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	:	APRIL 4, 2023

DEFENDANT'S EMERGENCY REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S SUMMARY JUDGMENT DECISION

The defendant, **Brandon Danaher** ("defendant"), hereby replies to the Plaintiff's Opposition to Defendant's Motion for Reconsideration of the Court's Summary Judgment Decision, dated March 15, 2023 [Doc. 130], and seeks to expedite a decision on the Defendant's Motion for Reconsideration on Motion for Summary Judgment [Doc. 128.00], plaintiff's opposition, and instant reply, pursuant to Local Rue 7(a)(2)(4). There is good cause for an expedited decision in this matter with an assigned trial start date of September 11, 2023.

As a preliminary matter, the defendant's motion to reconsider is brought pursuant to Local Rule 7(c) only. Fed.R.Civ. 54(b) and the law concerning it as set forth by plaintiff's counsel (see P's Opp. at 2) is inapplicable to the motion. The defendant properly seeks reconsideration of the Court's decision on his Motion for Summary Judgment to correct errors and prevent manifest injustice.

ORAL ARGUMENT REQUESTED

Specifically, the Court overlooked binding Second Circuit precedent along with plaintiff's judicial omission that she relies only on the fact that the defendant signed the arrest warrant application and submitted it to the State's Attorney's Office (see Pl's Mem. of Law in Supp. of Partial Summ. J., at 6 [Doc. 100-9], and Arrest Warrant, Plaintiff's Exhibit J. [Doc. 100-4), in finding a genuine issue of material fact as to whether plaintiff may satisfy the first element of a malicious prosecution claim, initiation of criminal proceedings.

In addition, the Court's ruling overlooks that, because a malicious prosecution claim brought under § 1983 is grounded in the Fourth Amendment, the plaintiff must also establish another element in addition to the state tort requirements: a post-arrest deprivation of liberty that rises to the level of a constitutional "seizure." Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995). As the court concluded, in granting summary judgment as to the plaintiff's federal false arrest claim, that there exists no genuine issue of material fact that the plaintiff voluntarily surrendered to her arrest and it was not clearly established at the relevant times that such a surrender constitutes a seizure implicating the Fourth Amendment, plaintiff likewise cannot establish that she was subject to a Fourth Amendment seizure for purposes of her federal malicious prosecution claim.

The defendant more specifically replies to certain of the plaintiff's arguments below.

I. LAW AND ARGUMENT

A. THE COURT ERRED IN FINDING THERE EXISTS A GENUINE ISSUE OF MATERIAL FACT AS TO ALL THE ELEMENTS OF A CLAIM FOR PLAINTIFF'S MALICIOUS PROSECUTION PURSUANT TO § 1983.

1. The defendant did not initiate criminal proceedings against the plaintiff pursuant to binding appellate authority applied to the case facts

Plaintiff argues that the Court should reject defendant's argument that the first element of a malicious prosecution claim against a police officer is not satisfied in the absence of evidence the officer exerted pressure on or misled the prosecutorial authority "because the defendant did not make a single argument in his summary judgment brief regarding the initiation element . . . ." As set forth in the defendant's supporting memorandum at footnote 1 [Doc. 128], the defendant argued this issue in his memorandum opposing the plaintiff's motion for partial summary judgment and incorporated same in support of summary judgment. Further, the issue was argued by counsel at the oral argument on the pending motions for summary judgment. (See Court Transcript re Motion Hearing, Feb. 15, 2023 at T71:12-74:22.) Accordingly, plaintiff's argument that the issue was not briefed and argued is without merit.

Plaintiff next argues that there is evidence in the record to support that the Assistant State's Attorney was misled or pressured by the defendant officer based upon 1) false statements and material omissions contained in the warrant and 2) that the defendant acted as an "advocate for Couloute" and "personally ensured that the arrest

warrant itself required Haidon to turn Sophia over to Couloute in contravention of the Erie County (New York) Family Court order. Pl.'s. Opp. Mem. at 6-10.

As set forth in the defendant's memorandum of law in support of summary judgment and in opposition to the plaintiff's motion for partial summary judgment, there are no material false statements or omissions contained in the arrest warrant affidavit. The defendant set forth what both the plaintiff and her ex-husband stated to him concerning the ex-husband's complaint, as well as what the defendant learned from speaking with New York law enforcement and reviewing emails and other documentation provided by parties.

With regard to plaintiff's contention that the defendant acted as Mr. Couloute's "advocate," same is based upon the following exchange at the defendant's deposition:

Q. But you certainly knew that the civil case was active?

Ms. MACCINI: Objection to form.

