[Cite as *Pierson v. Aaron's Rental*, 2010-Ohio-5443.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ebony Pierson,	:	
Plaintiff-Appellant,	:	
		No. 10AP-245
v.	:	(C.P.C. No. 09CVC-2-2466)
Aaron's Rental et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 9, 2010

Mark A. Serrott, for appellant.

Plunkett Cooney, and *Al A. Mokhtari*, for appellee Aaron's Rental.

Wiles, *Boyle*, *Burkholder & Bringardner Co.*, *L.P.A.*, *Thomas E. Boyle*, and *Alicia E. Zambelli*, for appellee Chris Merz.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Ebony Pierson ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting the summary judgment motions of defendants-appellees, Aaron's Rental ("Aaron's") and Ralph Christian Merz, III

("Merz"), on appellant's claims for malicious prosecution and abuse of process. For the following reasons, we affirm.

{¶2} The evidence submitted in support of, and in opposition to, Aaron's and Merz's motions for summary judgment establishes the following facts. On October 17, 2005 and December 27, 2005, respectively, appellant entered into rental agreements with Aaron's for several items of furniture and a large screen television. Appellant ceased making bi-monthly rental payments to Aaron's in September 2006.

{¶3} At her deposition, appellant testified that after defaulting, she neither attempted to arrange a payment schedule nor did she make any effort to return the rental property. She also testified that she was aware that Aaron's could not enter her home to retrieve the rental property without obtaining her permission to do so and that she would permit Aaron's to retrieve the rental property only if she were at home.

{¶4} Appellant further testified that soon after she defaulted, Aaron's employees repeatedly called her at home and left several tags on the door of her residence in an effort to persuade her to bring current her payments or return the property. She further testified that her live-in boyfriend, Ian Rice, told her that Aaron's employees had stopped by to retrieve the rental property, but he told them they would have wait to do so until appellant returned home from work. Appellant conceded that she never gave Ian permission to allow Aaron's to retrieve the property in her absence. She further admitted that no one from Aaron's ever told her it that it was acceptable for her to cease making payments on the property or that Aaron's would not attempt to repossess the property in the event she defaulted. Indeed, she testified that she understood that under the terms of

the rental agreements, Aaron's retained ownership of the property until she made payment in full and that Aaron's was entitled to repossess the property if she defaulted.

{¶5} Merz, the general manager of the Aaron's store from which appellant rented the merchandise, testified both by deposition and affidavit. According to Merz, after appellant defaulted on the rental agreements, he and other Aaron's employees left numerous voicemail messages asking appellant to contact Aaron's. He also personally visited appellant's residence several times; however, no one ever answered the door. On each of these visits, he left a door hanger asking appellant to contact Aaron's.

{¶6} In early 2007, Merz went to appellant's place of employment. There is a dispute in the evidence as to what transpired during this encounter. Appellant testified that Merz orally demanded that she pay him $700. She told Merz he could retrieve the property after she returned home from work. According to appellant, Merz cursed at her and threatened to call the police. He also said "[t]hat is what you people do, rent stuff, and think that you are going to get away with it by not paying for it. Your sister rented a TV from us, and she didn't pay us, you think you are going to do us like your sister did us." (Depo. 53.) According to appellant, Merz did not call the police; rather, he said, " 'F' you, you black 'B[itch],' " and then left. (Depo. 53.) Appellant denied that Merz provided her with written notice of a demand for payment.

{¶7} Merz testified that he personally handed appellant a written notice of final demand for payment notifying her that if she did not contact Aaron's immediately, it would seek all legal remedies available to it. According to Merz, appellant was verbally abusive and belligerent toward him. Appellant told Merz that her sister had rented merchandise from Aaron's, stopped making payments under the rental agreement but kept the

property, and, accordingly, Aaron's could do nothing to appellant about her default. Merz denied calling appellant a derogatory name.

