

2019 IL App (1st) 173198-U

No. 1-17-3198

Order filed June 14, 2019

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MICHAEL FILIMONIUK,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	
)	No. 15 L 9459
MICHAEL NILLES and METROPOLITAN PROPERTY)	
AND CASUALTY INSURANCE COMPANY,)	Honorable
)	Patricia O'Brien Sheahan,
Defendants-Appellees.)	Judge, Presiding.
)	

JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court's order denying plaintiff's motion to strike defendants' reply memorandum in support of their summary judgment motion affirmed where plaintiff forfeited review of the issue, and circuit court's order granting defendants' motion for summary judgment in malicious prosecution case affirmed where plaintiff failed to prove the underlying case was terminated in his favor.

¶ 2 Plaintiff Michael Filimoniuk appeals from an order of the circuit court of Cook County granting summary judgment in favor of defendants Michael Nilles and Metropolitan Property

and Casualty Insurance Company (Metropolitan) in a malicious prosecution and intentional infliction of emotional distress action.¹ On appeal, plaintiff contends that the circuit court improperly granted summary judgment to defendants because: (1) it erred in denying plaintiff's motion to strike defendants' reply memorandum in support of their summary judgment motion, and 2) the underlying proceeding was terminated in his favor and defendants did not have probable cause to prosecute plaintiff for insurance fraud. For the reasons below, we affirm.

¶ 3 BACKGROUND

¶ 4 The following facts are taken from the pleadings, depositions given in the instant proceedings, and other evidence relied upon by the circuit court in granting defendants' motion for summary judgment.

¶ 5 On May 11, 2012, Metropolitan's insured damaged a seal coater belonging to plaintiff's sealcoating business. After the incident, plaintiff filed a claim with Metropolitan to recover for the damage. On May 29, 2012, plaintiff's attorney, Richard Lucas, submitted a letter to Metropolitan and enclosed documents and contracts for sealcoating services, requesting compensation for plaintiff's "lost business" due to the sprayer's damage. The submitted "lost business" documents included purported contracts between plaintiff and three businesses: Ron's Taxidermy, Heritage Plumbing and Steven's Moldings.

¶ 6 Michael Nilles is a special investigator for Metropolitan. Nilles and another investigator were assigned to investigate plaintiff's lost business claims. They outlined their investigation notes in Metropolitan's claim diary for the incident.

¹ The record on appeal and most circuit court documents list defendant Metropolitan's name as both "MetLife Insurance Company" and "MetLife Property and Casualty Insurance Company." However, the notice of appeal lists its name as "Metropolitan Property and Casualty Insurance Company" and we will use this name for purposes of this appeal.

¶ 7 Nilles testified in his deposition that, because he thought the submitted lost business invoices were questionable, he spoke directly with Steven's Moldings' owner, Steven Ballek, and Heritage Plumbing's owner, James Helfrich. He also attempted to go to Ron's Taxidermy, but found no business with that name at the address or phone number plaintiff provided. After speaking with Ballek and Helfrich and finding inconsistencies in the statements they gave, he suspected that the invoices were fraudulent. Nilles submitted Metropolitan's claim diary documenting the investigation to the Cook County States' Attorney's office, which decided to seek a grand jury indictment.

¶ 8 At the grand jury proceedings held on October 23, 2012, Nilles testified that plaintiff made three false loss of business claims to Metropolitan. One of the claims for loss of business was with Ron's Taxidermy, located at 450 Telser Road in Lake Zurich, Cook County, Illinois. Nilles further testified that his investigation revealed that "Ron's Taxidermy does not exist[.]" and the "Lake Zurich Post Office verified that Ron's Taxidermy does not exist, nor does anything exist at 450 Telser."

¶ 9 Plaintiff was subsequently indicted and charged with insurance fraud. After his indictment, plaintiff filed a motion to dismiss. There is no record of plaintiff's motion to dismiss, but defendants filed a copy of the State's response to the motion with their reply memorandum in support of summary judgment. The State's response contended that Filimoniuk's motion did not specify an allowable basis for dismissal under section 114-1(a) of the Criminal Code (725 ILCS 5/114-1(a) (West 2012)), which lists eleven grounds on which a court can dismiss an indictment on defendant's motion. The State further asserted that in Filimoniuk's motion he contended that

Nilles knowingly gave false testimony to the grand jury, thus committing perjury and violating his due process rights.

