

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2318

DONNA KILLIAN

VERSUS

STEPHEN M. IRVING AND MIRACLE LANE

*J.E.K.
by J.S.P.
/ MK*

DATE OF JUDGMENT: JUN 10 2011

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 552,956, DIV. 23, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILLIAM A. MORVANT, JUDGE

A.J. Paul Fredrickson, II
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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.



PETTIGREW, J. CONCURS

Disposition: AFFIRMED.

KUHN, J.

Plaintiff-appellant, Donna Killian, appeals the trial court's judgment, dismissing her claims for malicious prosecution against defendant-appellee, Miracle Lane, and defendant-appellee, Stephen M. Irving, in his capacity as Lane's employer. We affirm.

PROCEDURAL BACKGROUND

The salient facts in this case are that Lane executed an affidavit in which she attested, among other things, that a power of attorney given to Killian by Elaine Williams was a forgery. That affidavit was notarized by Irving. Irving subsequently contacted the East Baton Rouge Sheriff's Office outlining his concerns about the propriety of several financial transactions Killian had conducted on behalf of money belonging to Elaine Williams. He provided the investigating officer, Detective Mark Bienvenu, with copies of Lane's affidavit, the allegedly-forged power of attorney, and two checks from bank accounts of Elaine Williams that had been negotiated by Killian. After an investigation by Det. Bienvenu, Killian was arrested and apparently spent three weeks in jail. Killian was formally charged with felony crimes, but the charges were dismissed without prejudice on March 7, 2006.

Killian filed this lawsuit against Irving and Lane, averring entitlement to damages arising from claims of defamation, false imprisonment, and malicious prosecution. Irving was summarily dismissed from the lawsuit in his personal capacity on the basis of qualified privilege, and all claims against Lane were dismissed on the basis of prescription, except Killian's claim of malicious prosecution. Irving remained in the lawsuit in his capacity as Lane's employer.

The matter was remanded to the trial court for further proceedings. *See Killian v. Irving*, 2009-0827 (La. 1st Cir. 4/1/2010) (unpublished), 34 So.3d 1167 (table).

Lane and Irving subsequently filed a motion for summary judgment, asserting entitlement to dismissal from the lawsuit. They contend that Killian is unable to demonstrate the requisite evidentiary support for damages resulting from malicious prosecution.

SUMMARY JUDGMENT

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. *Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corp.*, 2007-2206, p. 5 (La. App. 1st Cir. 6/6/08), 992 So.2d 527, 530, *writ denied*, 2008-1478 (La. 10/3/08), 992 So.2d 1018. The mover has the burden of proof that he is entitled to summary judgment. If the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. *See* La. C.C.P. art. 966C(2). If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. La. C.C.P. art. 967(B).

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Hines v. Garrett*, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765-66 (per curiam).

MALICIOUS PROSECUTION

Malicious prosecution actions have never been favored in our law, and the plaintiff in such an action must clearly establish that the forms of justice have been perverted to the gratification of private malice and the willful oppression of the innocent. *Cook v. American Gateway Bank*, 2010-0295, p. 19 (La. App. 1st Cir. 9/10/10), 49 So.3d 23, 37. An action for malicious prosecution of a criminal proceeding requires the following elements: (1) the commencement or continuance of an original criminal proceeding; (2) its legal causation by the present defendant against the plaintiff, who was the defendant in the criminal proceeding; (3) the *bona fide* termination of the criminal proceeding in favor of the present plaintiff; (4) the absence of probable cause for the criminal proceeding; (5) malice; and (6) damage to the plaintiff, conforming to legal standards. *Id.*, 2010-0295 at pp. 19-20, 49 So.3d at 37.

Lane and Irving contend that Killian cannot demonstrate evidentiary support for the element of legal causation for her malicious prosecution claim. In support of summary judgment, Lane and Irving offered into evidence at the hearing various items, including Det. Bienvenu's investigation reports; the warrant issued for Killian's arrest; the affidavit executed by Det. Bienvenu in support of the

issuance of the arrest warrant; and excerpts of deposition testimony by Killian and David Williams.