{¶8} In March 2007, following Aaron's standard practice, Merz mailed a certified letter to appellant at her last known address, identical to the one he delivered to her at her place of employment. The certified letter was returned unclaimed in April 2007. Appellant testified that she never received a certified letter from Aaron's.

{¶9} Merz testified that after the certified letter was returned unclaimed, and because appellant had made no arrangements with Aaron's to bring current her payments or return the property, he, with the consent and approval of his Aaron's area manager, Jeff Johnson, contacted the Whitehall police on April 16, 2007 and made a formal complaint against appellant. Merz advised the police that appellant had ceased making rental payments in September 2006 and that appellant had resisted Aaron's efforts to recover the property.

{¶10} Sergeant Rex Adkins of the Whitehall police testified by deposition that he was the detective assigned to the case. He received the packet of information assembled by the officer who took Merz's complaint. Sergeant Adkins sent appellant a postcard in May 2007 requesting that she contact him about a theft report. The postcard was returned unclaimed. On May 15, 2007, Sergeant Adkins filed a criminal complaint in the Franklin County Municipal Court charging appellant with theft in violation of R.C. 2913.02(A)(2). Upon this complaint, a warrant was issued for appellant's arrest.

{¶11} On June 3, 2007, Whitehall police officers arrested appellant. Appellant acknowledged that at the time of her arrest, she was behind in her payments and that Aaron's had attempted to contact her seeking return of the property. Appellant testified

that while she was at the police station, she called Rice and instructed him to contact Aaron's about retrieving the property. She conceded that her arrest prompted her to return the property. Following her arrest, appellant spent two days in the Franklin County Jail.

{¶12} Merz testified that on the day appellant was arrested, he received a call from an employee of another Aaron's store stating that Rice had called to make arrangements to have Aaron's pick up the merchandise. Merz further testified that Aaron's recovered the merchandise by June 6, 2007. According to Merz, he called the Whitehall police within a day or two of recovering the merchandise, identified himself to someone in the detective bureau, reported that appellant had returned the merchandise, and was told that the matter had been turned over to the prosecutor's office. Sergeant Adkins testified that he never received a phone call or message from Aaron's stating that appellant had returned the merchandise.

{¶13} Following appellant's arrest, Sergeant Adkins prepared the grand jury packet and forwarded it to the Whitehall Police Department court liaison, Detective John Grebb. Detective Grebb testified before the grand jury on July 24, 2007.[1] Detective Grebb testified that appellant completed a lease agreement with Aaron's in December 2005 and thereafter failed to make all the required payments. He further testified that in March 2007, Merz sent a certified letter to appellant demanding return of the property, but the letter was returned unclaimed on April 13, 2007. He further testified that Merz filed a

[1] Upon motion of appellant, the trial court authorized disclosure of the testimony before the grand jury.

police report on April 16, 2007, and that appellant never responded to a postcard sent by the Whitehall police advising her of the case. Detective Grebb further testified that following her arrest on June 3, 2007, appellant completed a written statement claiming she tried to return the merchandise to Aaron's several times. Upon this testimony, the grand jury indicted appellant on July 25, 2007 on one count of theft in violation of R.C. 2913.02(A)(2).

{¶14} Merz testified that in late summer or fall 2007, he received telephone calls from two different prosecutors on two different occasions. Merz informed the prosecutors that Aaron's had recovered the merchandise after appellant was arrested. According to Merz, the prosecutors stated that the criminal charges would still proceed against appellant despite the fact that the merchandise had been returned.

{¶15} Following a February 2008 bench trial, appellant was acquitted of the theft charge.

{¶16} On February 18, 2009, appellant filed a civil complaint against Aaron's, Merz, the city of Whitehall ("Whitehall"), and three John Doe defendants (one employee of Aaron's and two police officers employed by Whitehall), asserting claims for false arrest, malicious prosecution, defamation, and intentional infliction of emotional distress. Aaron's and Merz filed separate motions to dismiss pursuant to Civ.R. 12(B)(6). Appellant filed a motion seeking leave to file an amended counterclaim to add a claim for abuse of process. The trial court granted appellant's motion for leave to amend her complaint to add a claim for abuse of process, granted Aaron's and Merz's motions to dismiss appellant's claims for false arrest and defamation, and denied Aaron's and Merz's

motions to dismiss appellant's claims for malicious prosecution and intentional infliction of emotional distress.

