

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LARY W. GREMP,

No. C 08-2303 MMC

Plaintiff,

**ORDER DENYING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT;
DENYING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT; VACATING
HEARING**

v.

SARAH LITTLE, et al.,

Defendants

Before the Court are two motions: (1) defendants Patrick Taylor ("Taylor") and Glenn H. Van Schaack's ("Van Schaack") Motion for Summary Judgment and/or Adjudication, filed August 7, 2009; and (2) plaintiff Lary W. Grempe's ("Grempe") Motion for Summary Judgment and/or Adjudication, filed August 7, 2009. Both motions have been fully briefed.¹ Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.²

¹Defendants' Administrative Motion for Leave to Submit Supplemental Points & Authorities, filed September 9, 2009, is hereby DENIED, for the reason defendants fail to explain why they did not earlier make the arguments raised herein. The Court notes, however, that consideration of the supplemental filing would not change the conclusions reached herein.

²By order filed September 9, 2009, the Court deemed the matters suitable for decision on the parties' respective submissions, and vacated the hearing scheduled for September 11, 2009.

1 **BACKGROUND**

2 In his Second Amended Complaint (“SAC”), Grempp alleges the Chief Assistant
3 District Attorney of Sonoma County, in 1997, filed a felony complaint against him for two
4 violations of § 115(a) of the California Penal Code,³ and in connection therewith obtained
5 from a state court judge an arrest warrant. Grempp alleges the warrant was executed in
6 November 2006, when he was arrested at his place of business, that he hired an attorney
7 to defend him, and that, in February 2007, the District Attorney of Sonoma County
8 dismissed the charges “in the interests of justice’ because of ‘insufficient evidence.’” (See
9 SAC ¶ 105.) Grempp further alleges that Taylor and Van Schaack, who were at all relevant
10 times employees of the Bureau of Livestock Identification (“Bureau”), a department within
11 the California Department of Food and Agriculture, violated 42 U.S.C. § 1983 by subjecting
12 him to the above-referenced arrest and prosecution, in that, prior to the filing of the criminal
13 complaint, they knowingly made false and misleading statements to the Chief Assistant
14 District Attorney concerning Grempp’s alleged violations of § 115(a).

15 **LEGAL STANDARD**

16 Rule 56 of the Federal Rules of Civil Procedure provides that a court may grant
17 summary judgment “if the pleadings, the discovery and disclosure materials on file, and any
18 affidavits show that there is no genuine issue as to any material fact and that the movant is
19 entitled to judgment as a matter of law.” See Fed. R. Civ. P. 56(c).

20 The Supreme Court’s 1986 “trilogy” of Celotex Corp. v. Catrett, 477 U.S. 317 (1986),
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electric Industrial Co.
22 v. Zenith Radio Corp., 475 U.S. 574 (1986), requires that a party seeking summary
23 judgment show the absence of a genuine issue of material fact. Once the moving party
24 has done so, the nonmoving party must “go beyond the pleadings and by [its] own

25 _____
26 ³Section 115(a) provides as follows: “Every person who knowingly procures or
27 offers any false or forged instrument to be filed, registered, or recorded in any public office
28 within this state, which instrument, if genuine, might be filed, registered, or recorded under
any law of this state or of the United States, is guilty of a felony.” See Cal. Penal Code
§ 115(a).

1 affidavits, or by the depositions, answers to interrogatories, and admissions on file,
2 designate specific facts showing that there is a genuine issue for trial.” See Celotex, 477
3 U.S. at 324 (internal quotation and citation omitted). “When the moving party has carried
4 its burden under Rule 56(c), its opponent must do more than simply show that there is
5 some metaphysical doubt as to the material facts.” Matsushita, 475 U.S. at 586. “If the
6 [opposing party’s] evidence is merely colorable, or is not significantly probative, summary
7 judgment may be granted.” Liberty Lobby, 477 U.S. at 249-50 (citations omitted).
8 “[I]nferences to be drawn from the underlying facts,” however, “must be viewed in the light
9 most favorable to the party opposing the motion.” See Matsushita, 475 U.S. at 587
10 (internal quotation and citation omitted).

