[Cite as *Wilmouth v. Lowes, Inc.*, 2004-Ohio-6691.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

RONALD T. WILMOUTH,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2003-T-0160**
- vs -	:	
LOWES HOME CENTERS, INC., et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 02 CV 1054.

Judgment: Affirmed.

Samuel F. Bluedorn and *Charles E. Ohlin*, 144 North Park Avenue, #310, Warren, OH 44481 (For Plaintiff-Appellant).

Michael P. Marando, 3722 Starr's Centre Drive, P.O. Box 9070, Youngstown, OH 44513 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Ronald T. Wilmouth ("Wilmouth"), appeals from the trial court's grant of summary judgment in favor of Lowes Home Centers, Inc., ("Lowes"). We affirm.

{¶2} On November 4, 2000, Wilmouth purchased $8,000.74 worth of goods from Lowes. Wilmouth paid for this purchase with two checks: a credit card check for $7,038.15, and a check written by Wilmouth's wife on her account for $1,000. Citibank USA issued the credit card check. Wilmouth testified he received three such checks

from Citibank on or about November 4, 2000 to be used to make purchases or to transfer other credit card balances to the Citibank account. Wilmouth testified he contacted Citibank and was told the checks were valid up to $8,000.

{¶3} The credit card check was returned to Lowes for insufficient funds. Wilmouth received notice of the dishonored check.

{¶4} In January 2001, Wilmouth agreed to pay Lowes $500 a month until the balance was paid in full. Wilmouth never made any payments under this agreement.

{¶5} On January 22, 2001, Lowes filed a criminal complaint against Wilmouth alleging a violation of R.C. 2913.11. This complaint was dismissed on January 26, 2001, because Lowes provided an incorrect social security number and date of birth for Wilmouth.

{¶6} Wilmouth was arrested at his Pennsylvania home on February 1, 2001 on the bad check charge. He was held in jail for seven or eight days. When he appeared in Warren Municipal Court, he was informed the charge had been dismissed.

{¶7} Lowes filed a second criminal complaint against Wilmouth on July 2, 2001. This charge was subsequently dismissed without prejudice.

{¶8} On May 6, 2002, Wilmouth filed the instant civil action alleging claims of malicious prosecution and abuse of process. Following the completion of discovery, the trial court granted Lowes' motion for summary judgment. Wilmouth appeals raising two assignments of error:

{¶9} "[1.] The trial court erred to the prejudice of plaintiff-appellant by granting defendant-appellee's motion for summary judgment on plaintiff-appellant's claim for malicious prosecution.

{¶10} “[2.] The trial court erred to the prejudice of plaintiff-appellant by granting defendant-appellee’s motion for summary judgment on plaintiff-appellee’s claim for abuse of process.”

{¶11} We review a grant of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Thus, we review the trial court's grant of summary judgment independently and without deference to its determination. *Lexford Prop. Mgmt., L.L.C. v. Lexford Prop. Mgmt., Inc.* (2001), 147 Ohio App.3d 312, 2001-Ohio-4563, ¶10.

{¶12} Summary judgment is proper when: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion is made, that conclusion is adverse to that party. *Harless v. Willis Day Warehousing, Inc.* (1978), 54 Ohio St.2d 64, 66.

{¶13} "[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis of the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.

{¶14} If the moving party has satisfied this initial burden, the nonmoving party has a reciprocal burden under Civ.R. 56(E) to set forth facts showing that there is a genuine issue for trial. Id. at 293.

{¶15} "The elements of the tort of malicious criminal prosecution are (1) malice in instituting or continuing the prosecution, (2) lack of probable cause, and (3) termination of the prosecution in favor of the accused. Arrest of the plaintiff or seizure of his property is not a necessary element." *Trussell v. General Motors Corp.* (1990), 53 Ohio St.3d 142, at syllabus.

{¶16} Wilmouth argues the credit card check was not a "check" for purposes of R.C. 2913.11, and therefore, he could not have been prosecuted under this statute. In support of his argument, Wilmouth directs us to testimony of a Lowes employee that a credit card check is "basically just like another form of payment on a credit card that looks like a check." Wilmouth's argument is unpersuasive for two reasons.