{¶17} Appellant filed a motion seeking leave to file a second amended complaint to add the names of the Whitehall police officers. The trial court granted appellant's motion. On the same day, appellant filed an amended complaint, adding Whitehall police officers Sergeant Adkins and Detective Grinstead as defendants. Appellant subsequently filed a notice voluntarily dismissing Detective Grinstead from the action pursuant to Civ.R. 41(A)(1).

{¶18} Whitehall, Aaron's, Merz, and Sergeant Adkins filed separate motions for summary judgment. The trial court granted all four motions. As appellant has appealed only the trial court's grant of summary judgment to Aaron's and Merz, we consider only the trial court's judgment pertaining to those motions. In its February 19, 2010 decision and entry, the trial court first noted that appellant had conceded that the evidence was insufficient to sustain her claim for intentional infliction of emotional distress; accordingly, the court dismissed that claim. The court further found appellant's abuse of process claim failed as a matter of law because no evidence supported the assertion that Aaron's or Merz used the criminal justice system for a purpose for which it was not designed, and appellant's malicious prosecution claim failed because Aaron's and Merz had probable cause to support their actions. On March 17, 2010, the trial court filed a judgment entry granting summary judgment to Aaron's and Merz.

{¶19} Appellant filed a timely notice of appeal and asserts the following two assignments of error:

I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT WITH REGARD TO PLAINTIFF'S MALICIOUS PROSECUTION CLAIM BECAUSE A GENUINE ISSUE EXISTED AS TO WHETHER OR NOT PROBABLE CAUSE EXISTED FOR THE FILING OF THE THEFT CHARGE AGAINST PLAINTIFF.

II. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT WITH REGARD TO THE PLAINTIFF'S ABUSE OF PROCESS CLAIM BECAUSE PLAINTIFF ESTABLISHED GENUINE ISSUES EXISTED AS TO EVERY ELEMENT OF THE CLAIM.

{¶20} Appellant's first assignment of error contends that genuine issues of material fact precluded the trial court's entry of summary judgment in favor of Aaron's and Merz on appellant's claim for malicious prosecution. We disagree.

{¶21} Pursuant to Civ.R. 56(C), summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶22} "[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 for 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*, 75 Ohio St.3d 280, 293, 1996-Ohio-107. Once the moving party meets its initial burden, the nonmovant bears a reciprocal burden to produce competent evidence of the types listed in Civ.R. 56(C) showing that there is a genuine issue for trial. Id.; Civ.R. 56(E). Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the nonmoving party. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 358-59, 1992-Ohio-95.

{¶23} Appellate review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Thus, we apply the same standard as the trial court and conduct an independent review, without deference to the trial court's determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107.

{¶24} The tort of malicious criminal prosecution protects a criminal defendant's right to recover damages caused by misuse of criminal actions. See *Trussell v. Gen. Motors Corp.* (1990), 53 Ohio St.3d 142, 144. "A private person who initiates or procures the institution of criminal proceedings against another is not subject to liability unless the person against whom the proceedings were initiated proves all three of the following elements: (1) malice in instituting or continuing the prosecution, (2) lack of probable cause for undertaking the prosecution, and (3) termination of the prosecution in favor of the accused." *Fair v. Litel Comm., Inc.* (Mar. 12, 1998), 10th Dist. No. 97APE06-804, citing

Ash v. Ash (1995), 72 Ohio St.3d 520, 522, citing *Trussell.* Ohio courts disfavor malicious prosecution actions, and, accordingly, permit recovery only when a plaintiff fully complies with the requirements of such an action. *Dailey v. First Bank of Ohio,* 10th Dist. No. 04AP-1309, 2005-Ohio-3152, ¶14. Accordingly, a plaintiff's failure to establish any one element by a preponderance of the evidence is fatal to a malicious prosecution claim. Id.

