UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LAUREN HAIDON	:	NO.: 3:19-cv-00119 (SRU)
v.	:	
TOWN OF BLOOMFIELD, PAUL HAMMICK, BRENDAN DANAHER, ZACHARY KLOMBERG, MATTHEW SUPLEE AND OTHER KNOWN OR UNKNOWN OFFICERS OF THE BLOOMFIELD POLICE DEPARTMENT	:	FEBRUARY 22, 2023

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER RULING ON MOTION FOR SUMMARY JUDGMENT

The defendant, **Brendan Danaher**, respectfully submits this memorandum of law in support of his motion for this Court to reconsider its February 15, 2023 Ruling [Doc. 126] on his Motion for Summary Judgment [Doc. 99]. Specifically, as set forth below, the defendant seeks reconsideration of the denial of summary judgment in his favor as to the federal malicious prosecution claim pleaded in the First Count of the plaintiff's operative Amended Complaint ("Complaint" [Doc. 45], along with the state law malicious prosecution and false arrest claims pleaded in the Fifth and Sixth Counts, respectively.

I. LAW AND ARGUMENT

A. STANDARD OF REVIEW.

In seeking reconsideration, movant must: (a) "point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court"; and (b) refrain from using "a motion to reconsider solely to relitigate an issue already decided." Brocuglio v. Proulx, 478 F.Supp. 2d 297, 299-300 (D.Conn. 2007). The defendant maintains that the record evidence and controlling decisions regarding the elements and scope of liability for malicious prosecution and state law false arrest, present legitimate grounds for reconsideration, and further warrant summary judgment in the defendant's favor as to the First, Fifth, and Sixth Counts of the plaintiff's Complaint.

B. THE COURT ERRED IN FINDING A GENUINE ISSUE OF MATERIAL FACT CONCERNING WHETHER THE DEFENDANT DID INITIATE OR PROCURE THE INITIATION OF CRIMINAL PROCEEDINGS AND, THEREFORE, PLAINTIFF'S § 1983 CLAIM FOR MALICIOUS PROSECUTION FAILS AS A MATTER OF LAW.[1]

This Court, in reaching its ruling as to the First Count, overlooked Second Circuit precedent holding that in the absence of evidence that an officer exerted pressure on or misled the prosecutorial authority, the plaintiff may not satisfy the first

[1] Defendant's undersigned counsel briefed this argument in defendant's Memorandum in Support of Objection to Plaintiff's Motion for Summary Judgment (Mem. Obj. [Doc. 111-1] at Section, II, B, 2, p. 17-18, and raised it at oral argument occurring on February 15, 2023. Notably, the plaintiff acknowledged in her motion that she relies on no more than the defendant's submission of the arrest warrant affidavit to the prosecutor to satisfy the first element of her claim—initiation of criminal proceedings. (See Pl.'s Mem. in Support of Mot. for Sum. J. at 6 [Doc. 100-9]).

element of a malicious prosecution claim—that the defendant either initiated or procured the initiation of a criminal proceeding against him. See e.g. Dufort v. City of New York, 874 F.3d 338, 352 (2d Cir. 2017); Bermudez v. City of New York, 790 F.3d 368, 374-76 (2d Cir. 2015). Because the plaintiff cannot establish that the defendant caused her prosecution and the competent record evidence supports that the Assistant State's Attorney's decision to prosecute the case interrupted the chain of causation between the allegedly wrongful arrest and prosecution, see id. at 347, this Court should reconsider its ruling and grant summary judgment in the defendant's favor as to the First Count.

The Second Circuit observed in Bermudez, [w]hile police officers do not generally "commence or continue" criminal proceedings against defendants, a claim for malicious prosecution can still be maintained against a police officer *if* the officer is found to 'play[] an active role in the prosecution, such as giving advice or encouragement or importuning the authorities to act.'" 790 F.3d 377 (quoting Magneillo v. City of New York, 612 F.3d 149, 163 (2d Cir. 2010) (quoting Rohman v. New York City Transit Authority, 215 F.3d 208, 217 (2d Cir. 2000)) (emphasis added). "This element might be satisfied by, for example, showing that an officer generated witness statements or was regularly in touch with the prosecutor regarding he case." Id.