{¶17} R.C. 2913.11 provides:

{¶18} "(A) No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored.

{¶19} "(B) For purposes of this section, a person who issues or transfers a check or other negotiable instrument is presumed to know that it will be dishonored if either of the following occurs:

{¶20} "(1) The drawer had no account with the drawee at the time of issue or the stated date, whichever is later;

{¶21} "(2) The check or other negotiable instrument was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, indorser, or any party who

may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor."

{¶22} The credit card check was a "check" as defined in R.C. 1303.03(F)(1).[1]

{¶23} We also note neither the record in the trial court nor on appeal contains the deposition referred to by Wilmouth; therefore, we may not consider such statements as evidence. Civ.R. 56(C). Thus, Wilmouth has presented no evidence to rebut Lowes' contention the credit card check is a check under R.C. 2913.11.

{¶24} Wilmouth also argues a genuine issue of material fact exists as to whether Lowes had probable cause to prosecute him under R.C. 2913.11.

{¶25} In *Baryak v. Kirkland* (2000), 137 Ohio App.3d 704, we stated:

{¶26} "In the context of an action for malicious criminal prosecution, probable cause may be defined as a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." Id. at 710-711.

{¶27} Wilmouth argues he did not have a purpose to defraud Lowes because he had called Citibank who told him the check was valid for up to $8,000. He uses the same evidence in support of his contention that he did not know the check would be dishonored. Wilmouth also argues the presumption set forth under R.C. 2913.11(B) does not constitute probable cause.

1. This section provides:
"(F) "Check" means either of the following:
"(1) A draft, other than a documentary draft, payable on demand and drawn on a bank[.]"

{¶28} Under the facts of this case, Wilmouth has failed to present evidence of a genuine issue of material fact as to whether Lowes lacked probable cause to file the criminal complaints. Lowes presented evidence Wilmouth issued a check for $7,038.15 that was returned for insufficient funds. Both Lowes and the bank informed Wilmouth the check had been dishonored. Lowes entered into a payment arrangement with Wilmouth. Wilmouth failed to comply with the payment arrangements. R.C. 2913.11(B) provides a person is:

{¶29} "presumed to know [the check] will be dishonored if *** [t]he check *** was properly refused payment for insufficient funds upon presentment within thirty days after issue or the stated date, whichever is later, and the liability of the drawer, indorser, or any party who may be liable thereon is not discharged by payment or satisfaction within ten days after receiving notice of dishonor."

{¶30} Again, Wilmouth's "evidence" in support of his argument consists of material not properly before the trial court or this court pursuant to Civ.R. 56(C). Lowes' unrebutted evidence established probable cause to initiate the prosecution. Appellant's first assignment of error is without merit.

{¶31} In his second assignment of error, Wilmouth argues the trial court erred in granting summary judgment to Lowes on his claim for abuse of process. Wilmouth's argument is unpersuasive.

{¶32} "In order to establish a claim of abuse of process, a plaintiff must satisfy three elements: '(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct

damage has resulted from the wrongful use of process.'" *Robb v. Chagrin Lagoons Yacht Club, Inc.* (1996), 75 Ohio St.3d 264, 270, quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A* (1994), 68 Ohio St. 3d 294, 298.

{¶33} In the instant case, Wilmouth contends a genuine issue of material fact exists as to whether Lowes initiated the criminal proceeding to accomplish an improper purposes, i.e., obtain payment of the debt. In support of his argument, Wilmouth relies on testimony purportedly given by a Lowes employee at deposition. Again, this evidence is not part of the record as Wilmouth failed to comply with the requirements of Civ.R. 56(C).

{¶34} Lowes presented sufficient evidence to establish no genuine issue of material fact existed on Wilmouth's claim for abuse of process and that Lowes was entitled to judgment as a matter of law. Wilmouth failed to present any evidence in opposition. Appellant's second assignment of error is without merit.

{¶35} For the foregoing reasons the judgment of the Trumbull County Court of Common Pleas is affirmed.

DONALD R. FORD, P.J.,

ROBERT A. NADER, J., Ret., Eleventh Appellate District, sitting by assignment

concur.