

STATE OF MICHIGAN  
COURT OF APPEALS

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JOHN SAVITSKIE,

Plaintiff-Appellant,

v

JOE GAGNON,

Defendant-Appellee.

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UNPUBLISHED  
February 15, 2007

No. 264900  
Oakland Circuit Court  
LC No. 2002-045987-CZ

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Following remand by our Supreme Court “for consideration as on leave granted,” 474 Mich 852; 702 NW2d 586 (2006), plaintiff appeals an order granting summary disposition in defendant’s favor. We affirm.

Plaintiff first argues that the trial court erred in concluding that defendant was not the one who initiated and maintained the prosecution against him, which then resulted in the improper summary dismissal of his malicious prosecution claim. We disagree.

A grant or denial of summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Because the trial court considered the record evidence before dismissing the matter, we review the decision under the standards applicable to motions brought pursuant to MCR 2.116(C)(10). See *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002). Thus, if plaintiff failed to establish with admissible evidence, considered in the light most favorable to him, that a material fact existed, summary dismissal was proper. See *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

To establish malicious prosecution, a plaintiff must show that (1) the private defendant initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or for a purpose other than bringing the offender to justice. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 378; 572 NW2d 603 (1998). Here, plaintiff failed to establish, at least, the first element.

A private person can be held liable for malicious prosecution if all the elements are met and no defense applies. *Id.* at 379. “The prosecutor’s exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious

prosecution.” *Id.* at 384. “When a private person gives to a prosecuting attorney information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable [for malicious prosecution] . . . even though the information proves to be false and his belief was one that a reasonable person would not entertain.” *Id.* at 385 n 3, quoting 3 Restatement Torts, 2d, § 653, comment g, p 409. When a defendant furnishes information he knows to be false, and the prosecutor acts solely on that information, the defendant has procured the prosecution. *Id.* at 385; *Christy v Rice*, 152 Mich 563, 567-568; 116 NW 200 (1908). However, if the prosecutor conducted “his own investigation, and acted in his official capacity upon that investigation, independent of defendant’s statement,” the defendant did not procure the prosecution. *Matthews, supra*, quoting *Christy, supra*.

Here, the evidence indicated that the Attorney General initiated an investigation in response to multiple consumer complaints against Sands Appliance and its employees. Eleven complaints were addressed to the Attorney General and over 2,000 complaints were addressed to defendant. Defendant contacted the Attorney General’s Office and offered to help in the investigation of “appliance repair scams.” The Attorney General’s Office teamed up with the Michigan State Police, the city of Farmington Hills Consumer Protection Committee, and defendant to coordinate an investigation of the potentially fraudulent repair activity. The investigation consisted of several “sting operations” involving Sands’ employees. Defendant disabled home appliances found to be in working order by creating an easily repairable maintenance issue. Hidden surveillance cameras were installed to capture the repair services. Following the investigation, criminal charges were brought against plaintiff by the Attorney General.

In particular, the Attorney General stated in a media release that she intended to pursue criminal misdemeanor charges against three Sands’ employees, and thanked “the investigators of the Michigan State Police for their professionalism in coordinating the investigation, [defendant] for his expertise, and the City of Farmington Hills and its Consumer Protection Committee for their cooperation.” She also stated that “[t]his case [was] an example of a coordinated effort: vigilant consumers, responsive government, and concerned law enforcement working together.”

Thereafter, the Attorney General, through one of her assistants, brought charges against plaintiff for fraud and obtaining money under false pretenses. Defendant was the expert witness at the subsequent trial. Plaintiff claims that defendant was the complaining witness, but aside from a similar assertion made by plaintiff’s trial attorney, he has not provided any support for this claim. An examination of the complaint and report presented revealed that the complaining witness was police officer Terrance Doyle. At trial, plaintiff testified that his contested repairs were proper and that he did not try to cheat anybody. Defendant testified that plaintiff’s “repairs” were not proper, but admitted that questions of price and the extent and appropriateness of repairs were subjective. Plaintiff was acquitted of the criminal charges.

Considering the evidence, we agree with the trial court that there is no genuine issue of material fact as to the issue whether defendant initiated or maintained the prosecution against plaintiff. Defendant did not. Although defendant voluntarily offered his expertise to help in the investigation, the Attorney General initiated the investigation against plaintiff in response to multiple consumer complaints. Defendant, an expert in appliance repair, merely provided information based on his knowledge and expertise. The investigation was coordinated by the

Michigan State Police and the Attorney General. Based on the results of the investigation, the Attorney General exercised independent discretion in initiating and maintaining the prosecution against plaintiff. There was no evidence that the prosecution relied solely on information known by defendant to be false in initiating and maintaining the prosecution. And, there was no evidence that defendant pressured or induced the Attorney General to initiate or maintain the prosecution. Not all investigations rely on common knowledge and the help of experts is frequently needed. However, the provision of that assistance does not mean that the expert initiated and maintained a resulting prosecution.

Moreover, there was no evidence that defendant knew that the information he provided to the police was false. As defendant testified and plaintiff emphasized in his brief, appliance repair is often “a rather subjective endeavor.” Defendant had his opinion about the necessary repairs and plaintiff had a different opinion. That plaintiff was acquitted does not mean that defendant knew his opinion was false. The Attorney General exercised her independent discretion even though defendant’s opinion proved to be false or his belief was one that a reasonable person would not entertain. See *Matthews, supra* at 385 n 3. There was no evidence that defendant interfered with the discretion of the authorities. Thus, the trial court properly granted defendant’s motion for summary disposition.

Plaintiff also argues that summary dismissal was premature because discovery barely began and plaintiff was entitled to an opportunity to conduct further discovery. We disagree. Generally, a motion for summary disposition may be raised at any time after discovery on a disputed issue is complete. MCR 2.116(B)(2); *Kemerko Clawson, LLC v RXIV Inc*, 269 Mich App 347, 350; 711 NW2d 801 (2005). But, summary disposition is appropriate before discovery closes if further discovery does not stand a reasonable or fair chance of uncovering factual support for the opposing party’s position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

As indicated above, plaintiff failed to show that a genuine issue of material fact existed regarding whether defendant initiated and maintained the prosecution. Plaintiff did not assert or provide an evidentiary basis for his claim that further discovery stood a fair chance of revealing the existence of a factual dispute. See *id.*; *Bellows v Delaware McDonald’s Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Nor is it apparent what other evidence plaintiff might be able to produce on these issues. Thus, summary disposition before discovery closed was not premature. See *Village of Dimondale, supra*.

In light of our resolution of these two issues, we need not address plaintiff’s other issue on appeal concerning the lack of probable cause.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ William B. Murphy  
/s/ Patrick M. Meter