Q. From filings of the parties?

A. **From him telling me he filed a [motion for] contempt.**

Q. And from Lauren Haidon saying that she filed a document for the change of address?

A. **Yes, sir.**

Q. Okay, So why is it that you didn't let the civil court in Connecticut handle the issue of where Miss Haidon was with Sophia and where Mr. Couloute was in Georgia or whatever it was?

A. **So my complainant, Mr. Couloute told me that he wasn't receiving any assistance on [that] end from the courts or from New York courts or New York police or whatnot.**

Q So you decided to assist him?

A **That's my job.**

(Brendan Danaher Dep. Trans., May 26, 2021, T159:7-24, Exhibit F to P's Mot. Sum. J. [Doc. 100-3].) Thus, the defendant's testimony was simply that he was performing his duties as an officer in investigating Mr. Couloute's complaint.

Plaintiff's contention that the defendant "personally" ensured that the warrant required her to turn the child over to Couloute is incorrect. The Order contained within the warrant referenced by the plaintiff is written and signed by the Judge, not the defendant. (See Arrest Warrant, Def's Exhibit 1 to Exhibit A [Doc. 99-5].)

Lastly, plaintiff relies on the defendant (according to the deposition transcript) mistakenly referring to Mr. Couloute as his "client" instead of "complainant" towards the end of his deposition, which started at 10:00 a.m. and concluded at 7:23 p.m. Even if the defendant made this misstatement (interchanged the two words), his use of words or word choice to describe Mr. Couloute some four years post the underlying case events has no bearing on the issue of whether he influenced the prosecutor to initiate criminal proceedings against the plaintiff. Further, the defendant denies "advocating" or serving as Mr. Couloute's "advocate" but nonetheless the issue is whether any advocacy impacted the prosecutor's decision to the prosecute the case. The record is devoid of any evidence of same and as such, following binding Second Circuit precedent, the plaintiff's claim for malicious prosecution fails, as a matter of law, on this basis.

Next plaintiff argues that Dufart v. City of New York, 874 F.3d 338 (2d Cir. 2017) and Bermudez v. City of New York, 790 F.3d 368 (2nd Cir. 2015), are not controlling precedent. The defendant relies on these decisions for the proposition that where, as here, there is an absence of evidence that an officer exerted pressure on or misled the

prosecutorial authority, a plaintiff fails to satisfy the first element of a malicious prosecution claim, as a matter of law.

In Dufart, the court held that the record in the case presented a question of fact as to whether the District Attorney's office was aware of the limited nature of an eyewitness's identification of the plaintiff and "the highly suggestive manner in which it was procured" such that the prosecutors' determinations break the chain of causation. Id. at 352. "[W]hen a plaintiff pursues a claim of malicious prosecution against a police officer based on an 'unlawful arrest,' the intervening exercise of independent judgment' by a prosecutor to pursue the case usually breaks the 'chain of causation' unless the plaintiff can produce evidence that the prosecutor was 'misled or pressured' by the police." Dufort, 874 F.3d 352 (quoting Townes v. City of New York, 176 F.3d 138, 147 (2d Cir. 1999)). Central to the Court's decision in Dufart was that the district court granted summary judgment in the case without permitting the plaintiff to depose the prosecutors who tried him and the prosecutor's knowledge of problems with certain case evidence was unknown. Here, to the contrary, the plaintiff had every opportunity to depose the Assistant State's Attorney who prosecuted her case and chose not to do so. Instead, she relied on submission of the warrant affidavit alone which the foregoing binding precedent indicates is not enough to satisfy the initiation of criminal proceedings element.

Further, the plaintiff's submissions to this Court in support of summary judgment along with her Complaint support that her criminal attorney submitted a Franks motion to the prosecutor, on May 6, 2017, the same day the plaintiff voluntarily turned herself in to the Bloomfield Police Department. (See i.e. Amended Compl. [Doc. 45] ¶¶ 48, 50,

53.) Thus, by the plaintiff's own admission the prosecutor was aware of the plaintiff's claims with regard to the evidence. In short, unlike the cases in Dufart and Bermudez, there exists no triable issue concerning whether the prosecutor was misled as to any claimed deficiency in the warrant. As such, following Dufort, Bermudez, and Townes, the plaintiff has failed to raise an issue of fact as to the initiation of criminal proceedings element of the claim and/or the prosecutor's independent judgment to prosecute the plaintiff insulates the defendant from liability.

