those defenses. *See, e.g., Lay v. Pettengill*, 2011 VT 127, ¶ 22, 191 Vt. 141, 153 (defense of probable cause is rebuttable "if a plaintiff can demonstrate that

the earlier finding of probable cause was based on misleading, fabricated, or otherwise improper evidence"); *Skaskiw v. Vermont Agency of Agric.*, 2014 VT 133, ¶ 11, 198 Vt. 187, 194 (A qualified privilege is "overcome by a showing of one of two forms of malice: (1) conduct manifesting personal ill will, reckless or wanton disregard of plaintiff's rights, or carried out under circumstances evidencing insult or oppression or (2) knowledge of the statement's falsity or with reckless disregard of its truth. (internal quotations omitted)). In other words, if Defendants lied to the police and had malice toward Plaintiff in doing so, the fact that the police relied upon those statements to arrest Plaintiff and a judge relied upon them to find probable cause would not insulate that conduct from suit.

Second, the Court disagrees with Defendant's contention that the alleged conduct of Defendants is legally insufficient to establish a claim for intentional infliction of emotional distress (IIED). To make out a cognizable claim for IIED, Plaintiff "must demonstrate outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, resulting in the suffering of extreme emotional distress, actually or proximately caused by the outrageous conduct." *Boulton v. CLD Consulting Engineers*, 2003 VT 72, ¶31, 175 Vt. 413, 427-28. Plaintiff must also establish that Defendants "actions were so outrageous in character and so extreme in degree as to go beyond all possible bounds of decent and tolerable conduct in a civilized community and be regarded as atrocious and utterly intolerable." *Davis v. Am. Legion, Dep't of Vermont*, 2014 VT 134, ¶ 20, 198 Vt. 204, 212 (internal quotations omitted). Defendants contend that the Complaint

fails to provide factual support of the type of outrageous conduct necessary to support an IIED claim.

Plaintiff maintains that, as a result of Defendants' intentionally false and malicious statements and testimony to the authorities, he was arrested, subjected to criminal process, threatened with a potential sentence of up to six years in jail, and tried for serious offenses that he did not commit.

The Court cannot conclude that such behavior is beyond the scope of a claim for IIED as a matter of law.

Third, the Court declines Defendants' request that it consider all materials attached to the motion and convert the motion to dismiss into a motion for summary judgment, as provided for in Vt. R. Civ. P. 12(b). The Court understands that there may well be admissions of Plaintiff that could be relevant to the determination of this case as well as evidence from other sources. Rule 56 provides a mechanism to set out such facts in a sequential fashion with cites to the record, along with an assertion that the facts are undisputed. It then allows the nonmoving party an opportunity to indicate which facts, if any, are disputed and to provide countervailing evidence in support of that assertion, along with cites to the record.

In the Court's view, to the extent the allegations in this case could be resolved short of trial, the summary judgment process is the appropriate vehicle for such resolution. It will not "convert" the present motion into a summary judgment motion because doing so would deny the interchange of statements of undisputed and facts that the Court believes is critical in analyzing such a motion.

III. Conclusion

In light of the foregoing, the motion for summary judgment is denied.

Electronically signed on November 14, 2019 at 01:49 PM pursuant to V.R.E.F. 7(d).

_____
Timothy B. Tomasi
Superior Court Judge