

STATE OF MICHIGAN
COURT OF APPEALS

DIANA LAMB,

Plaintiff-Appellant,

v

CITY OF PONTIAC and PONTIAC POLICE
OFFICER JOHN MISTRETТА,

Defendants-Appellees.

UNPUBLISHED

July 2, 1999

No. 207146

Oakland Circuit Court

LC No. 96-519920 NO

Before: Doctoroff, P.J., and Markman and J. B. Sullivan*. JJ.

PER CURIAM.

Plaintiff filed an eight-count civil suit against the City of Pontiac and Pontiac Police Officer John Mistretta alleging violations of her state constitutional rights, intentional infliction of emotional distress, assault and battery, false arrest and imprisonment, gross negligence, and malicious prosecution. Defendants moved for partial summary disposition based on MCR 2.116(C)(7), (8), and (10).¹ The trial court dismissed plaintiff's constitutional claims, the claim for false arrest and imprisonment, and the claim for malicious prosecution. The parties then stipulated to an order of dismissal without prejudice, as to the remaining counts, in order to avoid piecemeal litigation. Plaintiff now appeals the dismissal of her claims for false arrest/imprisonment and malicious prosecution as of right. We affirm.

Plaintiff alleges that she was assaulted and injured by an unfriendly crowd at a bar and grill in Pontiac. As she lay injured, bleeding and semi-conscious in the bar's parking lot, she was forcibly picked up and spun around by defendant Mistretta. Mistretta punched plaintiff squarely in the nose and then arrested her. Plaintiff was subsequently charged and tried with assault on an officer, but was acquitted. Defendants responded with evidence that plaintiff intentionally spat on Mistretta and that Mistretta never struck plaintiff but that she had injured herself immediately prior to his arrival when she fell and struck her face on the sidewalk. Plaintiff denies intentionally spitting at Mistretta, conceding only that if her blood inadvertently landed on him, it was the consequence of his own act of spinning her around prior to arresting her. According to plaintiff, after she was assaulted by the crowd, but prior to

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

her mistreatment and arrest by Mistretta, she was in no condition to offer either resistance or cooperation to anyone.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998). We examine “the affidavits, pleadings, depositions, and other documentary evidence . . . to determine whether a genuine issue of any material fact exists to warrant a trial.” *Id.* On appeal, as below, all reasonable inferences are resolved in the nonmoving party’s favor. *Bertrand v Allan Ford*, 449 Mich 606, 617-18; 537 NW2d 185 (1995).

A police officer may take an individual into custody without a warrant if he possesses “information demonstrating probable cause to believe that an offense has occurred and that defendant committed it.” *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); MCL 764.15; MSA 28.874. In order to prevail on a claim for false arrest or imprisonment, under these circumstances, “a plaintiff must show that the arrest was not legal, that it was not based on probable cause.” *Young v Barker*, 158 Mich App 709, 720; 405 NW2d 395 (1987). See also *Burns v Olde Discount Corp.*, 212 Mich App 576, 581; 538 NW2d 686 (1995); *Blase v Appicelli*, 195 Mich App 174, 177; 489 NW2d 129 (1992).

The elements of an action for malicious prosecution are: (1) a criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; and (4) “malice” or a primary purpose other than that of bringing the offender to justice. *Wilson v Yono*, 65 Mich App 441, 443; 237 NW2d 494 (1975). See also *Mathews v Blue Cross*, 456 Mich 365, 379, 389-91; 572 NW2d 603 (1998). Moreover, malice may sometimes be inferred from a lack of probable cause.” See *Flores v Dalmon*, 199 Mich App 396; 502 NW2d 725 (1993).

Since it is undisputed that plaintiff was prosecuted and acquitted, and because malice may sometimes be inferred from a lack of probable cause, we will review whether there was probable cause for the criminal proceeding against defendant. There is nothing on the record here to support plaintiff’s claims of malice apart from the alleged absence of probable cause in support of her arrest and the charges against her. Further, because there is no reason, on the record, to believe that the required probable cause for pursuing the charges against plaintiff in the instant case can be distinguished from the requisite probable cause for her arrest, the ultimate resolution of both issues is resolved in favor of defendants if, at the time of plaintiff’s arrest, Mistretta was aware of facts and circumstances “sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.” *Champion, supra*, at 115.

In support of summary disposition, defendants offered the depositions of a Pontiac fireman, a Pontiac paramedic, one of the men who physically ejected plaintiff from the bar, and the police report of defendant Mistretta. This evidence indicated that plaintiff spat at Mistretta when he tried to ask her some questions outside the bar, and that Mistretta then spun her around, handcuffed her and placed her in the back of his police car. In response to this testimony that plaintiff purposely spat at Mistretta-- an act that would certainly constitute probable cause on Mistretta’s part for arresting her-- plaintiff’s

response was merely that, “If I did, it wasn’t intentionally. I was spitting blood quite a bit.” Nor did plaintiff suggest that Mistretta himself was, in fact, aware of the accidental nature of her spitting upon him, or that he reasonably should have been aware of this. In other words, there is considerable evidence that plaintiff spat upon Mistretta purposely, including from Mistretta himself; while plaintiff takes issue with this characterization of what occurred, she presents no evidence that Mistretta was insincere or unreasonable in believing that he had been purposely spat upon by plaintiff. Indeed, even if we accept plaintiff’s rendition of what occurred, i.e. that she was punched in the face by Mistretta after her blood may have accidentally gotten on his face, such a reaction (or overreaction) by Mistretta seems more consistent with the notion that he *believed* he had been spat upon by plaintiff than with the notion that he appreciated that this had occurred accidentally, but nevertheless arrested plaintiff without apparent probable cause.

We conclude, therefore, that, because probable cause existed for plaintiff’s arrest, a reasonable trier of fact could not have found the elements of either false arrest or imprisonment, or malicious prosecution on the part of defendants. As a result, we affirm the trial court’s dismissal of these claims pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman

/s/ Joseph B. Sullivan

¹ While the trial court was not specific, the context of the court’s ruling indicates that the counts currently on appeal were dismissed pursuant to MCR 2.116(C)(10). Defendant Pontiac moved to dismiss a count which sought to hold it liable for establishing customs, procedures or policies which caused plaintiff’s state constitutional rights under the Michigan Constitution to be violated. Defendant Pontiac asserted that the claim was barred because of immunity and that plaintiff had failed to plead facts in avoidance of that immunity. Our examination of the record indicates that any summary disposition under MCR 2.116(C)(7) and (8) was limited to this claim.