2. The defendant had probable cause

For all of the reasons set forth in Section II, C of the defendant's Memorandum in Support of Motion to Reconsider Ruling on Motion for Summary Judgment, the Court erred in finding issues of material fact as to plaintiff's establishment of the absence of probable cause and her federal claim for malicious prosecution and state law claims fail on this basis. The defendant does not deem a further reply to plaintiff's arguments is warranted.

B. THE COURT ERRED IN FINDING THAT DISPUTED ISSUES OF MATERIAL FACT PRECLUDE A GRANT OF QUALIFIED IMMUNITY AS TO PLAINTIFF'S FEDERAL MALICIOUS PROSECUTION CLAIM.

The plaintiff focuses only on the defendant's argument that plausible instructions from the defendant's supervisor to submit the warrant to the prosecutor's officer entitle him to qualified immunity to argue that genuine issues of material fact preclude such a finding. The defendant's argument, however, that the Court erred in finding genuine issues of material fact as to application of the defense is also premised on arguable probable cause and the Court's finding that it was not clearly established at all relevant times that a voluntary surrender to arrest implicates the Fourth Amendment. The latter

is unquestionably dispositive of the issue and bars the plaintiff's federal claim for malicious prosecution.

With regard to arguable probable cause,

> When police officers offer an affidavit in support of an application for an arrest warrant, they act in a capacity similar to complaining witnesses. *Malley v. Briggs*, 475 U.S. 335, 341-42, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). If an arrest warrant appears on its face to support probable cause, then an officer is entitled to qualified immunity as a matter of law for claims based on that affidavit. *Id.* at 344-45, 106 S.Ct. 1092. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Id.* (citation omitted). An application is considered to be objectively reasonable "if 'officers of reasonable competence could disagree' on the legality of the defendant's actions." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995) (quoting *Malley*, 475 U.S. at 341, 106 S.Ct. 1092).

Harasz v. Katz, 327 F. Supp. 3d 418, 451–52 (D. Conn. 2018).

The defendant's arrest warrant affidavit referred to and relied upon the reports of Mr. Couloute, the plaintiff, members of New York law enforcement, and documentation and emails provided to him by Couloute and the plaintiff. The entire BPD investigative file was provided to the Assistant State's Attorney prosecuting the matter. The defendant, his Sergeant,[1] and the prosecutor all agreed to the defendant's probable cause determination. Thus, officers of reasonable competence could disagree and qualified immunity bars the plaintiff's claim on this basis.

[1] Plaintiff's assertion that Sergeant Klomberg's deposition testimony does not support his full review of the warrant affidavit and all the supporting documentation provided to the defendant, including emails discussing Mr. Couloute's move to Georgia, is simply inaccurate. Moreover, the record establishes that Klomberg rather than the defendant made the decision to submit the warrant to the State's Attorney's Office. (Def's Rule 56(a)1 Statement at ¶ 31 [Doc. 99.2] and Def's Ex. D [Doc. 99.8]). Applying the law in this Circuit to these undisputed facts, the defendant is entitled to qualified immunity where he followed the plausible instructions of his supervising sergeant.

Lastly, as set forth above and in the defendant's memorandum of law in support motion for summary judgment, a malicious prosecution claim brought under § 1983 is grounded in the Fourth Amendment. As such, the plaintiff must also establish another element in addition to the state tort requirements: a post-arrest deprivation of liberty that rises to the level of a constitutional "seizure." Singer v. Fulton County Sheriff, supra; see also Fulton v. Robinson, 289 F.3d 188, 195 (2d Cir. 2002) ("In order to prevail on a § 1983 claim against a state actor for a malicious prosecution claim under § 1983, a plaintiff must show violation of his rights under the Fourth Amendment"); Rohman v. New York City Transit Authority, 215 F.3d 208, 215 (2d Cir. 2000) (holding in addition to the state requirements for malicious prosecution claim under § 1983, a plaintiff must also demonstrate 'a sufficient post-arraignment liberty interest restraint….'"). The Court's finding that it was not clearly established during the relevant time period that a voluntary surrender to an arrest constitutes a seizure that implicates the Fourth Amendment entitling the defendant to qualified immunity as to the false arrest claim, (Hr'g Tr. at 7), applies with equal force to the malicious prosecution claim.

II. CONCLUSION

WHEREFORE, for the foregoing reasons; the reasons set forth in the defendants' Memorandum of Law in Support of Motion to Reconsider Ruling on Motion for Summary Judgment; and the briefing, exhibits, and hearing on the motions for summary judgment; the defendant, Brendan Danaher, respectfully requests that this Court grant his motion to reconsider the ruling on the motion for summary judgment and grant the defendant summary judgment in his favor as to the First, Fifth, and Sixth counts of the operative Complaint.