According to the statements set forth by Det. Bienvenu in the narrative section of a report dated December 3, 2003, Irving contacted the Financial Crimes Division about the forged power of attorney document. The narrative indicated that Irving had advised of his representation of Elaine Williams who, terminally ill with cancer, had been cared for by her son, David Williams, and his girlfriend, Killian. Irving advised Det. Bienvenu that according to Lane's affidavit, while handling the succession of Williams' estate, Lane found two checks for investment dividends that had been issued to Elaine Williams but negotiated by Killian. Lane contacted the bank and learned that the checks had been negotiated using a power of attorney that was purportedly notarized by Lane. After reviewing a copy provided to her by the bank, Lane said that the power of attorney was a forgery because the notary signature was not hers.

Det. Bienvenu was unable to find a Louisiana driver's license or other contact information in Killian's name but located a vehicle registered to her.¹ On November 6, 2003, Det. Bienvenu contacted the bank. A representative verified that Killian had a personal checking account at the bank.

Det. Bienvenu subsequently talked to bank employee, Christine Lilley, who had handled most of the transactions involving Killian and Williams. Lilley provided Det. Bienvenu with limited information, advising him that because the bank had been sued by Elaine Combel, Elaine Williams' mother, over the transfer

¹ The vehicle was registered under plaintiff's name as "Vera O'Donna Killian." *See Killian*, 2009-0827 at p. 1 n.1.

of funds by Killian, she could not speak without the presence of the bank's attorney. Upon a return visit, in the presence of the bank's counsel, Lilley assured the detective that the negotiation of the two investment dividend checks by Killian were legitimate. Lilley told Det. Bienvenu that Killian had used the power of attorney to change the beneficiary on an annuity Elaine Williams had purchased in her children's names to benefit Ms. Combel who, at the time of purchase, was going to be placed in a nursing home. Lilley advised Det. Bienvenu that the value of the annuity was approximately \$136,000.00.

In late November 2003, Det. Bienvenu caused a subpoena to be served on the bank, resulting in the production of bank statements to him which showed that two days before Elaine Williams' death, Killian had used the power of attorney to convert Elaine Williams' bank accounts from individual to joint ones and change the beneficiaries on the annuity intended for the care of Ms. Combel from the children's names to Killian's name.

The narrative report states that on June 7, 2002, subsequent to the death of Elaine Williams, Killian opened a personal checking and savings account at the bank and began to transfer funds from Elaine Williams' joint account. Det. Bienvenu noted that the same day, Killian closed two of Elaine Williams' savings accounts and transferred the funds, which totaled \$19,306.36, into her own personal checking account. Killian then proceeded to spend the money "little by little" until September 11, 2002, when she made a final withdrawal of \$8,154.70, leaving Killian's personal account with a zero balance.

The report indicates that also on June 7, two weeks after she had signed paperwork authorizing her to be paid out in a lump sum, Killian deposited the total

amount of the annuity into her personal savings account. Statements from the personal savings account showed two subsequent withdrawals, one in June and another in July, after which Killian closed the account. In addition, on May 29, 2002, Killian withdrew \$4,898.00 from a savings account in Elaine Williams' name. And between May 13 and July 24, 2002, in twenty-one ATM transactions, Killian withdrew a total of \$4,040.00 from another Elaine Williams' savings account.

On December 8, 2003, a district court judge signed a warrant for Killian's arrest on charges of theft, bank fraud, forgery, and exploitation of the infirmed. A subsequent narrative report prepared by Det. Beinvenu states that Killian was arrested on January 9, 2004.

According to the affidavit executed by Det. Bienvenu in support of issuance of the arrest warrant, he recounts the details of Killian's uses of the purportedly-forged power of attorney to conduct various bank transactions on behalf of Elaine Williams, initially identifying the two investment dividend checks issued to Elaine Williams but negotiated by Killian. Det. Bienvenu expressly attests that he subpoenaed the bank for documents relating to any accounts held at the institution by Killian and that "[t]he information obtained revealed additional thefts and forgeries." Det. Bienvenu's affidavit then outlined the transfer of three of Elaine Williams' individual bank accounts to joint; the change in beneficiary designation on the annuity; the simultaneous inception of Killian's personal checking and savings accounts; and Killian's withdrawal of specified funds from Elaine Williams' savings accounts between May and July, 2002.

