

VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 755-11-10 Wrcv

Bruce Fanzen
Darlyne Franzen
Plaintiffs

v.

David S. Weiss
Norman E. Watts, Esq.
Watts Law Firm, P.C.
Defendants

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Defendants David S. Weiss, Norman E. Watts, Esq. and Watts Law Firm, P.C. (hereinafter Watts) have moved for summary judgment in this malicious prosecution action filed by Plaintiffs against them. Plaintiffs Bruce and Darlyne Franzen have filed a cross motion for partial summary judgment. Plaintiffs' complaint follows the conclusion of an action brought by Weiss concerning her claims against the Franzens concerning alleged water run off onto her property from the Franzens' abutting parcel. Weiss and Watts claim the plaintiffs can not establish the lack of probable cause to bring the action and termination of the underlying litigation in a manner favorable to plaintiffs. Plaintiffs claim the dismissal of the Weiss action "with prejudice" by the judge is a resolution favorable to the plaintiffs making their suit against Weiss and Watts proper.

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). The non-moving party has the burden of setting forth specific facts showing a genuine dispute for trial. V.R.C.P. 56(e). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citation omitted). Summary judgment is mandated where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which she

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has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254-55 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Undisputed Facts

In November, 2006, Davida Weiss, through her attorney, Norman Watts, of Watts Law Firm, P.C., filed suit against the Franzens alleging damages to her property from modifications on the Franzen property which Weiss claimed changed water flows and increased storm water run off onto her property. She sought money damages and injunctive relief.

During the course of the litigation, in December, 2007, the Franzens filed a motion for summary judgment, which was opposed by Weiss. Judge Morris denied the summary judgment motion on April 21, 2008 in a written decision, finding that there were material facts in dispute.

In May, 2008, the Franzens filed a motion to reconsider the denial of their summary judgment motion, which was opposed by Weiss. Judge Manley denied the motion for reconsideration in a written decision on May 21, 2008, agreeing with Judge Morris that there were material facts in dispute which precluded summary judgment.

A jury trial was held commencing on April 13, 2009. The trial lasted five days. During the trial, the Franzens filed several motions, including a Motion for Judgment as a Matter of Law, and Motion for Judgment on Partial Findings. At the close of Weiss's evidence the Court granted Franzens' motion for judgment as a matter of law as it pertained to claims for punitive damages but denied the motions with respect to Weiss's claims for trespass and nuisance, finding there was enough evidence to let those claims go forward.

At the close of the evidence, the Franzens moved for judgment in their favor pursuant to V.R.C.P. 50 and 52. The Court denied the motions and allowed the claims of Weiss to go forward on nuisance and trespass, taking the claims for injunctive relief under advisement.

The jury deliberated on Weiss's claims for many hours but was unable to reach a verdict. As a result of the hung jury, the Court declared a mistrial on April 17, 2009.

On May 11, 2009, Watts filed a Motion to Withdraw as counsel for Weiss. On May 26, 2009, the Court held a hearing on the motion and granted Watts withdrawal request.

On July 20, 2009, the Franzens filed a renewed motion for summary judgment. Weiss, acting pro se, filed a response indicating that she would not be hiring other counsel to respond to the motions and would not be seeking a new trial.

On September 1, 2009, the Court held a status conference in connection with the case, which Weiss did not attend. As a result, the Court dismissed the case "with prejudice" and ruled that all pending motions were moot in light of the dismissal.

Plaintiffs point to what they claim were deficiencies in Weiss's proof, including lack of photographic documentation of damages, lack of supporting expert opinions, and lack of

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evidence to substantiate her claims. Regardless of Plaintiffs' characterization of Weiss's evidence, it was sufficient to convince one or more jurors that she was entitled to recovery.

