

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL W. ROBERTS,)
)
Plaintiff,)
)
v.) C.A. No. 08C-10-052 MMJ
)
CPL. WILLIAM MURRAY, STAPLES,)
INC., AND REBECCA McBRIDE,)
)
Defendants.)

Submitted: June 19, 2009

Decided: July 24, 2009

On Plaintiff's Motion for Summary Judgment. **DENIED.**

On Defendant Cpl. Murray's Cross-Motion for Summary Judgment. **GRANTED.**

On Defendant Staples, Inc. Motion to Dismiss. **GRANTED.**

On Plaintiff's Motion for an Order Compelling Discovery. **DENIED.**

MEMORANDUM OPINION

Michael W. Roberts, *pro se*

Michael F. McTaggart, Esquire, Deputy Attorney General, Department of Justice,
Wilmington, Delaware, Attorney for Defendant Corporal William Murray

Megan T. Mantzavinos, Esquire, Theodore J. Segletes, III, Esquire, Marks,
O'Neill, O'Brien & Courtney, P.C., Wilmington, Delaware, Attorneys for
Defendant Staples, Inc.

JOHNSTON, J.

FACTUAL BACKGROUND

This matter arises out of the arrest and detention of plaintiff Michael Roberts for allegedly shoplifting at the Staples store on Concord Pike in Wilmington, Delaware on April 27, 2007. A Staples employee witnessed the incident and picked plaintiff out of a photo lineup. Plaintiff was arrested for the shoplifting. Plaintiff spent approximately twenty-eight days in jail.¹ It was later determined that plaintiff could not have been the Staples shoplifter. At the time of the incident, plaintiff was incarcerated on unrelated shoplifting charges.

Plaintiff claims:

9. ...[Cpl. Murray] arrested me on 6-25-07 for shoplifting at Home Depot (Miller Road).... [Cpl. Murray] checked my criminal history [and] discovered that I was a “Professional” shoplifter.
10. ... [Cpl. Murray] located one (1) arrest in particular that stood out... this was a shoplifting arrest, which occurred on 6-1-07 involving me. The arrest occurred at the Staples store in Newark, [Delaware].
11. Cpl. Murray realized that the plaintiff matched the description of one of the suspects from the 4-27-07 [shoplifting]..., Cpl. Murray responded to the [Wilmington] Staples store and spoke with a Staples employee, who advised that he was working on [the] day of the incident.

¹ According to plaintiff, on July 13, 2007, he was picked up on a capias. At that time, plaintiff also was arrested for the Staples shoplifting incident. On July 23, 2007, plaintiff was released on the capias, but still was held on the shoplifting charge. Plaintiff ultimately was released on bail for the shoplifting charge on August 20, 2007.

12. The employee state[s] that he actually helped one (1) of the suspects right before the incident occurred.
13. Cpl. Murray showed the employee the photo line up and he instantly picked the plaintiff: Michael W. Roberts['] image from the line up, and advised [that] this was the same suspect involved in the shoplifting on 4-27-07.

Plaintiff asserts that this sequence of events illustrates that all involved acted negligently, maliciously, and without probable cause.

On October 6, 2008, plaintiff filed suit against: the investigating officer, Corporal William Murray; the prosecuting attorney, Deputy Attorney General Marsha J. White, Esq.; Staples, Inc. and its management; and Rebecca McBride, the Staples employee who identified plaintiff as the alleged shoplifter. Plaintiff's complaint generally asserts claims of false imprisonment, malicious prosecution, and various non-specific violations of plaintiff's constitutional rights.

Additionally, plaintiff is suing Cpl. Murray for defamation based on a reference to plaintiff as a "professional shoplifter" within Cpl. Murray's police report.

Presently before the Court are three motions seeking to end this litigation: (1) plaintiff's Motion for Summary Judgment; (2) Cpl. Murray's Cross-Motion for Summary Judgment; and (3) Staples' Motion to Dismiss.²

² By order dated January 29, 2009, this Court dismissed plaintiff's claim against DAG White. The Court had determined that DAG White was immune from suit because the complained of conduct arose out of the performance of her official duties.