In the excerpted deposition testimony of David Williams, he stated that he believed that the money in the annuity belonged to Ms. Combel. And Killian's excerpted testimony shows that she admits to having transferred the money to herself, but contends it was done pursuant to Elaine Williams' verbal instruction. Killian also testified that she ultimately received the money from the annuity but this too, she said, was in accordance with Elaine Williams' wish. Killian conceded that she had no way of knowing the source of the funds in the annuity and that she was aware that Ms. Combel had made a claim to them.

The decision to detain a plaintiff made by the independent actions and investigation of a sheriff's office breaks the chain of legal causation in a malicious prosecution case. *See Kennedy v. Sheriff of East Baton Rouge*, 2005-1418, p. 32 n.20 (La. 7/10/06), 935 So.2d 669, 690 n.20 (citing *Banks v. Brookshire Bros. Inc.*, 1993-1616, pp. 2-3 (La. App. 3d Cir. 6/1/94), 640 So.2d 680, 682).

In this case, the undisputed facts established by the evidence submitted by Lane and Irving show that while Lane may have executed an affidavit attesting that the power of attorney Killian had presented to the bank to conduct the various transactions contained a signature that was not hers, she was not the complaining witness. It was Irving who initiated contact with the sheriff's office. More importantly, Det. Bienvenu conducted a rather detailed investigation of his own and determined that crimes had occurred, other than the alleged forgery of the notary signature on the power of attorney and the negotiation of the two investment dividend checks Lane had reported in her affidavit.

Killian insists that the authenticity of the power of attorney is an unresolved factual issue that precludes summary judgment. In support, she entered into

evidence a letter from a forensic document examiner who identified the signature on the power of attorney as Lane's; David Williams' deposition excerpts and affidavit testifying that he had been present when Lane signed the power of attorney; and her own affidavit stating that David Williams averred to her that he was present when the document was executed by Elaine Williams before Lane as notary public. But as the trial court pointed out, even accepting as true that the power of attorney was not a forgery, Det. Bienvenu's subsequent independent investigation was sufficient to break the chain of legal causation.

While we appreciate Killian's assertion that "but for" Lane's statement that the power of attorney was not notarized by her perhaps no investigation would have followed, but that is not the inquiry in a determination of whether a defendant legally caused the prosecution of a plaintiff. Although Lane's concerns about the authenticity of the power of attorney may have given rise to Irving's decision to report his observations to the sheriff's office, it was Det. Bienvenu who, based on his own investigation, caused the warrant for her arrest to issue. Any inadequacies in the investigation are not the responsibility of Lane or Irving in his capacity as her employer. *See Kennedy*, 2005-1418 at p. 32 n.20, 935 So.2d at 690 n.20 (actions of restaurant employees of reporting their suspicions of counterfeit currency to the sheriff's office were not cause of any criminal proceedings against patron; the decision to arrest patron of fast food restaurant, who sued restaurant after he was detained on suspicion of attempting to use a counterfeit one hundred dollar bill to pay for his order, was made by the independent actions and investigation of the sheriff's office); *see also Cook*, 2010-0295 at p. 20, 49 So.3d at 37 (actions of bank employee's supervisor and other

bank representatives in reporting loss of bank funds to police, which led to the employee's arrest for theft, were not the cause of any criminal proceeding against the employee; bank representatives merely reported the substantial monetary loss to the police in accordance with bank policy, and the decision to detain bank employee was made by the independent actions and investigation of police detective); and *Banks*, 1993-1616 at pp. 3-4, 640 So.2d at 682 (actions of grocery store and its manager who merely reported their observations to police were not the legal cause of arrest of store patron for shoplifting; police officers conducted their own investigation and made the decision to arrest him); *but see and compare Plessy v. Hayes Motor Co., Inc.*, 31,947, p. 5 (La. App. 2 Cir. 6/16/99), 742 So.2d 934, 939 (seller's report to the police that vehicle was stolen, despite seller's contention that it had no control over the decision to arrest or charge, was the legal cause of plaintiff's arrest; arrest and prosecution were instigated by seller, whose representatives converted what should have been handled as a civil matter into a criminal matter by involving the police, and there was no evidence that police conducted any independent investigation into whether the vehicle was actually stolen, but, rather, arrested buyer based simply upon seller's report).

