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NO. COA10-1019  
NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2011

BASIL DWAYNE CHILDRESS,  
Plaintiff,

v.

Cabarrus County  
No. 09 CVS 5351

CONCORD HOSPITALITY  
ASSOCIATES, LLC, and  
JOEL B. GRIFFIN,  
Defendants.

Appeal by plaintiff from order entered 22 March 2010 by  
Judge Joseph N. Crosswhite in Cabarrus County Superior Court.  
Heard in the Court of Appeals 26 January 2011.

*Jefferson Mabrito, Attorney at Law, by Jefferson Van Daele  
Mabrito, for plaintiff-appellant.*

*Johnston Allison & Hord, P.A., by Gary J. Welch and  
Kathleen K. Lucchesi, for defendant-appellants.*

STEELMAN, Judge.

Where plaintiff's allegations, taken as true, were  
sufficient to establish that defendants lacked probable cause to  
have plaintiff arrested for trespass after he refused to remove  
a Confederate flag from the window of his hotel room, the trial

court erred by dismissing plaintiff's claim for malicious prosecution.

I. Factual and Procedural Background

Prior to 17 July 2008, Basil Childress (plaintiff) reserved a block of rooms at the Wingate Inn, owned and operated by Concord Hospitality Associates, LLC, (CHA) in Concord, North Carolina. Upon reserving the rooms, plaintiff informed the staff receptionist that he was associated with the Sons of Confederate Veterans (SCV) and that he was making reservations for the organization's national convention hosted in Cabarrus County on the weekend of 17 July 2008.

On the evening of 17 July 2008, plaintiff prepared one of the rooms reserved, Room 328, to host a reception in honor of Confederate soldiers from Kentucky. Plaintiff placed a Confederate flag in the window as part of the decorations for the reception. After several requests for plaintiff to remove the flag from the window due to "issues of sensitivity" and plaintiff's refusal, plaintiff was banned from the premises. Plaintiff was arrested at the request of Joel Griffin (Griffin), an operating partner of the hotel, and was charged with the misdemeanor of second-degree trespass.

On 21 December 2009, plaintiff filed a complaint against CHA and Griffin, individually, (collectively, defendants) and alleged claims for malicious prosecution and breach of contract. On 15 February 2010, defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure. On 22 March 2010, the trial court filed its order (1) granting defendants' motion to dismiss plaintiff's claim for malicious prosecution; (2) denying defendants' motion to dismiss plaintiff's claim for breach of contract; and (3) granting defendants' motion to dismiss plaintiff's claims against Griffin, individually.

Plaintiff appeals.

## II. Interlocutory Appeal

At the outset, we note that this appeal is taken from an interlocutory order. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). There is no right of immediate appeal from an interlocutory order except in two circumstances: "(1) the order is final as to some claims or parties, and the trial court certifies

pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed." *Currin & Currin Constr., Inc. v. Lingerfelt*, 158 N.C. App. 711, 713, 582 S.E.2d 321, 323 (2003) (quotation omitted). There was no Rule 54(b) certification in this case. Thus, the burden is on plaintiff to demonstrate that a substantial right would be lost unless the order is immediately reviewed.

Plaintiff argues that the trial court's order affects a substantial right based upon the possibility of inconsistent jury verdicts. It is well-established that

when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn "creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue."

*Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491 (1989) (quotation and citation omitted) (alteration in original).

A substantial right is affected when "there are overlapping factual issues between the claim determined and any claims which have not yet been determined" because such overlap creates the potential for inconsistent verdicts resulting from two trials on the same factual issues." *Liggett Group v. Sunas*, 113 N.C. App. 19, 24, 437 S.E.2d 674, 677 (1993) (quotation omitted).

In the instant case, plaintiff's claim for malicious prosecution was dismissed while his claim for breach of contract remains pending before the trial court. The basis of plaintiff's claim for malicious prosecution was that there was a want of probable cause for Griffin to have commenced criminal proceedings against plaintiff. This contention is necessarily dependent upon whether the demand to remove the Confederate flag from the window was in violation of the terms and conditions of the room rental contract as discussed more thoroughly *infra*. We hold that the malicious prosecution claim was so inexorably intertwined with the claim for breach of contract that plaintiff's appeal does affect a substantial right. We address the merits of plaintiff's appeal.

### III. Standard of Review

On a Rule 12(b)(6) motion to dismiss, the question is whether, as a matter of law,

the allegations of the complaint, treated as true, state a claim upon which relief can be granted. *Isenhour v. Hutto*, 350 N.C. 601, 604, 517 S.E.2d 121, 124 (1999). Dismissal under Rule 12(b)(6) is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

*Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002). We "consider plaintiff's complaint to determine whether, when liberally construed, it states enough to give the substantive elements of a legally recognizable claim." *Governor's Club, Inc. v. Governor's Club Ltd. P'ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 786 (2002) (internal citations omitted), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003). An appellate court's review of the trial court's granting of a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*. *Acosta v. Byrum*, 180 N.C. App. 562, 566, 638 S.E.2d 246, 250 (2006).