11 **DISCUSSION**

12 Taylor and Van Schaack argue they are entitled to summary judgment on Grempp’s
13 § 1983 claim, for the asserted reason that Grempp cannot establish the violation of a federal
14 right and/or that they are entitled to qualified immunity. Grempp, on the other hand, argues
15 he is entitled to summary judgment on his claim.

16 **A. Applicable Law**

17 The Court, at the outset, observes that the parties, in their respective motions, rely
18 on different lines of case authority to establish a legal framework applicable to the instant
19 analysis.

20 In particular, Taylor and Van Schaack rely on cases in which the plaintiff was
21 arrested without a warrant and the prosecutor subsequently made a decision to institute
22 criminal proceedings after having received allegedly false or misleading information from
23 the defendant. (See Defs.’ Mot., filed August 7, 2009, at 5:1-19.) Under this line of cases,
24 the plaintiff bears the burden of overcoming a presumption that the prosecutor “exercised
25 independent judgment” in determining to file charges, and can satisfy that burden by, for
26 example, offering evidence to support a finding that the defendant submitted to the
27 prosecutor information the defendant knew was false. See, e.g., McSherry v. City of Long
28 Beach, 560 F.3d 1125, 1130, 1132 (9th Cir. 2009) (holding plaintiff’s evidence, that

1 defendants “knowingly supplied false information” to prosecutor, sufficient to rebut
2 presumption prosecutor exercised independent judgment). In that regard, a plaintiff may
3 proceed against a defendant who knowingly provides “relevant” false information to the
4 prosecutor, even where, in the absence of such false information, probable cause
5 nonetheless exists to support an arrest for the charge on which the prosecutor initiated the
6 proceedings. See id. at 1132-33. Moreover, because a “clearly established” right exists
7 “not to be subjected to criminal charges on the basis of false evidence that was deliberately
8 fabricated by the government,” where a triable issue is raised as to a defendant’s
9 presentation of false or misleading information to the prosecutor, such defendant is not
10 entitled to qualified immunity. See id. at 1127, 1130 (finding where determination of
11 whether defendants provided false information to prosecutor was “issue for the trier of fact,”
12 district court erred by finding defendants entitled to qualified immunity).

13 Grempp, by contrast, relies on cases in which the plaintiff was arrested pursuant to an
14 arrest warrant and, in support of the application for such warrant, the defendant allegedly
15 submitted an affidavit containing statements known to him to be false and/or misleading.
16 (See Pl.’s Mot., filed August 7, 2009, at 23:7-24:5.) Under this line of cases, the plaintiff
17 has the burden to establish that “but for the dishonesty, the affidavit would not support a
18 finding of probable cause.” See, e.g., Liston v. County of Riverside, 120 F.3d 965, 972-74
19 (9th Cir. 1997). Consequently, unless the allegedly false or misleading statements in the
20 affidavit are “material to a finding of probable cause,” in that a “reasonable magistrate”
21 would not issue the warrant if those statements had been omitted, the defendant is entitled
22 to summary judgment. See id.⁴

23
24 ⁴The development of two distinct tests, as set forth in the two lines of cases, appears
25 to derive from a focus on the pertinent decision-maker. In the latter line of cases, the
26 pertinent decision is made by a magistrate, who does not have discretion to refuse to issue
27 a warrant if probable cause exists. See, e.g., Cal. Penal Code § 813(a) (providing
28 magistrate “shall issue a warrant” if magistrate finds “there is reasonable ground to believe
that the defendant has committed [the alleged offense]”). In the former lines of cases, the
pertinent decision is made by a prosecutor who, even if probable cause exists to believe
the arrested person has committed a crime, has discretion not to pursue criminal charges,
and, consequently, false or misleading information beyond that required to establish
probable cause may well play a role in the prosecutor’s determination to file charges.

1 In the instant case, although an arrest warrant was obtained from the state court, the
2 prosecutor first made a determination to initiate criminal proceedings, and, indeed, filed a
3 felony complaint before Grempp was arrested. Further, neither Taylor nor Van Schaack
4 signed an affidavit or otherwise provided sworn testimony to a state court, or to anyone
5 else. Under such circumstances, the Court finds the underlying facts in the line of cases on
6 which Taylor and Van Schaack rely most closely resembles the facts alleged herein, and,
7 accordingly, such authority provides the relevant law for resolution of Grempp's § 1983
8 claim.

9 **B. Relevant Evidence**

10 The statements on which Grempp relies are contained in a report dated October 16,
11 1996 ("Report"), prepared by Morris Weisbart ("Weisbart"), an employee of the Bureau,
12 which Report was submitted to the prosecutor by the Bureau. According to Grempp's
13 evidence, Taylor was the source of the factual information contained in the Report (see
14 Stanzler Decl., filed August 7, 2009, Ex. 1 at 18:11-23, 21:18-22:7, 26:14-17),⁵ and Van
15 Schaack both approved the Report before it was submitted to the prosecutor and spoke to
16 the prosecutor about its content (see id. Ex. 1 at 22:11-24; Stanzler Decl., filed August 19,
17 2009, Ex. 3 at 54:12-25).

18 **1. The Report**

19 The Report consists of a brief summary, a listing of state statutes that are either
20 quoted or paraphrased, a list of witnesses, a number of exhibits, and an "Investigation"
21 section. (See Van Schaack Decl. Ex. A.) In the Report's Investigation section, Weisbart
22 sets forth the circumstances pertaining to what the Report characterizes as a "crime"
23 committed by a "suspect," identified as Grempp, specifically, the crime of "falsifying records."
24 (See id. Ex. A at BC 002, 007-008.) In particular, the Report sets forth the Bureau's view
25 that Grempp's presentation to the Bureau of a purported bill of sale constituted a violation of
26

27 ⁵Additionally, the Report itself identifies Taylor as the "reporting party." (See Van
28 Schaack Decl. Ex. A at BC 002.)

1 §§ 21709 and 21710 of the California Food and Agriculture Code,⁶ and further constituted a
2 violation of § 115(a) of the California Penal Code, which statute, according to the Bureau,
3 required bills of sale be “mailed to the director [of the Bureau] within 30 days of the date of
4 the sale.” (See id. Ex. A at BC 002, 006.)

5 Additionally, in the Investigation section, the Report conveyed the following
6 information:

7 • Grempp, an auctioneer who operated Modesto Livestock Commission Co.
8 (“Modesto Livestock”), and Vic Chiapetta (“Chiapetta”), a rancher, were involved in a
9 dispute over the right to possess 40 heifers, which at that time were being raised on
10 Chiapetta’s property. (See id. Ex. A at BC 007.)

11 • Grempp, who wanted to deliver the heifers for sale at an upcoming auction, sought
12 the assistance of the Bureau in regaining possession, and the Bureau assigned a brand
13 inspector, specifically, Maureen Doherty (“Doherty”), to the task. (See id.)

14 • Thereafter, Grempp and Chiapetta, in the course of their respective conversations
15 with Doherty, each presented what purported to be a form bill of sale for the same heifers,
16 each dated May 8, 1995, with the former listing Modesto Livestock, Grempp’s company, as
17 the purchaser (hereinafter, “Grempp Bill of Sale”), and the latter listing Chiapetta as the
18 purchaser (hereinafter, “Chiapetta Bill of Sale”). (See id. Ex. A at BC 007-008.)⁷

19 • The following day, February 29, 1996, Chiapetta executed bills of sale transferring
20 ownership of the heifers to Grempp in exchange for a payment by Grempp in a specified

21
22 ⁶Under §§ 21709 and 21710, respectively, it is unlawful to present to a state
23 agricultural inspector any altered invoice of sale or falsified bill of sale. (See id. Ex. A at BC
006.)

24 ⁷In support of his motion, Grempp offers evidence that Modesto Livestock had
25 purchased the heifers and that an employee of Modesto Livestock, in connection therewith,
26 had filled out what Grempp describes as a “custodial invoice” to show the heifers were
27 “going to Chiapetta” to be raised. (See Luann Grempp Decl., filed August 7, 2009, ¶¶ 9-12;
28 Grempp Decl., filed August 7 2009, ¶ 5.) That document, however, states the heifers were
“sold to Chiapetta” and refers to Chiapetta as the “purchaser.” (See Luann Grempp Decl.
Ex. 3 (Chiapetta Bill of Sale).) Grempp does not argue, let alone offer evidence to support a
finding that, he advised Doherty or any other employee of the Bureau of the above
explanation for the existence of two conflicting documents stating in essence the same
heifers had been sold to two different parties.

1 amount (hereinafter, “February 1996 Sale”). (See id. Ex. A at BC 008.)

2 • Subsequently, at the Bureau’s request, the Packers and Stockyard Administration,
3 a federal agency, conducted an audit of Modesto Livestock’s records, which audit
4 “confirmed” the Grempe Bill of Sale was “falsified.” (See id.)

5 **2. Alleged False and Misleading Statements**

6 By the instant action, Grempe asserts the Report’s description of the Grempe Bill of
7 Sale as “falsified” was a knowing misrepresentation. In that regard, Grempe argues, in
8 essence, the Report constitutes both a conscious overstatement and understatement of
9 facts known to Taylor and Van Schaack, in an effort to make out a case that Grempe had
10 violated the law.⁸

11 The Court considers, in turn, the statements and omissions on which Grempe relies.

12 **a. Circumstances Surrounding February 1996 Sale**

13 The Report describes the circumstances of a transaction between Grempe and
14 Chiapetta, by which Chiapetta assertedly transferred title of the subject heifers to Modesto
15 Livestock, Grempe’s company. Specifically, according to the Report, “Grempe wanted
16 Chiapetta to relinquish his proof of ownership, but instead Chiapetta wrote the two bills of
17 sale to Modesto Livestock so that the brand inspector [Doherty] could release the heifers to
18 be sold in Modesto Livestock’s name.” (See id. Ex. A at BC 008 (internal citation omitted).)
19 Grempe argues said statement was false and misleading because the Report failed to
20 disclose that the transaction between Chiapetta and Grempe was initially proposed by
21 Doherty and was required by her as a condition of Grempe’s obtaining possession of the
22 heifers. (See Grempe Decl. ¶ 29.)⁹

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24 ⁸Grempe states that he and Taylor had known each other for many years and had
25 engaged in “various arguments” regarding Taylor’s ability to perform his job (see Grempe
26 Decl. ¶ 28), which disagreements, Grempe asserts, provided Taylor and Van Schaack,
27 Taylor’s supervisor, a motive to engage in the conduct alleged herein.

28 ⁹Additionally, Grempe argues the Report is misleading because it omits the fact that
Chiapetta did not “rebrand” the heifers. (See Pl.’s Mot. at 15:24-25.) Grempe fails to cite,
however, any evidence to support a finding that Chiapetta did not rebrand the heifers and,
if Chiapetta did not, that either Taylor or Van Schaack was aware of such circumstance.
Further, although Grempe fails to explain the evidentiary significance of rebranding, to the

1 The Court finds the omitted information qualifies as “relevant” with respect to the
2 prosecutor’s assessment of the case and determination to institute criminal proceedings.
3 See McSherry, 560 F.3d at 1132-33. In particular, in the absence of the context in which
4 the February 1996 Sale occurred, a reasonable inference can be drawn that both parties to
5 the transaction had acknowledged Chiapetta’s ownership of the subject heifers. Neither
6 side is entitled to summary judgment on the issue of whether such omission was the result
7 of a conscious effort to mislead the prosecutor, however, for the reason that each party has
8 submitted evidence sufficient to raise a triable issue with respect thereto. (See Stanzler
9 Decl., filed August 7, 2009, Ex. 9 at 60:6-17 (acknowledging Taylor’s awareness of
10 Doherty’s proposal); id. Ex. 3 at MW 021 (stating Van Schaack “advised [Doherty] what to
11 do”); Taylor Decl., filed August 7, 2009, ¶ 9 (attributing ultimate content of Report to
12 Weisbart); Stanzler Decl., filed August 7, 2009, Ex. 10 at 6 (stating Van Schaack “wasn’t
13 involved” in “dealings” with Grempp “at all”).)