Discussion

In order to establish a claim for malicious prosecution, a plaintiff must establish the following elements: 1) the underlying claim was asserted without probable cause, 2) the underlying claim was asserted with malice, 3) the underlying claim was terminated in the malicious prosecution claimant's favor, and 4) the plaintiff suffered damages. *Anello v. Vinci*, 142 Vt. 583 (1983). Claims for malicious prosecution are not favored in the law because they have "the undesirable tendency to unduly discourage citizens from seeking redress in the courts." *Chittenden Trust Co. v. Marshall*, 146 Vt. 543, 549 (1986), quoting *Anello*.

Lack of probable cause:

The procedural facts regarding the underlying suit are not in dispute. Accordingly, the Court may determine the existence of probable cause as a matter of law. *Chittenden Trust Co. v. Marshall*, 146 Vt. 543 (1986); *Specialty Mills v. Citizen's State Bank*, 1997 S.D. 7, 558 N.W. 2d 617.

In the underlying suit, all of the various motions seeking favorable resolution on behalf of the Franzens were denied by the trial court. This included a summary judgment motion, a motion to reconsider, and various motions at the time of trial, including a motion for judgment as a matter of law at the close of the plaintiff's case and at the close of the evidence. The trial itself resulted in a hung jury, meaning at least one juror felt Weiss's claims had merit. These various denials and the inability of the jury to return a verdict in Franzens' favor provide an ample basis for the existence of probable cause to bring the action.

The denial of a motion for summary judgment does not, in all circumstances establish probable cause for prosecution of an action sufficient to insulate the party from a later claim of malicious prosecution. For example, in *Bacon v. Reimer and Brannstein, LLP*, 2007 VT 57, 182 Vt. 553, the Court held the denial of a summary judgment motion on the basis that there had been inadequate time for discovery was not the type of decision on summary judgment which provided a basis for probable cause to prosecute the claim. The Court noted, however:

We agree that the denial of a motion for summary judgment may provide persuasive evidence that the case had sufficient merit to establish the element of probable cause and thereby defeat a subsequent suit for malicious prosecution. Summary judgment is appropriate "where, after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an element essential to his case and on which he has the burden of proof." *Poplaski v. Lamphere*, 152 Vt. 251, 254-55, 565 A.2d 1326, 1329 (1989) (quotations omitted). Thus, the denial of summary judgment may well establish that, if the material facts in dispute are decided favorably to the party opposing the motion, the claimant could establish all of the elements of the claim necessary to prevail at trial. See *Fromson v. State*, 2004 VT 29, ¶ 13, 176 Vt. 395, 848 A.2d 344 ("[I]f the nonmoving party alleges specific facts that raise a triable issue and establish a prima

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facie case" summary judgment must be denied). In such a case, logic supports a finding that the claim had sufficient potential merit to preclude any subsequent finding in a malicious prosecution suit that there was no objectively reasonable basis to bring the action. See *Wilson*, 123 Cal.Rptr.2d 19, 50 P.3d at 737-38 ("denial of a defendant's summary judgment motion provides ... persuasive evidence that a suit does not totally lack merit" for purposes of determining probable cause to bring the action (quotations and alterations omitted)); *W. Keeton, Prosser & Keeton on the Law of Torts* § 120, at 893-94 (5th ed. 1984) (probable cause standard in civil actions merely requires that facts and law would support a "reasonable chance" of prevailing on the claim).

The Court's denial of the Franzen summary judgment motion, and the motion to reconsider, was not based upon an inadequate time to conduct discovery. On the contrary, the denial of both motions was based upon two separate judges coming to the conclusion that material facts existed which precluded the granting of a summary judgment in the Franzen's favor.