Defendants argue that we should apply the "plausibility" standard of review for motions to dismiss enunciated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 167 L. Ed. 2d 929 (2007). However, this argument

was expressly rejected by this Court in *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584 (2008).

#### IV. Malicious Prosecution

This appeal is before this Court upon the trial court's dismissal of plaintiff's claim for malicious prosecution.

"An action in tort for malicious prosecution is based upon a defendant's malice in causing process to issue." A plaintiff must prove four essential elements to establish a malicious prosecution claim against an accuser. He must prove "[1] that defendant initiated the earlier proceeding, [2] that he did so maliciously and [3] without probable cause, and [4] that the earlier proceeding terminated in plaintiff's favor."

*Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984) (internal quotations omitted). The only element at issue in this case is probable cause. "[A] malicious prosecution complaint must allege sufficient facts to show that the proceeding was initiated without probable cause . . . ." *Stanback v. Stanback*, 37 N.C. App. 324, 332, 246 S.E.2d 74, 80 (1978) (citation omitted), *rev'd in part on other grounds*, 297 N.C. 181, 254 S.E.2d 611 (1979).

Where the claim is one for malicious prosecution, "[p]robable cause . . . has been properly defined as the existence of such facts and circumstances, known to [the defendant] at the time, as would induce a reasonable man to commence a prosecution."

*Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966) (quoting *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907)). Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, the existence of probable cause is a question of law for the court. *Id.* at 171, 147 S.E.2d at 914.

*Best v. Duke University*, 337 N.C. 742, 750, 448 S.E.2d 506, 510 (1994). However, "when the facts are in dispute the question of probable cause is one of fact for the jury." *Nelson v. Chang*, 78 N.C. App. 471, 474, 337 S.E.2d 650, 652 (1985) (quotation omitted), *disc. review denied*, 317 N.C. 335, 346 S.E.2d 501 (1986).

#### V. Allegations of Complaint

The following are the allegations contained in plaintiff's complaint that are relevant to the analysis of the element of probable cause in his claim for malicious prosecution:

7. Prior to July 17, 2008, Plaintiff reserved rooms at the Wingate Inn Site #12643-60102-02 as a member of the Sons of Confederate Veterans, a non-profit 501(c)3 corporation with historical designation, for the weekend on [and] around July 17, 2008; Cabarrus County was hosting the organization's national convention and listed Defendants' Hotel as having a group rate available to SCV members.

8. Upon information and belief, the staff member of Defendant Hotel who took Plaintiff's reservation was apprised that

this was an organization and what its designation was; and in fact, Plaintiff was quoted a group rate for the rooms being reserved.

9. On the evening of July 17, 2008, Plaintiff prepared to host a reception in one of the rooms he reserved, Room 328; said reception had traditionally been hosted in memory of John Hunt Morgan and other Kentucky Confederate soldiers by Kentucky Division Sons of Confederate Veterans members since 1997.

10. Upon information and belief, Plaintiff placed a Confederate battle flag in the window of Room 328, along with other patriotic flags on the walls to appropriately decorate the room for the reception.

11. Upon information and belief, at approximately 5:45PM on July 17, 2008, Plaintiff received a phone call to Room 328 at the hotel from someone purporting to be working at the front desk; this individual asked Plaintiff to take down the flag due to issues of "sensitivity."

12. Upon information and belief, at approximately 6:45PM on July 17, 2008, a man purporting to be the General Manager of Defendant Hotel called Room 328 and asked Plaintiff to remove the flag, though acknowledging that there was no written policy in place regarding the display of a flag in a lessee's window.

13. Upon information and belief, Plaintiff advised the General Manager of his belief that as the lessee, a mandate like that being requested was a violation of his room rental contract.

14. Upon information and belief, at approximately 7:15PM on July 17, 2008, an agitated man identifying himself as "Joel Griffin" advised Plaintiff that he was the owner of the hotel, and threatened to call the police if Plaintiff did not take down the aforementioned flag from the window of Room 328.

15. Upon information and belief, Plaintiff refused Mr. Griffin's request.

16. Upon information and belief, shortly before 8:00PM, Mr. Griffin returned to Room 328 with members of the Concord Police Department.

17. Upon information and belief, during discussion with the Concord Police Officers, Mr. Griffin acknowledged that the hotel had no standing policy regarding the display of flags or materials in lessee's windows, and stated that he was angry that his evening's plans were being spoiled by his having to deal with this situation.

18. Upon information and belief, acting as Owner of the hotel, Mr. Griffin advised the Police Officers that Plaintiff was banned from the premises, and asked that Plaintiff be arrested.