Plaintiff's Motion for Summary Judgment

On February 18, 2009, plaintiff filed a motion for summary judgment.

Plaintiff asserts that judgment should be entered “for the plaintiff on the grounds that there is a genuine issue as to the material facts, and the plaintiff is entitled to judgment as a matter of law.” Plaintiff does not provide any additional facts or argument to support his position, other than to provide conclusory statements about “official immunity” and “sovereign immunity.”

Cpl. Murray's Cross-Motion for Summary Judgment

On March 6, 2009, Cpl. Murray filed his Cross-Motion for Summary Judgment. Cpl. Murray contends that because both parties have submitted motions for summary judgment, the Court should treat the case as submitted for decision on the merits under Superior Court Rule 56(h).

Additionally, Cpl. Murray asserts that under the State Tort Claims Act he is entitled to qualified immunity. To support his position, Cpl. Murray provides an affidavit explaining that his actions occurred within the scope of his official duties and that the arrest warrant was obtained in good faith. Cpl. Murray asserts that there is no evidence in the record that he acted with gross or wanton negligence. Cpl. Murray states that plaintiff has failed to provide any facts that would negate the applicability of qualified immunity.

Additionally, Cpl. Murray contends that plaintiff's defamation claim is without merit. Cpl. Murray asserts that plaintiff has failed to allege the necessary elements for defamation. Cpl. Murray argues that truth is a complete defense to any claim of defamation and his statement that plaintiff was a "professional shoplifter" is true or substantially true based upon plaintiff's extensive shoplifting record.³

Plaintiff's Response to Cpl. Murray's Motion

On March 20, 2009, plaintiff filed a response to Cpl. Murray's motion. Plaintiff contends that he never should have been arrested because the "evidence never pointed toward [him]." Plaintiff asserts that "Cpl. William Murray's personal feelings of hatreded [sic] and disgust – was malicious sadistic and for the very purpose of falsely arresting [plaintiff]."

Additionally, plaintiff asserts that all of the defendants willfully and wantonly inflicted mental pain on plaintiff by falsely arresting him. While stating that "there is substantial evidence that defendants disregarded a clear and obvious risk of harm," plaintiff does not provide any additional facts or evidence to support his conclusory allegations.

³ According to plaintiff's criminal record, he has been arrested 22 times for shoplifting and either was adjudicated or pled guilty 10 times between July 25, 2002 and October 7, 2007.

Staples' Motion to Dismiss

On May 8, 2009, Staples filed a Motion to Dismiss. Staples asserts that “[p]laintiff may not recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint.” Staples contends that it and its employees are immune from suit under 11 *Del. C.* § 840(d) because their accounts of the incident and identification of plaintiff were reasonable and non-negligent. Staples asserts that an “employee’s eyewitness account of an individual removing merchandise from the store without paying for it is sufficient to support the probable cause required by the statute.”

Additionally, Staples asserts that plaintiff cannot maintain any constitutional claims against it. Staples argues that in order to make a claim that it violated plaintiff’s civil rights, plaintiff must demonstrate that Staples acted “under color of state law” and plaintiff must plead such facts “highly specifically” within his complaint. Staples asserts that plaintiff has failed to meet either requirement.

Staples also contends that plaintiff cannot maintain a false imprisonment or malicious prosecution claim against it. Staples asserts that a private citizen who reports a crime to the police and provides the police with information, cannot be sued for false imprisonment if the private citizen did not actively participate in the service of the warrant. Staples explains that it did not participate in the service of the warrant. Also, Staples asserts that it and its employee acted without malice and

did not institute a criminal complaint against plaintiff, such that, they could be held responsible for malicious prosecution.