The defendant denies that Matthew Couloute's residency on January 11, 2017 or any of the other omissions and/or false statements claimed by the plaintiff are material to the probable cause analysis for the crime charged, Custodial Interference in the First Degree, in violation of Connecticut General Statutes § 53a-97. Nevertheless, the prosecuting attorney was aware of the plaintiff's claim that Matthew Couloute was a Georgia resident, at a minimum, by February 14, 2015, when the defendant documented same in a case/incident report which report was forwarded by the Bloomfield Police Department ("BPD") Records Division to the State's Attorney's Office. The entire BPD investigative file was provided to the prosecutor as is the normal course and, thus, she was in possession of all the same documentation the defendant reviewed in reaching the finding of probable cause, including emails between the plaintiff and her ex-husband and certain family court pleadings and orders.

Further, prosecution of the matter did not commence until some weeks later when the plaintiff finally turned herself in pursuant to the warrant on March 6, 2017 and continued through to August 17, 2017, when the matter was dismissed. The prosecutor took no position as to the dismissal of the matter and review of the criminal court transcript indicates that the prosecutor was satisfied that Matthew Couloute had access to the child and that the matter was being worked out through the family courts in Connecticut and New York and for this reason declined to continue with prosecution

of the case. (See Ex. F attached to Def's Rule 56(a)1 Statement [Doc. 99-10].) Prosecution of the matter likely stemmed from plaintiff's own conduct in continually refusing to allow Matthew Couloute access to the child until her criminal prosecution was commenced.

In short, here, following binding appellate level authority, the Assistant State's Attorney's decision to prosecute the plaintiff constitutes an intervening cause that shields the defendant from liability as she was aware of plaintiff's claims, including the claim that Matthew Couloute was a Georgia resident well before the plaintiff's arrest and commencement of her prosecution. At the very least, there is no summary judgment evidence[2] that the prosecutor was misled or pressured by the defendant officer, Dufort, 874 F.3d at 352, and, as such, this Court should reconsider its ruling as to the First Count and grant summary judgment in the defendant's favor.

[2] The Supreme Court has recognized that a plaintiff may not "rest on his allegations . . . to get to a jury without 'any significant probative evidence tending to support the complaint.'" Melillo v. Brais, No. 3:17-CV-520 (VAB), 2019 WL 1118091, at *6 (D. Conn. Mar. 11, 2019) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct 2505 (1986). "Conclusory allegations, conjecture, and speculation ... are insufficient to create a genuine issue of fact. *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998) (citing *D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998)). Thus, plaintiffs " 'may not rely on mere speculation or conjecture as to the true nature of the facts to overcome' " summary judgment. *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (quoting *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995))." Id.

C. THE COURT ERRED IN FINDING OF ISSUES OF MATERIAL FACT AS TO THE ABSENCE OF PROBABLE CAUSE AND, THEREFORE, PLAINTIFF'S MALICIOUS PROSECUTION AND FALSE ARREST CLAIMS FAIL AS A MATTER OF LAW.

The Court's finding of issues of fact as to whether the defendant had probable cause misapprehends the case facts and applicable law concerning which family court—Connecticut or New York—had jurisdiction over the custody dispute between the plaintiff and her ex-husband. Further, the Court failed to consider whether the defendant had probable cause for the lesser charge of Custodial Interference in the Second Degree, in violation of § 53a-98, even if he did not have probable cause for Custodial Interference in the First Degree.

General Statutes § 53a-98 provides in pertinent part:

> (a) A person is guilty of custodial interference in the second degree when: (1) ***Being a relative of a child who is less than sixteen years old and intending to hold such child permanently or for a protracted period and knowing that he has no legal right to do so, he takes or entices such child from his lawful custodian***; (2) knowing that he has no legal right to do so, he takes or entices from lawful custody any incompetent person or any person entrusted by authority of law to the custody of another person or institution; or (3) ***knowing that he has no legal right to do so, he holds, keeps or otherwise refuses to return a child who is less than sixteen years old to such child's lawful custodian after a request by such custodian for the return of such child.***

Conn. Gen. Stat. Ann. § 53a-98 (emphasis added).