Examination of the authority relied upon in *Bacon* reveals many cases supporting the proposition that a denial of summary judgment on the ground that material issues remain in dispute is persuasive, if not conclusive, evidence of the existence of probable cause for purposes of defeating a subsequent claim for malicious prosecution. See, e.g., *Wolfiner v. Cheche*, 80 P.3d 783 (Ariz. 2003) (even though Arizona law provides that a summary judgment motion may be denied under certain circumstances despite the absence of any disputed material facts, surviving a motion for summary judgment on the ground that material issues remain in dispute generally means that a claim is objectively reasonable and thus negates an essential element in a later malicious prosecution action); *Wilson v. Parker, Covert & Chidester*, 50 P.3d 733 (Cal. 2002) (trial court's conclusion that issues of material fact remain for trial necessarily implies that the judge finds at least some merit in the claim, compelling the conclusion that there is probable cause); *Davis v. Butler*, 522 S.E.2d 548 (Ga. App. 1999) (if the trial court finds the action withstands a motion for summary judgment and is entitled to a trial by jury, such denial of summary judgment constitutes a legal determination that the action has substantial justification for purposes of defeating the vexatious litigation claim even if the plaintiff later loses at trial).

Probable cause to bring an action obviously does not depend upon the claim being determined to be meritorious. Probable cause exists if the claim is arguably tenable. *Sheldon Appel Co. v. Albert & Oliker*, 765 P.2d 498 (Ca. 1989). The existence of probable cause for Weiss's claims is even stronger when the effect of the hung jury is considered. While a judge would be required under Vermont law to deny a summary judgment motion if any disputed material fact existed (see, e.g., *Murray v. White*, 155 Vt. 621 (1991)), the jury was examining the claims based upon a preponderance of the evidence standard. Even under this more rigorous review, one or more of the jurors felt Weiss was entitled to recovery.

Where multiple efforts by the Franzen to obtain dismissal of the action prior to consideration by the jury were unsuccessful due to the existence of disputed material facts, and where the jury was divided as to whether Weiss or the Franzen should prevail, the existence of probable cause can not be gainsaid. The Franzen's efforts at criticizing the strength of the

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evidence mustered by Weiss ignores the denial of multiple motions by them seeking favorable resolution and the reality that a jury could not agree upon a unanimous verdict.

Resolution in favor of Plaintiffs:

The existence of probable cause for the Weiss claim is sufficient to establish that Plaintiffs will be unable to satisfy all of the elements required to establish malicious prosecution. However, the Plaintiffs also can not establish that the underlying suit was resolved in their favor, also a necessary element in a malicious prosecution claim. *Siliski v. Allstate Insurance Co.*, 174 Vt. 200 (1974).

Following the hung jury, Attorney Watts sought, and received, permission to withdraw. Thereafter, Ms. Weiss, acting pro se, informed the court that she would not be seeking a new trial. When she failed to appear at a status conference, Judge Cohen dismissed her claims “with prejudice”. There are several reasons why this dismissal was not a favorable resolution to the Franzens.

First, Judge Cohen’s dismissal “with prejudice” was in the nature of a sanction for failure to prosecute. Under the circumstances, V.R.C.P. 41(b) requires that notice of impending dismissal for failure to prosecute be given to all parties. There is no evidence that such notice was provided to Ms. Weiss. Although the Court has discretion to dismiss cases for want of prosecution, compliance with V.R.C.P. 41 is required. *Pownal Mobile Homes v. Caron*, No. 2006-080, 2006 WL 5838198 (Vt. Nov. 2006) (unpub. mem.).

V.R.C.P. 41 (b)(3) provides that a dismissal under Rule 41(b) is an adjudication on the merits unless the court otherwise specifies. *Littlefield v. Town of Colchester*, 150 Vt. 249 (1988). However, the purpose of this rule, where the dismissal is due to lack of prosecution is obviously to protect the defendant in the action from a later renewal of the same claim, and certainly does not contemplate a decision not to pursue the action further following a hung jury. In this case the dismissal with prejudice does not penalize the original plaintiff, it merely confirms, once and for all, her decision not to pursue the case after a hung jury. It would be anomalous to penalize a party that decides not to retry a case after a hung jury and use the enlightened refusal as evidence of a malicious prosecution.