Plaintiff's Response to Staples' Motion

On May 15, 2009, plaintiff filed a submission in opposition to Staples' Motion to Dismiss. Plaintiff contends that Staples is not entitled to immunity. Plaintiff asserts that an employee's eyewitness account of the shoplifting incident "is not sufficient to support the probable cause, due to the plaintiff's incarceration on that date[] and time." Plaintiff does not state that the eyewitness account and photo identification are alone insufficient for probable cause. Instead, plaintiff suggests that his incarceration at the time of the shoplifting effectively nullified probable cause. Further, plaintiff conclusively states that "under color of law, the Staples Corporation must be held liable, for damages arising from Constitutional Laws of the United States." However, plaintiff does not provide any facts to support his contention that Staples acted under color of state law at the time it reported and cooperated with the investigation of the shoplifting incident. Neither does plaintiff specify which "Constitutional Laws" Staples violated.

On May 29, 2009, the Court heard oral argument on the motions.

ANALYSIS

Under Superior Court Civil Rule 56(h), plaintiff and Cpl. Murray's motions for summary judgment cannot be considered together as a stipulation for decision

on the merits because plaintiff states that a genuine issue of material fact exists. Where the parties file cross motions for summary judgment and one of the parties presents an argument to the Court that a material issue of fact is in dispute, it is inappropriate to consider the submissions as a stipulation for decision on the merits.⁴ Therefore, the Court will review the motions individually, as separate motions for summary judgment.

This Court will grant summary judgment only when no material issues of fact exist. The moving party bears the burden of establishing the nonexistence of material issues of fact.⁵ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.⁶ Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁷ If, after discovery, the non-

⁴ Super. Ct. Civ. R. 56(h) provides:

Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

⁵ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

⁶ *Id.*

⁷ Super. Ct. Civ. R. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

moving party cannot make a sufficient showing of the existence of an essential element of the case, summary judgment must be granted.⁸

A court deciding a summary judgment motion must identify disputed factual issues whose resolution is necessary to decide the case, but the court must not decide those issues.⁹ The court must evaluate the facts in the light most favorable to the non-moving party.¹⁰ Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.¹¹

Plaintiff's Motion for Summary Judgment

Plaintiff's Motion for Summary Judgment must be denied on its face. Plaintiff's motion explicitly states that "there is a genuine issue as to the material facts." A party moving for summary judgment is only entitled to judgment as a matter of law where the *moving* party demonstrates that no genuine issues of material fact exist.¹² "If there are material facts in dispute, it is inappropriate to grant summary judgment..."¹³ Therefore, plaintiff's Motion for Summary Judgment must be denied.

⁸ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 504 U.S. 912 (1992); *Celotex Corp.*, 477 U.S. at 322-23.

⁹ *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992).

¹⁰ *Id.*

¹¹ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

¹² *See Paul v. Deloitte & Touche, LLP*, 2009 WL 1396411, at *4 (Del.).

¹³ *Id.*

Cpl. Murray's Motion for Summary Judgment

Tort Claims

Under the State Tort Claims Act¹⁴, Cpl. Murray is entitled to qualified immunity. A state employee is exempt from civil liability where the following three elements are present: (1) the act or omission arose out of or in connection with the performance of an official duty involving the exercise of discretion; (2) the act or omission was performed in good faith and in the belief that the public interest would be best served thereby; and (3) the act or omission was made without gross or wanton negligence.¹⁵ The plaintiff has the burden of proving the absence of one or more of these elements in order to show the inapplicability of immunity.¹⁶ At the time of the incident, Cpl. Murray was performing his job as a police officer. Cpl. Murray asserts that he acted in good faith, with probable cause, and without gross or wanton negligence.

Plaintiff has failed to meet his burden of proving that qualified immunity does not apply. Plaintiff has not shown that Cpl. Murray's actions exceeded the scope of his official duties or that he failed to act in good faith. While plaintiff conclusively asserts that Cpl. Murray acted maliciously and with gross negligence, plaintiff has failed to provide any specific facts to support such a position. Under

¹⁴ 10 *Del. C.* § 4001.