19. That Plaintiff was thereafter arrested at Mr. Griffin's demand, and charged with Misdemeanor Second Degree Trespass.

20. That Plaintiff was taken away in custody and processed at the Concord Police Substation.

21. Upon information and belief and as a direct and proximate result of Defendant's statements to police, Plaintiff was arrested and held on charges of Trespassing pursuant

to the North Carolina General Statutes.

22. That as a part of the malice Defendants bore to Plaintiffs, Defendants attempted to dissuade other area hotels from renting rooms to SCV members.

23. Defendant's actions described herein were intentional, malicious and without probable cause of any criminal wrongdoing on the part of Plaintiff.

24. The criminal case against Plaintiff arising from these events on July 17, 2008, to wit: 08-CRS-7962, was subsequently dismissed in Plaintiff's favor.

25. As a direct and proximate result of the above-described actions of the Defendants, Plaintiff incurred legal expenses for legal representation in the aforementioned actions.

FIRST CLAIM OF RELIEF  
MALICIOUS PROSECUTION

26. The allegations of paragraphs 1 through 25 above are incorporated herein by reference as if set forth fully.

27. Upon information and belief, by initiating charges against Plaintiff as described herein above, Defendants procured the institution of a criminal proceeding against Plaintiff.

28. Upon information and belief, Defendants' actions described above were conducted with reckless and wanton disregard for Plaintiff's rights, with malice and without probable cause of any criminal wrongdoing on the part of Plaintiff and was based on the anger he felt towards the Plaintiff.

29. Defendants knew that initiating charges against Plaintiff would be prejudicial and injurious to Plaintiff and did so without probable cause and without regard to Plaintiff's [well-being].

30. As a direct and proximate cause of Defendants' actions described herein, Plaintiff has been damaged in an amount in excess of Ten Thousand Dollars (\$10,000).

31. As a direct and proximate cause of Defendants' actions described herein, Plaintiff is entitled to punitive damages pursuant to North Carolina General Statutes from Defendants.

#### VI. Analysis of Plaintiff's Complaint

Applying the proper standard of review and treating the allegations contained in plaintiff's complaint as true, the following was established:

Cabarrus County was hosting the SCV national convention and listed CHA as having a group rate available for SCV members. Upon plaintiff's reservation, defendants were advised that plaintiff was part of the SCV organization and was quoted a group rate for the rooms that were reserved. Plaintiff hosted a reception in Room 328 and placed a Confederate flag in the window. The General Manager of the hotel acknowledged that there was no written policy in place regarding the display of a flag in the window of a guest's room. The room rental contract contained no language prohibiting plaintiff's conduct, and the

demand to remove the flag was in violation of the room rental contract. Nevertheless, the General Manager instructed plaintiff to remove the Confederate flag from the window. At approximately 7:15 p.m., Griffin, an operating partner of the hotel, threatened to call the police if plaintiff refused to remove the Confederate flag. At 8:00 p.m., Griffin arrived at Room 328 with officers from the Concord Police Department. During the discussion, Griffin acknowledged that the hotel had no standing policy regarding the display of flags or materials in lessee's windows and stated he was angry that his evening's plans were being spoiled by having to personally deal with the situation. Griffin advised police officers that plaintiff was banned from the premises and plaintiff was arrested for second-degree trespass.

The issue is whether these allegations were sufficient to allege that Griffin did not have probable cause to believe that reasonable grounds existed to commence prosecution of plaintiff for trespass. We hold that the allegations contained in plaintiff's complaint were sufficient. Plaintiff entered into a room rental contract with CHA. CHA knew from the fact that a group rate was sought and agreed upon that plaintiff was there for the purpose of attending the SCV convention. CHA had no

written policy prohibiting the display of the flag. The demand to remove the flag was in violation of the room rental contract.

The reasonableness of Griffin's actions in the tort claim has to be considered in light of the relationship between plaintiff and CHA under the terms of the room rental contract. If the demand to remove the flag was in violation of the terms and conditions of the room rental contract (which under our standard of review we must accept as true), then there was no reasonable grounds for Griffin to have commenced criminal proceedings against plaintiff.

We emphasize that the trial court erred in dismissing the malicious prosecution claim based upon the pleadings. We make no comment on the viability of this claim upon a motion for summary judgment under Rule 56, or upon a motion for a directed verdict at trial under Rule 50.

The trial court erred by dismissing plaintiff's claim for malicious prosecution against defendants.

VII. Breach of Contract Claim Against Griffin, Individually

Because there are no allegations in plaintiff's complaint that Griffin, individually, was a party to the room rental contract, the trial court properly dismissed plaintiff's breach of contract claim as to Griffin. See *Canady v. Mann*, 107 N.C.

App. 252, 259, 419 S.E.2d 597, 601 (1992) (holding that where a defendant "was not a party to the contract, as a matter of law he cannot be held liable for any breach that may have occurred."), *disc. review improvidently allowed*, 333 N.C. 569, 429 S.E.2d 348 (1993).

AFFIRMED IN PART; REVERSED IN PART.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).