Because the evidence submitted by Lane and Irving demonstrated the absence of factual support for the element of legal causation in Killian's malicious prosecution claim, the onus was on Killian to produce factual support sufficient to satisfy her evidentiary burden at trial. In light of the independent investigation conducted by Det. Bienvenu, Killian cannot establish that Lane legally caused her subsequent arrest even if the power of attorney was not a forgery as Lane attested to in her affidavit. As such, the authenticity of the power of attorney does not

potentially insure or preclude recovery, affect Killian's ultimate success, or determine the outcome of the legal dispute. In light of Det. Bienvenu's independent investigation, since reasonable persons could reach only one conclusion, there is no need for trial on the issue of whether Lane was the legal cause of Killian's prosecution even if the power of attorney is not a forgery. Accordingly, the trial court correctly granted summary judgment and dismissed Killian's suit against Lane and against Irving in his capacity as her employer.²

² The trial court granted summary judgment on the additional basis of Killian's inability to produce factual support for the element of absence of probable cause. The crucial determination in regard to the absence of probable cause is whether the defendant had an honest and reasonable belief in the guilt of the plaintiff at the time charges were pressed. *Reese v. City of Baton Rouge*, 1993-1957 (La. App. 1st Cir. 10/7/94), 644 So.2d 674, 676-77. The evidence introduced by Lane and Irving in support of this motion for summary judgment contained little about Lane's honest and reasonable belief of Killian's guilt at the time charges were pressed. In Det. Bienvenu's narrative report, he noted that after learning the power of attorney presented to the bank by Killian to negotiate the two investment dividends checks had been notarized by Lane, she said the power of attorney was a forgery. The narrative also states that Lane told Det. Bienvenu that after Elaine Williams' death, the checks should have been turned over to the law firm to become part of her estate. Lastly, the narrative indicates that on November 13, 2003, Det. Bienvenu met with Lane to show her a line-up of Killian where Lane stated that because she had only met Killian once she would not be able to make a positive identification. But Lane picked two pictures, one of which was Killian. There is no statutory indication or suggestion that the court should not consider all filed pleadings, depositions, answers to interrogatories, and admissions of fact in circumstances in which said supporting documents were previously filed into the court record, but were not resubmitted as part of the motion for summary judgment. La. C.C.P. art. 966B is expressly inclusive of pleadings, depositions, answers to interrogatories, and admissions "on file." *Thibodaux v. Tilton*, 2003-2220, p.3 n.3 (La. App. 1st Cir. 10/22/04), 888 So.2d 920, 922 n.3, *writ denied*, 2005-0075 (La. 2/18/05), 896 So.2d 44. Thus, we examine the evidence submitted at the earlier summary judgment hearing, tried before the same trial judge, at which Lane's affidavit, executed in September 2008, was admitted into the record. Lane attested, "Although the power of attorney was purportedly signed and then notarized by her, she did not sign the disputed power of attorney." Therefore, the evidence in the record submitted by Lane and Irving on the two motions for summary judgment establishes that as of November 13, 2003, Lane was willing to identify Killian in a line-up in conjunction with Det. Bienvenu's investigation. And that as of September 2008, Lane maintained her earlier belief that she had not signed and then notarized the power of attorney that Killian used in various financial transactions affecting accounts in the name of Elaine Williams. We believe this is sufficient to establish that Lane had an honest and reasonable belief in Killian's guilt at the time Irving reported his concerns to the sheriff's office. Accordingly, summary judgment was also correctly granted on this basis as well because Killian is unable to show an absence of probable cause.

DECREE

For these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against plaintiff-appellant, Donna Killian.

AFFIRMED.