¹⁵ *Id.*; see also *Phillips v. Conley*, 2004 WL 692656, at *2 (Del. Super.), *aff'd*, 2004 WL 2239721 (Del.).

¹⁶ *Abdul-Akbar v. Figliola*, 1990 WL 74326, at *1 (Del. Super.) (citing *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 530 (Del. 1987)).

Superior Court Civil Rule 9(b), negligence must be alleged with particularity.

“Moreover, gross negligence signifies more than ordinary negligence or inattention and must be pleaded accordingly.”¹⁷ Therefore, Cpl. Murray is immune from suit for plaintiff’s tort claims.

Constitutional Claims

Cpl. Murray is entitled to qualified immunity with regard to plaintiff’s constitutional claims. “Qualified immunity means that a state official or employee acting in an official capacity does not constitute a person for purposes of § 1983 and is therefore immune from suit, but the same individual may not be immune when acting in his or her individual capacity.”¹⁸ At the time of the complained of action, Cpl. Murray was acting in his official capacity as a police officer. Plaintiff has failed to present any facts to the contrary. Therefore, Cpl. Murray is entitled to qualified immunity from plaintiff’s constitutional claims.

Further, even if plaintiff had demonstrated that Cpl. Murray was operating in his individual capacity, plaintiff’s claim fails. In order to make out a constitutional claim against a police officer in his individual capacity, a plaintiff must “show that they were in fact deprived of an actual constitutional right...” and that “the right was so clearly established at the time of the alleged violation that a reasonable police officer in the defendant’s situation would have known that he violated that

¹⁷ *Id.* at *2.

¹⁸ *Brandon v. Diana*, 2008 WL 660333, at *2 (Del. Super.)

right.”¹⁹ Here, plaintiff has not specifically pled what constitutional rights Cpl. Murray may have violated. Plaintiff has failed to provide any facts to show that a reasonable police officer in defendant’s situation would have known that the officer violated any rights. By plaintiff’s own account of events, Cpl. Murray had probable cause to believe that plaintiff was the individual who shoplifted from Staples – plaintiff matched the perpetrator’s description and an eyewitness “instantly” picked plaintiff’s photo out of a line-up. Thus, Cpl. Murray is immune from suit both in his official and individual capacities.

Defamation Claim

Cpl. Murray’s characterization of plaintiff as a “professional shoplifter” within his police report is not an actionable defamation claim. In order to state claim for defamation, a plaintiff must show the following elements: (1) a false and defamatory communication concerning the plaintiff was made; (2) the communication was published to third parties; (3) the third party understood the defamatory nature of the communication; (4) the publisher was at fault; and (5) the plaintiff suffered an injury as a result.²⁰ Truth is an absolute defense; and where the alleged defamatory statement is shown not to be false, it is unnecessary to delve into any of the additional factors.²¹

¹⁹ *Id.*

²⁰ *Wharton v. Worldwide Dedication Services*, 2007 WL 404770, at *2 (Del. Super.).

²¹ *See id.*

Here, plaintiff has failed to clearly and succinctly plead all of the elements of defamation.²² Cpl. Murray's reference to plaintiff as a "professional shoplifter" is not a false statement. Plaintiff does in fact have an extensive shoplifting record.²³ Further, as discussed above, Cpl. Murray is immune from civil liability for tort claims under the State Tort Claims Act.

Staples' Motion to Dismiss

When reviewing a motion to dismiss, the Court must determine whether plaintiff has a viable cause of action.²⁴ Plaintiff's complaint may not be dismissed "unless it appears to a certainty that under no set of facts which could be proved to support the claim asserted would the plaintiff be entitled to relief."²⁵ When applying this standard, the Court will accept as true all well-pleaded allegations.²⁶ If plaintiff may recover, the Court must deny the motion to dismiss.²⁷

Because the Court concludes that plaintiff's claims against Staples must be dismissed pursuant to Rule 12(b)(6), the Court need not address Staples' grounds for relief under Rules 12(b)(4) and (5).