¶ 10 In response to plaintiff's claims, the State contended that his motion failed to address Nilles's full grand testimony, which asserted that plaintiff submitted false documents for two other businesses in addition to a false invoice from Ron's Taxidermy. Nilles testified that plaintiff submitted an invoice for Steven's Molding on a project that was previously completed and Heritage's owner admitted to Nilles that the submitted letter he wrote for plaintiff was false. On plaintiff's due process claims, the State contended that even if the trial court excluded Nilles's statements as to Ron's Taxidermy, plaintiff's claims were unfounded because Nilles's testimony as to the other two businesses was enough evidence to return an indictment against him.

¶ 11 The record contains no further information about the motion to dismiss except a "half-sheet" entry from the criminal court indicating a hearing on March 28, 2014, and an entry on March 28, 2014, indicating that the indictment was dismissed without prejudice. Both parties acknowledge that the statute of limitations expired without the State refiling its charges against plaintiff.

¶ 12 On September 16, 2015, Michael Filimoniuk filed a six-count complaint against defendants. In count 1 for malicious prosecution, plaintiff alleged that Nilles acted with malice towards plaintiff in the underlying criminal proceeding when he allegedly made false statements to the grand jury. In count 3 for intentional infliction of emotional distress, plaintiff alleged that Nilles knew that his actions would cause severe emotional distress to plaintiff. In count 5 for negligent infliction of emotional distress, plaintiff alleged that Nilles had a duty to plaintiff to exercise due care in his underlying investigation and plaintiff suffered injury based on his failure

to do so. In counts 2, 4 and 6, plaintiff set forth the same allegations against Metropolitan as in counts 1, 3, and 5, alleging that Metropolitan was liable for Nilles's actions under a *respondeat superior* theory.

¶ 13 Defendants filed a section 2-615 motion (735 ILCS 5/2-615 (West 2014)) to dismiss, which was granted without prejudice with leave for plaintiff to refile.

¶ 14 Plaintiff filed an amended four-count complaint on February 17, 2016, which removed the negligent infliction of emotional distress allegations, and defendants again filed a section 2-615 motion to dismiss, which was denied on April 1, 2016.

¶ 15 On July 18, 2017, defendants filed a motion for summary judgment in which they contended that plaintiff's malicious prosecution claim failed because he could not establish an absence of probable cause to prosecute in the underlying criminal case. In plaintiff's response filed on September 28, 2017, he contended that defendants did not have probable cause to prosecute him at the time of his indictment because they did not know the facts alleged for probable cause in their summary judgment motion, namely testimony from plaintiff's 2016 and "lost business" owners' 2017 depositions, until after the underlying criminal proceedings were terminated in his favor. In defendants' reply memorandum filed on October 11, 2017, defendants reiterated their initial contentions, and included new exhibits.

¶ 16 Also on September 28, 2017, plaintiff filed a motion captioned "motion to strike defendant's reply or to treat defendant's reply as their original motion and to file a further response or surreply," in which he contended that defendants' reply violated Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) because their reply memorandum improperly presented new facts and an additional 37 pages of exhibits, including documents which were not part of their

original motion. These new documents included excerpts from Nilles's 2016 deposition, portions of Metropolitan's 2012 claim diary which included notes from Nilles and the other investigator, and an affidavit from Nilles. On October 23, 2017, the circuit court denied plaintiff's motion, and the order noted that plaintiff failed to appear.

¶ 17 A hearing was held on defendants' motion for summary judgment on November 28, 2017, and the circuit court granted the motion. This timely appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal, plaintiff contends that the circuit court improperly granted summary judgment in favor of defendants because: (1) it erroneously denied plaintiff's motion to strike defendants' reply memorandum in support of defendant's motion for summary judgment, or alternately file a surresponse, (2) the underlying proceeding was terminated in his favor, and (3) there was no probable cause for defendants to prosecute him.

¶ 20 Plaintiff first contends that the circuit court erred in denying his motion to strike defendants' reply memorandum in support of their motion for summary judgment because defendants improperly presented new facts in their reply memorandum which were not part of their original motion, in violation of Rule 191(a). Ill. S. Ct. R. 191 (eff. Jan. 4, 2013).

¶ 21 We initially note that plaintiff's brief violates Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017)) for failing to support his arguments on this issue with authority. The argument section of the appellant's brief must contain the appellant's contentions and reasons therefore, with proper authorities cited. *Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 19. "Arguments that do not comply with Rule 341(h)(7) do not merit consideration on appeal and may be rejected by this court for that reason alone." *Wells Fargo Bank, N.A. v. Sanders*, 2015 IL App (1st)

141272, ¶ 43. Accordingly, plaintiff forfeits review of this issue. *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2d) 111151, ¶ 12.