The plaintiff can only avoid summary judgment if she can establish a genuine issue of material fact as to the absence of probable cause. "[A] police officer is not liable for . . . false arrest [or malicious prosecution] under Section 1983 if probable cause to arrest the plaintiff existed for *any* crime—whether or not that particular crime was closely related to the offense [charged] . . . ." Kee v. City of New York, 12 F.4th 150, 158-59 (2d Cir. 2021). At a minimum, the defendant officer had knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable belief that the plaintiff had or was committing the crime of Custodial Interference in the Second Degree. In this regard, it is undisputed that the plaintiff is a relative of the child who was less than sixteen years old at all relevant times. It is also undisputed that Matthew Couloute, the child's father, requested return of the child—attempted to exercise visitation rights with the child—and the plaintiff refused same and would not disclose the child's location to him.

The remaining elements are the plaintiff's 1) refusal to return the child to her lawful custodian while 2) knowing she had not lawful right to do so. As set forth below, there exists no genuine issue of material fact that the Connecticut Family Court had jurisdiction over the matter, its order was in effect and, thus Matthew Couloute was a lawful custodian and, further, the defendant had reason to believe the plaintiff knew the Connecticut order was in effect and, thus, that she had no lawful right to deprive Couloute of custody.

The Connecticut Family Court had jurisdiction

Under the Uniform Child Custody Jurisdiction Act ("UCCJA") codified in Connecticut at General Statutes §46b-115, et seq., once a state enters an initial child custody determination, that state has exclusive jurisdiction to modify the determination provided that initial jurisdiction was proper. Conn. Gen. Stat. § 46b-115l. Exclusive jurisdiction continues until:

> (a) A court of [the issuing] state determines that the child, the child's parents, and any person acting as a parent do not have a significant connection with [the issuing] state and that substantial evidence is no longer available in [the issuing] state concerning the child's care, protection, training, and personal relationships; or
>
> (b) A court of [the issuing] state or court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in [the issuing] state.

Id.

A state may modify the custody order of another state only if it would have jurisdiction to make an initial determination, and either:

> . . . The court of the [issuing] state determines that it no longer has exclusive, continuing jurisdiction . . . a court of another state determines that a court of [the new] state would be a more convenient forum . . .; or a court of the [issuing] state or court of the [new] state determines that the child, the child's parents and any person acting as a parent do no presently reside in the [issuing] state.

Conn. Gen. Stat. § 46b-115m.

"The issue of modification thus tracks the issue of exclusive continuing jurisdiction: the new state may modify only if it has jurisdiction to make an initial custody order, *and* if the issuing state decides that it has lost exclusive continuing jurisdiction pursuant to [the act] or either state determines that no party presently resides in the issuing state." Brandt v. Brandt, 268 P.3d 406, 412 (Colo. 2012).

In Brandt, the Colorado Supreme Court held, inter alia, after reviewing the provisions of the UCCJEA and cases on point from other jurisdictions, before a Colorado court may assume jurisdiction to modify an out-of-state custody order, it must communicate with the issuing state pursuant to relevant provisions of UCCJEA and must conduct a hearing at which both sides are allowed to present evidence on any factual dispute as to the residency issue, with the burden of proof being on the parent petitioning for assumption of jurisdiction. Id. at 413.

Further, "presently reside" as used in the UCCJEA provisions relating to a non-issuing state's jurisdiction to modify a custody decree, is not equivalent to "currently reside" or physical present," but necessitates an inquiry into the totality of circumstances that make up domicile. Id. at 415 (and cases cited therein).

Here, plaintiff argues that the defendant's affidavit failed to mention that, on January 9, 2017, the plaintiff filed a petition in an Erie County, New York family court to suspend Matthew Couloute's child custody, and that her petition was granted the

same day by Judge Mary Carney, who signed a temporary court order suspending Couloute's custody rights. Plaintiff's representation of the New York's order and effect is inaccurate. (See Def's Ex. A to Mot. Summ. J. and attached Ex. 1 at Haidon v. Danaher 00032 [Doc. 99-5 page 30 of 123]). The defendant, however, did mention the order in his affidavit. Nevertheless, following the UCCJEA, as adopted by Connecticut and New York, same is immaterial as the Connecticut Family Court retained jurisdiction and, thus, at all relevant times Matthew Couloute continued to be the child's lawful custodian. The only impact of the New York order was to temporarily suspend Couloute's "access" or visitation with the child on an emergent basis based upon plaintiff's allegations that the child was at risk of abuse, pending a hearing on the plaintiff's petition. Thus, the New York order did not impact Couloute's status as a lawful custodian during the relevant time period and did not negate probable cause.[3]