{¶25} Lack of probable cause becomes the essence of a malicious prosecution action because malice may be inferred in the absence of probable cause. *Fair*. Thus, malice becomes material only in the absence of probable cause. *Waller v. Foxx* (Oct. 6, 1982), 1st Dist. No. C-810568. If probable cause exists, no action for malicious prosecution will lie, even if the plaintiff can demonstrate actual malice. Id.; *Agner v. The Kroger Co.* (Oct. 25, 1984), 3d Dist. No. 4-83-11. For purposes of malicious prosecution, probable cause is 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.' " *Dailey* at ¶15, quoting *Ash v. Marlow* (1851), 20 Ohio 119, paragraph one of the syllabus; *Huber v. O'Neill* (1981), 66 Ohio St.2d 28, 30.

{¶26} The determination of whether a criminal prosecution was initiated or continued in the absence of probable cause requires examination of the facts and circumstances known to or reasonably within the contemplation of the defendant at the time of the instigation of criminal proceedings. *McFinley v. Bethesda Oak Hosp.* (1992), 79 Ohio App.3d 613, 616-17. Probable cause does not depend upon whether the plaintiff was guilty of the offense charged. *Waller.* The defendant need not have evidence sufficient to ensure a conviction; rather, the defendant need only have evidence sufficient

to justify an honest belief in the defendant's guilt. *Brown v. Crestmont Cadillac,* 8th Dist. No. 87460, 2006-Ohio-5734, ¶14, citing *Epling v. Pacific Intermountain Express Co.* (1977), 55 Ohio App.2d 59, 62. The issue of probable cause, while ordinarily one of fact to be resolved at trial, may be determined as a matter of law upon a record that allows for only one reasonable conclusion. *McFinley* at 617, citing *Huber.*

{¶27} The return of an indictment by a grand jury raises a rebuttable presumption that probable cause existed for the institution of criminal proceedings, and it is the plaintiff's burden to rebut such a presumption. *Dailey* at ¶16, citing *Mayes v. Columbus* (1995), 105 Ohio App.3d 728, 737-38. To rebut the presumption, the plaintiff must "produce 'substantial' evidence that the return of the indictment resulted from perjured testimony or that the grand jury proceedings were otherwise 'significantly' irregular." *Fair*. Recognizing that grand jury evidence is usually secret, this court has stated that a plaintiff may also rebut a presumption of probable cause by introducing " 'evidence of a substantial nature which counterbalances the presumption.' " *Mayes* at 738, quoting *Adamson v. May Co.* (1982), 8 Ohio App.3d 266, 270.

{¶28} Appellant contends that a genuine issue of material fact exists as to whether Aaron's and Merz acted with malice in instituting or continuing the criminal proceedings against her. More specifically, appellant contends, citing her own testimony regarding her encounter with Merz at her place of employment, that an issue of fact exists as to whether Aaron's and Merz acted maliciously by instituting criminal charges against her because she is African-American or because her sister had previously defaulted on a rental agreement with Aaron's and never returned the property. As noted above, however, malice becomes material only in the absence of probable cause. *Waller.*

Accordingly, even if appellant successfully demonstrates a genuine issue of fact as to actual malice, her claim for malicious prosecution still fails if no genuine issue of fact exists as to probable cause. Id.; *Agner.* Thus, we must determine whether genuine issues of material fact exist as to whether Aaron's and Merz had probable cause for instituting criminal proceedings against appellant. In making this determination, we must examine the facts and circumstances known to or reasonably within the contemplation of Aaron's and Merz at the time the criminal proceedings were initiated. *McFinley.*

{¶29} Construing the evidence most strongly in favor of appellant, we conclude that at the time Merz contacted Whitehall police and lodged a complaint against appellant, he and Aaron's had probable cause to believe that appellant had committed a theft offense against Aaron's in violation of R.C. 2913.02(A)(2). That statute provides that "[n]o person, with purpose to deprive the owner of property * * *, shall knowingly obtain or exert control over * * * the property * * * [b]eyond the scope of the express or implied consent of the owner or person authorized to give consent."