²² See *Phillips*, 2004 WL 692656, at *1 (dismissing the complaint where the plaintiff failed to "clearly and succinctly" plead the five elements of defamation and where the defendants, who were state employees, committed the alleged wrongs were entitled to immunity under 10 *Del. C.* § 4001).

²³ Plaintiff has been arrested 22 times for shoplifting and either adjudicated or pled guilty 10 times between July 25, 2002 and October 7, 2007.

²⁴ *Proctor v. Taylor*, 2006 WL 1520085, at *1 (Del. Super.).

²⁵ *Lord v. Souder*, 748 A.2d 393, 398 (Del. 2000).

²⁶ *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

²⁷ *Id.*

Tort Claims

Staples and its employees are immune from suit under 11 *Del. C.* § 840(d). The Delaware code provides stores and their employees with immunity from civil and criminal liability for assisting the police in the detention and arrest of shoplifting suspects, provided that they had probable cause to believe that the accused shoplifted.²⁸

An eyewitness account of a crime is sufficient for probable cause.²⁹ The Staples employee not only witnessed the shoplifting, but had also helped one of the suspects prior to the incident. Plaintiff does not dispute the employee's account of events. Instead, plaintiff argues that he could not have been the shoplifter because he was in jail at the time of the incident. Such a statement is irrelevant to whether the eyewitness had probable cause to believe that plaintiff was the shoplifter. The Court finds that Staples and its employee acted in good faith and with probable cause. Plaintiff has failed to provide any facts to negate immunity. Therefore, the Court finds that Staples and its employees are immune from suit under 11 *Del. C.* § 840(d).

²⁸ 11 *Del. C.* § 840(d).

²⁹ See *O'Neil v. State*, 691 A.2d 50, 54 (Del. 1997) (stating that direct observation is sufficient to establish probable cause); see also *Sirmans v. State*, 2008 WL 1778249 (Del.) (holding that eyewitness' account of individual shoplifting was sufficient to uphold conviction).

Constitutional Claims

Plaintiff's constitutional claims against Staples and its employee are inappropriate. To state a civil rights claim, "a plaintiff must allege 'the violation of a right secured by the Constitution or laws of the United States and must show that the alleged deprivation was committed by a person acting under color of state law.'"³⁰ An individual acts "under color of state law" when it is "clothed with the authority of state law."³¹

Staples is a private corporation that reported a crime to the police and cooperated with the police's investigation of the crime. A private individual who assists law enforcement does not act under color of state law.³² The Court finds that Staples and its employees were not acting under color of state law when they reported the crime and cooperated with the police. Plaintiff has failed to state a valid civil rights claim against Staples or its employees.

CONCLUSION

The Court finds that plaintiff can not recover under any conceivable set of circumstances against any of the defendants. The Court finds that are all of the defendants entitled to immunity, and plaintiff has failed to provide any facts that

³⁰ *Abbott v. Gordon*, 2008 WL 821522, at *5 (Del. Super.) (quoting *Cullom v. Boeing, Inc.*, 2007 WL 1732097, at *5 (D. Del.)).

³¹ *Id.*

³² *See Padover v. Gimbel Bros., Inc.*, 412 F.Supp. 920, 923 (D.C.Pa. 1976).

would negate such immunity. Further, plaintiff's claims are conclusory, not supported by specific factual allegations, and lack merit.

THEREFORE, plaintiff's Motion for Summary Judgment is hereby **DENIED**.

Cpl. Murray's Cross-Motion for Summary Judgment is hereby **GRANTED**.

Staples' Motion to Dismiss is hereby **GRANTED**.

Plaintiff's Motion for an Order Compelling Discovery is hereby **DENIED AS MOOT**.

This case is hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston