

BOBBY B. BROUSSARD, SR.

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NO. 2001-CA-1441

VERSUS

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COURT OF APPEAL

**HOUSING AUTHORITY OF
NEW ORLEANS, MICHAEL
KELLY, KERMIT GIBSON,
NATHANIEL JOHNSON AND
SHARLENE SULLIVAN**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-14490, DIVISION "J-13"
Honorable Nadine M. Ramsey, Judge

Charles R. Jones
Judge

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones and Judge Patricia Rivet Murray)

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AFFIRMED

Plaintiff/Appellant, Bobby Broussard, appeals the judgment of the district court granting the Motion for Summary Judgment in favor of defendants/appellees, Sharlene Sullivan, the Housing Authority of New Orleans (hereinafter “HANO”), and three HANO employees, Michael Kelly, Kermit Gibson, Nathaniel Johnson, which resulted in the dismissal of his lawsuit. We affirm.

In 1995, Mr. Broussard was employed by HANO for over twenty years and held the position of Facility Maintenance Manager I at the St. Thomas housing development in New Orleans. In September of 1995, HANO employee, Desmond Mayfield, received information from Ms. Bell, a St. Thomas resident who is now deceased, that she saw Mr. Broussard remove supplies from a St. Thomas storeroom and load them onto his assigned HANO truck late one weekend night. Nathaniel Johnson, HANO facility manager at St. Thomas, was told by Mr. Mayfield that another St. Thomas resident, Sharlene Sullivan, had reported the same incident as Ms. Bell. When Mr. Johnson confronted Mr. Broussard about the allegations of theft made against him, Mr. Broussard denied the allegations.

HANO investigated the matter and found that the allegedly stolen supplies were in fact missing. These items included floor tiles, floor wax, toilet tanks and toilet bowls. HANO knew that Mr. Broussard used his HANO truck on weekends and that Mr. Broussard knew how to access the storeroom. HANO employees found broken glass in the area near the storeroom and noted that Mr. Broussard's truck had a broken side mirror. These employees also found green paint on Mr. Broussard's truck matching the color of paint on wood piled outside the storeroom. HANO employees tested Mr. Broussard's truck and determined that it could haul the very heavy supplies that were missing.

HANO believed, as a result of its internal investigation, that Mr. Broussard took the supplies. HANO placed him on leave without pay approximately one month after HANO received the reports of theft and terminated Mr. Broussard's employment effective December 29, 1995.

Mr. Broussard appealed his termination. The Civil Service Commission overturned the termination and reinstated him with full back pay and benefits with interest. Mr. Broussard returned to work at HANO.

Meanwhile, HANO reported the incident to the New Orleans Police Department, and the local authorities arrested and charged Mr. Broussard with the crime of theft in excess of \$1,000. The State's prosecution of Mr.

Broussard ended because Ms. Sullivan would not testify against Mr.

Broussard after she allegedly received threats.

On September 3, 1996, Mr. Broussard filed a lawsuit against Ms. Sullivan, HANO and the three HANO employees, alleging negligence, defamation, malicious prosecution, and federal civil rights violations. On February 23, 2001, the defendants filed a Motion for Summary Judgment, asserting that Mr. Broussard's case should be dismissed because essential elements of each of the claims could not be proven. The district court held a hearing on the motion on March 19, 2001 and rendered judgment on March 23, 2001, dismissing all of Mr. Broussard's claims with prejudice. Mr. Broussard appeals this judgment.

Mr. Broussard assigns error to the district court's conclusions regarding his defamation, malicious prosecution, and civil rights claims, and to the granting of summary judgment notwithstanding the defendants' failure to comply with La. C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Taylor v. Rowell, 98-2865 (La. 5/18/99), 736 So.2d 812, 814; Billes/Manning Architects v. Accountemps, Division of Robert Half of Louisiana, Inc., 98-3044 (La. App. 4 Cir. 9/15/99, 742 So.2d 728, 731. Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La.Code Civ.P. art. 966. Pursuant to the 1996 amendments to article 966, summary judgments are now favored, and the rules regarding summary judgments are to be liberally applied. La.Code Civ.P. art. 966(A)(2). The amendments leveled the playing field for the litigants, required equal scrutiny of documentation submitted by the parties, and removed the earlier overriding presumption in favor of trial on the merits. Rogers v. Horseshoe Entertainment, 32,800 (La. App. 2 Cir. 8/1/00), 766 So.2d 595, 599, writs denied, 00-2894 and 00-2905 (La. 12/8/00), 776 So.2d 463-464.

In 1997, La. C.C.P. art. 966 was further amended to alter the burden of proof in summary judgment proceedings. The initial burden of proof remains on the movant to show that no genuine issue of material fact exists...After the movant has met its initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La.Code Civ.P. art. 966(C)(2); Smith v. General Motors Corp., 31-258 (La. App. 2 Cir. 12/9/98) 722 So.2d 348, 351. If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the movant is entitled to summary judgment. La.Code Civ.P. art. 966; Schwarz v. Administrators of Tulane Educational Fund, 97-0222 (La. App. 4 Cir. 9/10/97), 699 So.2d 895, 897. When a motion for summary judgment is properly supported, the non-moving party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La.Code Civ.P. art. 967; Townley v. City of Iowa, 97-493 (La. App. 3 Cir. 10/29/97), 702 So.2d 323, 326.

Marrogi v. Gerber, 2000-1091, p. 10-11 (La. App. 4 Cir. 5/16/01), 787 So.2d 1098, 1105-1106, writ denied, 2001-1768 (La. 9/28/01), 798 So.2d 120.

In his first assignment of error, Mr. Broussard argues that the district court erred in granting summary judgment on his malicious prosecution claims by concluding that the evidence indicates that the defendants had an honest, good faith belief that Mr. Broussard committed the crime of theft. Specifically, Mr. Broussard complains that the finding of the district court that HANO had probable cause to initiate criminal proceedings was unreasonable.

With regard to his malicious prosecution claims, in its Reasons for Judgment, the district court described HANO's investigation of the reported incident and then stated:

Upon a thorough review of all the evidence regarding this issue, the Court finds that the defendants have shown that they had probable cause to initiate criminal proceedings against the plaintiff in this matter. The fact that the State Civil Service Commission subsequently overturned plaintiff's termination does not negate the probable cause on the part of the defendants to initiate these proceedings. For these reasons, the Court finds that plaintiff has failed to satisfy all of the required elements of his malicious prosecution claim against the defendants.

In his petition alleging malicious prosecution, Mr. Broussard vaguely

identified as a negligence cause of action this claim in which he maintains that his termination resulted from the failure of HANO to conduct a thorough and proper investigation of the charges of theft levied against him. He maintains that the charges, his arrest, incarceration, suspension, and termination were improper and resulted from the fault, negligence, carelessness, or inattention of the defendants.

In support of their summary judgment motion, the defendants submitted affidavits from HANO employees, Mr. Mayfield, Mr. Gordon and Mr. Gibson, and from Ms. Janice Culotta, the assistant district attorney who prosecuted the criminal case against Mr. Broussard. They also attached portions of the transcript from Mr. Broussard's civil service hearing, which included testimony from Ms. Sullivan, and the deposition of Mr. Johnson. The testimony provided in these documents primarily involves the scope of HANO's investigation of the reported incident, the circumstances of Mr. Broussard's termination from HANO, and the circumstances surrounding his criminal prosecution.

With regard to his malicious prosecution claim, Mr. Broussard submitted his own affidavit in opposition to the Motion for Summary Judgment. He states in the affidavit that the evidence he gathered indicates that the defendants did not have an honest, good faith belief that he had

committed theft.

In his affidavit, Mr. Broussard further seeks to discredit Ms. Sullivan by asserting that she was involved in a relationship with a subordinate of his, with whom there existed “bad blood”. Also, he asserts that Ms. Sullivan could not have seen the storeroom from where she claimed to have been at the time of the incident, and that it is impossible to enter the storeroom from the door Ms. Sullivan claimed to have seen him enter, and HANO employees knew this. Mr. Broussard also asserts that HANO refused to investigate his claim of an alibi for the time the theft occurred and would not let him take a polygraph test. He maintains that HANO ignored his explanation for the damage to the mirror on his vehicle and overlooked Ms. Sullivan’s failure to mention the broken glass or scraped paint. Mr. Broussard asserts that a shoulder injury he sustained in 1992 would have prohibited him from moving the items he was alleged to have moved.

“Malicious prosecution is the wrongful institution or continuation of a criminal or civil proceeding.” Shepherd v. Williams, 2000-01506, p. 7 (La. App. 3 Cir. 3/1/01), 780 So.2d 633, 637-638, quoting, Frank L. Maraist & Thomas C. Galligan, Jr., LOUISIANA TORT LAW §2-6 (d) at p. 31 (1996).

Actions for malicious prosecution have never been favored [in Louisiana], and hence, in order to sustain them, a clear case must be

established. Eusant v. Unity Industrial Life Ins. and Sick Ben Association of New Orleans, 195 La. 347, 196 So.2d 554 (1940); Coleman v. Kroger, Co., 371 So.2d 1186 (La. App. 1 Cir.), writ denied, 372 So.2d 1041 (La. 1979).

The law protects persons who resort to the courts to redress wrongs when they act in good faith upon reasonable grounds in commencing such proceeding. Aucoin v. Aetna Cas. & Sur. Co., 520 So.2d 795, 798 (La.App. 3 Cir. 1987). See also Craig v. Carter, 30,625 (La. App. 2 Cir. 9/23/98); 718 So.2d 1068, writ denied, 98-2698 (La. 12/18/98), 734 So.2d 636.

To prevail in a malicious prosecution claim [sic], the plaintiff must prove [the following] six elements: (1) the commencement or continuance of an original criminal or civil judicial proceeding, (2) its legal causation by the present defendant against the plaintiff who was defendant, (3) a bona fide termination in favor of the present plaintiff, (4) the absence of probable cause for such proceeding, (5) the presence of malice therein and (6) damage. Sam Z. Scandaliato & Assoc., Inc. v. First Eastern Bank, 629 So.2d 1347 (La. App. 4 Cir. 1993), writ denied, 94-0142 (La. 3/11/94); 634 So.2d 391; Keller v. Schwegmann Giant Supermarkets, Inc., supra; Craig v. Carter, 30,625 (La. App. 2 Cir. 9/23/98); 718 So.2d 1068, writ denied, (La. 12/18/98); 734 So.2d 636.

Kelly v. West Cash & Carry Building Materials Store, 99-0102, p. 29 (La. App. 4 Cir. 10/20/99), 745 So.2d 743, 761.

At issue in this appeal are the elements of the absence of probable cause and the presence of malice. Because Mr. Broussard offered no evidence or argument indicative of malice, his claim for malicious

prosecution initially lacks proof of one element. Nevertheless, the crucial determination regarding the absence of probable cause is whether the defendant had an honest and reasonable belief in the allegations he made. Kelly, 745 So.2d at 761.

Considering the submissions by the parties at the summary judgment proceeding in light of the applicable principles of law, we find that the determination by the district court that HANO had probable cause to believe that Mr. Broussard had committed a crime is soundly supported by the record. The initial investigation undertaken by HANO and its employees, and what that investigation revealed, gave them probable cause to believe that Mr. Broussard had committed theft. The affidavits and other documents submitted by the defendants indicate that they had an honest and reasonable belief in the information they provided to local law enforcement authorities.

Mr. Broussard's opposition to the summary judgment motion, consisting mainly of his own affidavit and references thereto, was based purely on speculation for which there was no support in the record. Simply putting one's own "evidence gathering" in affidavit form does not transform unsupported allegations into genuine issues of material fact. In this case, Mr. Broussard's affidavit does not satisfy his burden of proof in a summary judgment proceeding. See Guichard v. Super Fresh/Sav-A-Center, Inc., 97-

1573, p. 4-5 (La. App. 4 Cir. 2/4/98), 707 So.2d 1013, 1015. Furthermore, while Mr. Broussard may have pointed out discrepancies in HANO's investigation, HANO is not responsible for conducting an investigation that is of the scope and/or magnitude of a police investigation.

Moreover, while the defendants turned over information to local authorities, an action effectively initiating proceedings against Mr. Broussard, they did not pursue prosecution. Likewise, neither the district attorney's decision to end the prosecution, nor the decision of the Civil Service Commission to reinstate Mr. Broussard to his employment, impacts whether probable cause existed for HANO to reveal their investigation of Mr. Broussard.

The defendants demonstrated that there existed no genuine issue of material fact regarding probable cause or malice. Once the burden of proof shifted to Mr. Broussard, he did not produce factual support to indicate that he would be able to satisfy his evidentiary burden at trial. He presented only unsupported allegations. Summary judgment in favor of the defendants on any malicious prosecution claims was appropriate. This assignment of error lacks merit.

In his second assignment of error, Mr. Broussard asserts that the district court further erred in determining that the defendants were entitled to

summary judgment on his defamation claims and, in particular, concluding that the particular statements made were not published, were protected by a qualified privilege, and made in good faith.

In its Reasons for Judgment, the district court stated the following with regard to the defamation claims:

In the present matter, plaintiff asserts that statements made in the defendants' correspondence regarding the alleged theft justify his claim for defamation. The particular letters plaintiff is referring to include the following: (1) an October 12, 1995 memorandum from the (sic) Michael Kelly, the Executive Director of HANO, to Lloyd Gavoin, Internal Audit Supervisor, (2) an October 27, 1995 memorandum from Irma Garcia, HANO Human Resources Director to plaintiff, and (3) a December 15, 1995 letter from Michael Kelly, the Executive Director of HANO, to plaintiff which states that "Mr. Kermit Gibson, Deputy Executive Officer/Management charges you with theft of HANO property." . . .

Upon a thorough and comprehensive review of the evidence presented in this matter, the Court finds that none of the letters nor the statements included therein were published to anyone other than those listed in the documents. Moreover, the court finds that all of the statements included in the letters were protected by the qualified privilege since they were made by HANO officials, who have an active role in the employment decisions regarding plaintiff, to the police and others within HANO who also have an equally, active role in employment decisions regarding plaintiff. Likewise, the Court finds that the statements were made in good faith since they were made after a thorough investigation of the plaintiff and a

reasonable belief that the plaintiff had committed the alleged theft. For these reasons, the Court finds that plaintiff has not satisfied all of the elements required to maintain a cause of action for defamation.

With his opposition to the summary judgment motion, Mr. Broussard submitted the three letters mentioned by the district court. Mr. Broussard contests the conclusions of the district court that the letters were not published and that the statements in the letters were protected by a qualified privilege because they were written by HANO employees and sent to other HANO employees or to Mr. Broussard. He argues that the publication element is met because the defendants' accusations were known by various groups of people, that the evidence indicated that Mr. Johnson and Mr. Gibson did not act in good faith, and that the protection offered by the qualified privilege is subject to instances when a state agency requests the information alleged to be defamatory.

The elements of an action for defamation are: (1) defamatory words, (2) publication, (3) falsity, (4) malice, actual or implied, and (5) resulting injury. Albarado v. Abadie, 97-478 (La. App. 5 Cir. 11/12/97), 703 So.2d 736, 739, writ denied, 97-C-3081, (La. 2/13/98), 709 So.2d 756; Cangelosi v. Schwegmann Brothers Giant Super Markets, 390 So.2d 196, 198 (La. 1980). If even one of these elements is lacking the cause of action fails. Douglas v. Thomas, 31-470, (La. App. 2 Cir. 2/24/99), 728 So.2d 560, 562; writ denied, 99-0835, (La. 5/14/99), 741 So.2d 661.

A crucial element in a defamation claim is

proving that the defendant made an unprivileged publication to a third party.

Brunet v. Fullmer, 2000-0644, p. 3-4 (La. App. 4 Cir. 1/10/01), 777 So.2d 1240, 1241-1242.

Publication is the communication of a defamatory statement to someone other than the party defamed. Kelly, 745 So.2d at 752. The only defamatory statements alleged are in the three letters mentioned by the district court. Mr. Broussard's listing in his brief of groups of people who may have learned of his predicament is not an adequate demonstration of a defamatory statement. Only one of the three letters Mr. Broussard references to support his defamation claim is directed to someone other than Mr. Broussard. That statement might satisfy the publication element; therefore, we will examine only that letter to determine if the qualified privilege applies.

In Kelly, 745 So.2d at 752, this Court discussed the concept of a qualified privilege:

An otherwise defamatory publication enjoys a qualified conditional privilege if made (a) in good faith; (b) on any subject matter in which the person communicating has an interest or in reference to which he has a duty; and, (c) to a person having a corresponding interest or duty. Clements v. Ryan, 382 So.2d 279, 282 (La. App. 4 Cir. 1980). A statement is made in good faith when it is made with reasonable grounds for believing it to be true. Id.; Harrison v. Uniroyal,

Inc., 366 So.2d 983, 986 (La. App. 1 Cir. 1978). The jurisprudence establishes that communications between appropriate persons within the employer's walls, concerning allegations of conduct by an employee that bears on the employer's interest, are subject to the qualified privilege if made in good faith. Martin v. Lincoln General Hosp., 588 So.2d 1329 (La. App. 2 Cir. 1991), writ denied, 592 So.2d 1302 (La. 1992).

The jurisprudence does not support Mr. Broussard's claim that a qualified privilege exists only when a state agency requests the information alleged to be defamatory. Moreover, the district court's reliance on HANO's internal investigation in determining that the statements at issue were made in good faith is reasonable and supported by the record. Specifically with regard to the letter sent by HANO's Executive Director to its Internal Audit Supervisor, these individuals both clearly have an interest in the subject matter of their correspondence.

Therefore, Mr. Broussard failed to meet his burden of proving two elements of a defamation claim, that each statement was published and not protected by a qualified privilege. This assignment of error lacks merit.

In his third assignment of error, Mr. Broussard asserts that the district court erred in granting summary judgment on his Section 1983 claims for deprivation of his civil rights, specifically finding that the actions of local law enforcement agencies in arresting and prosecuting him were done

independently of the defendants.

On the Section 1983 claims made by Mr. Broussard, the district court in its Reasons for Judgment stated:

The federal civil rights statute, 42 U.S.C. § 1983, allows suit to be brought against any “person” acting “under color of” state or local law for the deprivation of “any rights, privileges or immunities secured by the Constitution and the laws of the United States.” The plaintiff alleges that the defendants violated 42 U.S.C. § 1983 by their involvement in the investigation and subsequent arrest of plaintiff. As such, plaintiff asserts that because HANO is a political subdivision of the State, he has satisfied the burden of proving a state action, a required element under 42 U.S.C. § 1983. The Court does not agree.

The Court finds that the only constitutional right plaintiff alleges he was deprived of was his liberty due to his arrest and incarceration. The Court agrees with the defendant’s (sic) contention that these actions were taken by the New Orleans Police Department and the Orleans Parish District Attorney’s Office, independent of the defendants, upon a finding that probable causes (sic) existed to arrest and charge plaintiff with theft. Therefore, the Court finds that plaintiff has not stated a valid, state action against the defendants for his arrest and incarceration. For these reasons, the Court finds that plaintiff has not satisfied all of the required elements for a claim under 42 U.S.C. § 1983.

Mr. Broussard argues that the “state action” or “state actor”

requirement of Section 1983 was met in this case against the defendants because HANO's attorney was present at various times during the criminal proceedings against him and advised the criminal court about the alleged threats made to Ms. Sullivan. Mr. Broussard also references the affidavit he submitted in the district court of a former assistant district attorney who asserted that, in his experience, the district attorney's office does not prosecute theft crimes without the victim's cooperation. Finally, Mr. Broussard argues that the state action requirement is met because a police officer assigned to the housing development was involved in his investigation and arrest.

The fundamental problem with Mr. Broussard's argument is that the only constitutional right that he alleges was violated—the deprivation of his liberty by his arrest and imprisonment—was not accomplished by the parties that he has sued. While some of the defendants may have initiated criminal proceedings against Mr. Broussard by making allegations against him or informing law enforcement officials of HANO's investigation, these actions do not support liability under Section 1983. Likewise, the presence of one of the defendants' attorney at the criminal proceedings against Mr. Broussard is insufficient to support Section 1983 liability. Without more, a defendants' input or cooperation with state actors will not support such

liability if the defendant himself did not act to deprive Mr. Broussard of his constitutional rights.

Furthermore, although HANO is a political subdivision of the state, Mr. Broussard has offered no reasonable argument or applicable jurisprudence to support finding that any of the defendants are “state actors” for purposes of Section 1983 liability. He did not offer evidence sufficient to prove that he satisfied the elements of a valid Section 1983 claim against these defendants. This assignment of error lacks merit.

In his final assignment of error, Mr. Broussard argues that the district court erred in granting summary judgment to the defendants because they failed to comply with La. C.C.P. art. 966(B), which required them to serve their summary judgment motion and supporting affidavits at least ten days prior to the hearing. He asserts that he received the motion seven days prior to the hearing, and that he filed an opposition three days before the hearing.

The ten-day requirement in La. C.C.P. art. 966(B) is designed to provide fair notice to opposing parties in a summary judgment proceeding. Clark v. Favalora, 98-1802, p. 7 (La. App. 1 Cir. 9/24/99), 745 So.2d 666, 671. Nevertheless, the requirement is considered waived if the opposing party appears at the summary judgment hearing and argues the merits of the motion. Chaney v. Coastal Cargo, Inc., 98-1902, p. 3 (La. App. 4 Cir.

1/20/99), 730 So.2d 971, 972; Strickland v. Board of Supervisors of Louisiana State Univ., 432 So.2d 964, 966 (La.App. 4 Cir. 1983).

Therefore, not only does Mr. Broussard fail to assert any prejudice to him by the defendants' untimely service of their motion, but also under the law he is considered to have waived his objection by opposing and arguing the merits of the motion. We find no merit in this assignment of error.

DECREE

Accordingly, having found that Bobby Broussard failed to meet his burden of proof in the summary judgment proceeding, and that Mr. Broussard's assigned errors lack merit, we affirm the judgment of the district court granting summary judgment in favor of the defendants and dismissing Mr. Broussard's claims.

AFFIRMED