14 **b. Statement Re: “Confirmed” Falsification**

15 The Report, as noted, states the Bureau requested that a federal agency conduct an
16 audit of Modesto Livestock’s records and, further, that such “audit confirmed the invoice
17 presented by Grempp [was] falsified.” (See Van Schaack Decl. Ex. A at BC 008.) Grempp
18 argues the latter statement was false because the auditor’s report did not include a
19 conclusion as to whether the Grempp Bill of Sale was falsified.

20 Although that statement, standing alone, may more properly be described as a
21 conclusion rather than a statement of fact, the statement is dependent in part on the above-
22 described omission regarding the February 1996 Sale by Chiapetta to Grempp and cannot
23 be readily separated therefrom. Neither side is entitled to summary judgment on the issue
24 of whether such statement was the result of a conscious effort to mislead the prosecutor,
25 however, for the reason that a triable issue of fact exists as to whether the subject

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27 extent Grempp may be arguing the true owner would have rebranded the heifers after
28 purchasing them, Grempp cites no evidence to support a finding that Grempp himself ever did
so.

1 statement was knowingly false, both for the reasons stated with respect to the above-
2 described omission and in light of conflicting evidence regarding the findings made by the
3 auditor. (See id. Ex. A at BC 024-052 (report including no conclusion of falsity); Taylor
4 Decl. ¶ 7 (stating federal auditor told Bureau that auditor “had found reason to believe
5 [Grempp Bill of Sale] was false”).)

6 **c. Statement Re: Statutory Filing Requirement**

7 The Report, as noted, includes a section in which certain California statutes are
8 either quoted or paraphrased. (See Van Schaack Decl. Ex. A at BC 006.) In paraphrasing
9 the text of § 21702 of the Food and Agriculture Code, the Report, after correctly stating that
10 a person may not buy or sell an animal unless the buyer receives a written bill of sale, then
11 states: “The bill of sale required by this section shall be made out in triplicate with one copy
12 being mailed to the director within 30 days of the date of the sale.” (See id.) As Grempp
13 notes, however, § 21702 does not require such bill of sale be mailed to the “director” or to
14 any state employee or agency. See Cal. Food & Agric. Code § 21702. Grempp argues the
15 Report’s statement that he was required to file bills of sale constitutes a false statement
16 made to the prosecutor.

17 As discussed above, a prosecutor is presumed to exercise independent judgment in
18 determining whether to file charges, see McSherry, 560 F.3d at 1130, and, ordinarily, such
19 prosecutor would be expected to independently review the applicable law. Even assuming,
20 however, the presumption of independent judgment can, under some circumstances, be
21 rebutted by evidence of a knowing misrepresentation as to the law, Grempp cannot, in this
22 instance, satisfy his burden to rebut such presumption, as the undisputed evidence
23 demonstrates that prior to her seeking a warrant for Grempp’s arrest, the prosecutor was
24 apprised by Van Schaack that the Grempp Bill of Sale was not the type of document
25 required by law to be filed. (See Stanzler Decl., filed August 7, 2009, Ex. 9.)

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C. Summary

For the reasons stated above, a triable issue of fact exists as to whether Taylor and Van Schaack knowingly made false or misleading statements to the prosecutor, specifically, the Report's omission of facts regarding the circumstances under which Chiapetta issued the February 1996 bills of sale and the Report's statement that the federal auditor had "confirmed" the falsity of the Grep Bill of Sale.

Accordingly, neither party has established that summary judgment on Grep's § 1983 claim is proper.


CONCLUSION

As set forth above:

1. Taylor and Van Schaack's motion for summary judgment is hereby DENIED; and
2. Grep's motion for summary judgment is hereby DENIED.

IT IS SO ORDERED.

Dated: September 11, 2009


MAXINE M. CHESNEY
United States District Judge