Further, the fact that Coloute informed the defendant that the plaintiff had violated the Court order and the plaintiff acknowledged as much in her phone conversation with the defendant, (see Ex. A to Mot. Summ. J. and attachments and Ex. H to Obj. to P's Mot. Summ. J.; Jan. 11, 2017 Audio Recording [Doc. 111-6]), provided probable cause and the defendant was not required to study the competing

[3] Plaintiff acknowledged the Connecticut Court's jurisdiction over custody of the minor child in a motion she filed with the court on February 28, 2017, prior to her arrest. Portions of Family Court File, Couloute v. Coloute, Docket No.: HHD-FA14-4073278-S, attached as **Exhibit A**. Further, on the same day the Connecticut Family Court Judge and New York Family Court Judge conferred and agreed that Connecticut had jurisdiction over the case and the minor child. Id. Significantly, Connecticut jurisdiction was confirmed prior to the plaintiff's arrest and prosecution.

family court dockets. See e.g. Herman v. City of New York, 15-CV-3059 (PKC) (SJB), 2022 WL 900592 (E.D. New York, 2021).

Plaintiff demonstrated that she knew she had no right to deprive Couloute of custody

The plaintiff agreed with the defendant that the New York temporary order did not supersede the Connecticut order and that she was, therefore, in violation of the Connecticut custody order. (See [Doc. 111-6].) Further, the plaintiff's Notice Regarding Co-Parenting Orders, Post Judgment, filed on November 21, 2016 with the Connecticut Court she provided to the officer further supported to him that she knew that she did not have a right to deprive Couloute of custody—that she was aware that she was required to petition the Connecticut Family Court to modify the custody order. (See Ex. A to Mot. Summ. J. and attached Ex. 1, Haidon v. Danaher 000026-00030 [Doc. 99-5].) The Court's ruling on the defendant's motion overlooks these undisputed case facts supportive of probable cause.

D. THE COURT ERRED IN FINDING THAT THE DEFENDANT OFFICER IS NOT ENTITLED TO QUALIFIED IMMUNITY.

The Court erred in finding that the defendant is not entitled to qualified immunity as to plaintiff's claim for malicious prosecution pursuant to § 1983 as it was objectively reasonable for him to believe his actions were lawful at the time of his challenged conduct.

1. Arguable Probable Cause

"An officer's determination is objectively reasonable if there is 'arguable' probable cause at the time of the arrest—that is, if officers of reasonable competence could disagree on whether the probable cause test was met." Gonzalez v. City of Schenectady, 728 F.3d 149, 157 (2d Cir. 2013). Here, four officers of reasonable competence agree that there was probable cause for the crime charged. There exists no genuine issue of material fact that the defendant's supervising officer, the Assistant State's Attorney, and the Judge all had the same information as the defendant did, including a copy of the New York Family Court Order, and reached the same probable cause determination.

2. Plausible Instruction from Superior Officer

Sergeant Klomberg's deposition testimony that he reviewed the police investigative file, found probable cause, instructed the defendant to seek a warrant for the plaintiff's arrest, and supervised the defendant in preparing the Affidavit and Application for plaintiff's arrest provides an additional basis for this Court to find that the defendant is entitled to qualified immunity. (See Def.'s Rule 56(a) 1 Statement·¶ ¶¶ 31-32 [Doc. 99-2].) The Court's ruling overlooks Second Circuit authority that "[p]lausible instructions from a superior officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a

reasonable officer to conclude that the necessary legal justification for his actions exists . . .” Anthony v. City of New York, 339 F.3d 129, 138 (2d Cir. 2003).

II. CONCLUSION

WHEREFORE, the defendant respectfully requests that the Court reconsider its Ruling on his Motion for Summary Judgment insofar as it denied summary judgment to him as to the First, Fifth, and Sixth Counts of the Complaint, and grant summary judgment in his favor on those claims as well.

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CERTIFICATION

This is to certify that on **February 22**, **2023,** a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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