¶ 22 Additionally, the circuit court's order denying plaintiff's motion to strike on October 23, 2017, only states that plaintiff's motion to strike was denied and plaintiff failed to appear. As plaintiff did not provide this court with a transcript of the hearing or a certified bystander's report in the record on appeal, we are unable to divine the court's reasoning for denying plaintiff's motion, we must presume that the circuit court acted in conformity with the law and that its decision rested on a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984). Accordingly, we affirm the circuit court's denial of plaintiff's motion to strike.

¶ 23 We next determine whether the trial court erred in granting defendants' motion for summary judgment.

¶ 24 Summary judgment is proper 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." 735 ILCS 5/2–1005(c) (West 2016). The reviewing court construes the pleadings, depositions, admissions and affidavits strictly against the movant and liberally in favor of the nonmovant. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22. 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. *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. Summary judgment is a drastic means of disposing of litigation and "should be allowed only when the right of the moving party is clear and free from doubt." *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). The reviewing court has a duty to review the entire record to determine whether summary judgment was proper (*Foy v. City of Chicago*, 194

Ill. App. 3d 611, 616 (1990)) and can affirm summary judgment on any basis in the record (*Sang Ken Kim v. City of Chicago*, 368 Ill. App. 3d 648, 653 (2006)). We apply a *de novo* standard when reviewing an order granting summary judgment. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22.

¶ 25 A party brings a malicious prosecution action to recover damages suffered from a previous suit that was filed maliciously and without probable cause. *Miller v. Rosenberg*, 196 Ill. 2d 50, 58 (2001). To prevail on a claim of malicious prosecution, the plaintiff must prove each of the following elements: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant, (2) the termination of the proceeding in plaintiff's favor, (3) the absence of probable cause for such proceeding, (4) malice, and (5) damages. *Swick v. Liautaud*, 169 Ill. 2d 504, 512 (1996). The failure to satisfy any of the foregoing elements precludes recovery for malicious prosecution. *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶ 99.

¶ 26 The record establishes the first element of malicious prosecution, the commencement or continuance of an original criminal or civil judicial proceeding by the defendant as plaintiff was criminally prosecuted for insurance fraud. Plaintiff's arguments focus on the second and third elements of malicious prosecution.

¶ 27 As to the second element of malicious prosecution, the termination of the proceeding in plaintiff's favor, plaintiff contends that the circuit court erred when it determined that he had not met his burden to establish that the underlying criminal proceedings were terminated in a manner that indicated his innocence. Specifically, plaintiff asserts that the criminal court dismissed the underlying case because it found that Nilles committed perjury, citing *Swick*, 169 Ill. 2d 504 (1996) and *Cult Awareness Network v. Church of Scientology International*, 177 Ill. 2d 267

(1997) in support of his contention that the criminal case was terminated in his favor. Plaintiff's reliance on these two cases is misplaced.

¶ 28 To maintain a cause of action for malicious prosecution, the former proceeding must have been legally determined in favor of the plaintiff. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 99 (2004). "Whether disposition of the underlying matter constitutes a termination that is favorable to the plaintiff turns upon the circumstances under which the disposition was obtained." *Ferguson*, 213 Ill. 2d at 103. Whether the abandonment of the underlying matter is a favorable determination for plaintiff turns on if the termination compels an "inference that there was a lack of reasonable grounds to pursue the criminal prosecution." *Swick*, 169 Ill. 2d at 513–14. A reviewing court must "look to the circumstances and nature of the prior disposition to determine whether it was a 'favorable termination' of the proceedings." *Velez v. Avis Rent A Car System, Inc.*, 308 Ill. App. 3d 923, 928 (1999). Plaintiff must prove that the prosecutor abandoned the case for reasons that indicate his innocence. *Ferguson*, 213 Ill. 2d at 102.

¶ 29 Generally, for the legal termination in plaintiff's favor requirement, it is necessary that the judgment resolves the factual issues of the case. *Cult Awareness*, 177 Ill. 2d at 274. It is not sufficient just to obtain a dismissal from opponents' complaint, because the dismissal may not have a logical relationship to the legitimacy of the assertions of the complaint. *Cult Awareness*, 177 Ill. 2d at 274. In certain circumstances, the favorable termination requirement can be satisfied even if the underlying disposition did not reach the merits of the case, if there is: (1) withdrawal of the proceedings by the person bringing them, or (2) the dismissal of the proceedings because of the defendant's failure to prosecute them. *Cult Awareness*, 177 Ill. 2d at 276.

¶ 30 In *Swick*, our supreme court determined whether a *nol-prossed* underlying charge in a malicious prosecution context constituted a "termination in plaintiff's favor." *Swick*, 169 Ill. 2d at 512. The court held that the criminal proceeding is terminated in favor of the accused unless the abandonment is for reasons "not indicative of the innocence of the accused." *Swick*, 169 Ill. 2d at 512-14. The court further held that an abandoned *nol-prossed* charge does not indicate the accused's innocence when it results from: (1) an agreement or compromise with the accused, (2) the accused's misconduct which prevents trial; (3) when the accused requests or accepts "mercy"; (4) instituting new criminal proceedings; or (5) it is impossible or impractical to bring the accused to trial. *Swick*, 169 Ill. 2d at 513.

¶ 31 In *Cult Awareness*, where various underlying lawsuits were terminated by summary judgment, voluntary or involuntary dismissals, our supreme court expanded upon the holding in *Swick*. *Cult Awareness*, 177 Ill. 2d at 270. The court clarified that certain underlying dispositions could be considered a "favorable termination" in a malicious prosecution case and did not require that the underlying case was legally or factually determined in the plaintiff's favor. *Cult Awareness*, 177 Ill. 2d at 276. These dispositions included if the person bringing charges dropped them, or the court dismissed the proceedings because the defendant failed to prosecute them. *Cult Awareness*, 177 Ill. 2d at 276.

¶ 32 In *Ferguson*, 213 Ill. 2d 94, our supreme court further clarified the second element of malicious prosecution when it held that charges that are *nol-prossed* terminate the case and charges that are stricken with leave to reinstate do not terminate the case. *Ferguson*, 213 Ill. 2d at 100-01. Similarly, an order that dismisses a case without prejudice does not terminate the litigation. *BankFinancial, FSB v. Tandon*, 2013 IL App (1st) 113152 ¶ 18. An order dismissing

the case without prejudice removes the case from the docket, but allows the person who filed it to refile the charges within the applicable statute of limitations period. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 500 (2008).

¶ 33 The instant case is distinguishable from *Swick* and *Cult Awareness* because the record does not indicate why the underlying criminal case against plaintiff was dismissed without prejudice. The record does not contain plaintiff's motion to dismiss but only contains a half-sheet indicating that there would be a hearing on the motion to dismiss, and a subsequent entry on March 28, 2014, indicating that the indictment was dismissed without prejudice. The record also does not contain a report of proceedings or certified bystander's report on the hearing on plaintiff's motion to dismiss. While it is true that once the statute of limitations ran without the State refiling its charges, plaintiff achieved a termination in the underlying case, (*Hudson*, 228 Ill. 2d at 500) plaintiff must prove that the prosecutor abandoned the case for reasons that indicate his innocence (*Ferguson*, 213 Ill. 2d at 102). As stated previously, it is plaintiff's duty to present a sufficiently complete record of the trial court proceedings to support his error claim and any doubts arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 391-92. Without a report of proceedings or certified bystander's report, we cannot presume that the charges were dismissed without prejudice because plaintiff was innocent. See *Ferguson*, 213 Ill. 2d at 104.

¶ 34 Moreover, the dismissal without prejudice on plaintiff's motion to dismiss the underlying criminal case was not a favorable legal determination in plaintiff's favor because it was not a legal determination on the case's merits or one of the two exceptional circumstances that do not require a determination on the merits. See *Cult Awareness*, 177 Ill. 2d at 274, 276. While

plaintiff contends that the criminal court found that Nilles committed perjury, there is no order or report of proceedings that confirm his statement and we cannot presume that plaintiff's contentions are true. See *Foutch*, 99 Ill. 2d at 391-92. Without an explanatory order, report of proceedings or a certified bystander's report from the underlying case, our court cannot review the circumstances surrounding why the State chose to abandon its charges against plaintiff (*Velez*, 308 Ill. App. 3d at 929) and we find that he has not proved his burden that he achieved a termination for reasons indicative of his innocence (*Ferguson*, 213 Ill. 2d at 102). Thus, plaintiff has failed to establish that the underlying proceedings were terminated in his favor for the purpose of malicious prosecution.

¶ 35 Plaintiff has not satisfied the second element of malicious prosecution, and the failure to satisfy any element bars a successful claim for malicious prosecution. (*Gauger*, 2011 IL App (2d) 100316, ¶ 99). As a result, we need not reach the elements of probable cause, malice or damages.

¶ 36 We find that the circuit court properly granted summary judgment in favor of defendants. Plaintiff has not proven the second element of malicious prosecution and so defendants were entitled to judgment as a matter of law.

¶ 37 **CONCLUSION**

¶ 38 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 39 Affirmed.