Judge Cohen’s dismissal was not accompanied by any factual findings concerning the merits of the Weiss action. Simply equating a dismissal with prejudice, even if properly granted, as a favorable resolution for purposes of a malicious prosecution action is overly broad. A favorable termination for malicious prosecution purposes includes only those dispositions that can give rise to an inference of a lack of probable cause. If the manner of termination, including dismissal, reflects negatively on the merits of the case, it will be considered a resolution favorable to the defendant. *Siliski v. Allstate Insurance, Co.*, 174 Vt. 200, citing cases and the Restatement (Second) of Torts § 674.

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The dismissal here was consistent with Weiss no longer wishing to pursue her action following the rigors of lengthy litigation and a hung jury.¹ This was hardly a termination of the litigation where the actual merits of the claim was considered by the judge at the time he dismissed it. In fact, the same judge had presided over the lengthy trial and the jury's inability to reach a verdict, thereby being fully cognizant of the competing positions which the jury was unable to resolve. Judge Cohen's dismissal was not an indication that the Franzens were innocent of wrongdoing, it was because Ms. Weiss elected not to prosecute her case any further and failed to appear in court. The dismissal was "not inconsistent" with the Franzens' wrongdoing. Therefore, the dismissal is not a termination favorable to the Franzens. *Siliski v. Allstate Insurance Co.*, 174 Vt. 200 (2002). To the extent the dismissal was a disposition on the merits, it was only to protect the Franzens from any attempt by Weiss to bring her claims again, not to provide a basis for a malicious prosecution action. The judge's dismissal was in no way an expression of the merit, or lack of merit, of Weiss's claims.

An additional basis exists for the grant of summary judgment exists concerning the Watts defendants. At the time Watts was last involved with the claim the trial had resulted in a hung jury. The claims by Ms. Weiss remained viable and pending when the attorney was given permission by the Court to withdraw. There had been no resolution favorable to the Franzens at that time. Once the attorney withdrew he was without authority to take any action concerning the claim. It is not disputed that at the time Judge Cohen dismissed the claims "with prejudice" Watts was no longer the attorney regarding the Weiss claim. He is not responsible for decisions made by Weiss after he ceased representing her.

In *Pennington v. Caggiano*, 723 So. 2d 931 (Fla. App. 1999), the Court found an attorney was not liable in malpractice where the client's medical malpractice case was dismissed on summary judgment after the attorney withdrew from representing the plaintiff. Plaintiff has cited no authority why Watts should be liable for malicious prosecution when the disposition of the Weiss claim, even were it to be considered to be one favorable to the Franzens, occurred after he ceased representing Ms. Weiss.

For the reasons stated herein, the Franzens are unable as a matter of law to establish either the lack of probable cause or a resolution favorable to them concerning the Weiss claim and therefore Weiss and Watts are entitled to judgment in their favor.² Also for the reasons state herein, the Franzens' motion for partial summary judgment on the grounds of resolution of the Weiss claim favorable to them must be denied.

The Weiss and Watts Motions for Summary Judgment are **GRANTED**.

The Franzens' motion for partial summary judgment is **DENIED**.

¹ An affidavit to that effect has been provided by Weiss, however it adds nothing to the analysis. To the extent it was submitted to establish the existence of disputed facts in opposition to Franzens' motion, such disputed facts are unnecessary in light of the Court's disposition of the Weiss and watts motions.

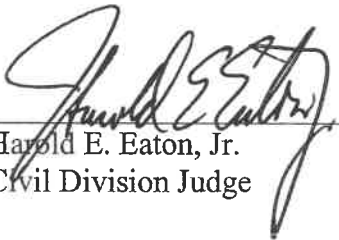
² The Court has decided these motions for summary judgment before the time for the reply pleading on the Weiss motion for summary judgment has run as her motion is made on the same basis as was the motion by Watts to which there has been a reply brief submitted.

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As the disposition of these motions resolves all the claims of all the parties, a final judgment order will issue pursuant to V.R.C.P. 54 and 58.

Dated at Woodstock this 25th day of October, 2012.



Harold E. Eaton, Jr.
Civil Division Judge

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