{¶30} Appellant's own testimony establishes that as of April 16, 2007, Aaron's and Merz had probable cause to believe that appellant had no intention of returning Aaron's property because she had stopped making payments in September 2006 and had made no effort to arrange a payment schedule or to facilitate Aaron's recovery of the property. She admitted that Aaron's never suggested that she was not required to make payments on the property. She also testified that she understood that under the terms of the rental agreements, Aaron's retained ownership of the property until she made payment in full and that Aaron's was entitled to repossess it in the event of default. Appellant further

conceded that she knew Aaron's employees repeatedly attempted to contact her in an effort to obtain payment or to retrieve the merchandise.

{¶31} In addition, Merz testified that he left several voicemail messages on appellant's phone, made several personal visits to appellant's residence, and visited her place of employment prior to contacting the police. The undisputed evidence establishes that at the time Merz contacted the police in April 2007, appellant was approximately seven months in arrears on her payments and had ignored Aaron's efforts to recover the property.

{¶32} Appellant argues that several facts negate a finding of probable cause. Appellant first points to the fact that she previously leased furniture from Aaron's and paid off the debt in a timely manner. This fact is of no consequence in this case, as appellant conceded that she defaulted on the rental agreements at issue and thereafter resisted Aaron's efforts to recover its property.

{¶33} Appellant next points to the fact that she made a substantial number of payments on the contracts. This fact is also irrelevant given that she admitted both that she was aware that Aaron's retained ownership of the property until she made payment in full and that she did not make full payment on the property.

{¶34} Appellant further asserts that no probable cause existed because, at the time she defaulted, she had already paid more than the fair market value of the merchandise. This fact is also immaterial. As Merz notes in his brief, renting to own is essentially a form of financing the purchase of merchandise. When an individual finances a purchase, the payment of principal and interest will result in a total payment of more than the value of the item being financed.

{¶35} Appellant also contends that no probable cause existed because Aaron's and Merz failed to comply with R.C. 2913.72(B). Under R.C. 2913.72(A), a rentee's intent to commit theft of rental property can be established if the rentee fails to return rental property to its owner after receiving a notice demanding that the rentee do so. R.C. 2913.72(B) requires that such a notice be sent by certified mail, return receipt requested. In the instant case, Merz testified that he sent appellant a certified letter demanding return of the rental property, but the letter was returned unclaimed. Appellant contends that because she did not receive the demand letter, Aaron's and Merz cannot rely upon R.C. 2913.72(A)(2) to establish appellant's intent to commit theft of the rental property. While the failure to comply with R.C. 2913.72(B) prevents reliance upon R.C. 2913.72(A)(2) to establish appellant's intent to commit theft of the rental property, R.C. 2913.72(C) provides that R.C. 2913.72(A) is not the exclusive means of establishing such intent. See *Hogan v. Rent-A-Center, Inc.* (S.D.Ohio 2002), 228 F.Supp.2d 802, 809. R.C. 2913.72(C) provides that "[a] demand for the return of rented property is not a prerequisite for the prosecution of a rentee for theft of rented property * * *. The evidence specified in division (A) of this section does not constitute the only evidence that may be considered as evidence of intent to commit theft of rented property." For the reasons set forth above, we conclude that there existed probable cause to believe that appellant acted with the requisite intent to commit theft of the merchandise she rented from Aaron's. Accordingly, the failure of Aaron's and Merz to comply with R.C. 2913.72(B) does not vitiate the existence of probable cause.

{¶36} Moreover, as noted above, the return of an indictment by a grand jury raises a rebuttable presumption that probable cause existed for the institution of criminal

proceedings, and appellant bears the burden of rebutting this presumption by producing "substantial" evidence that the return of the indictment resulted from perjured testimony or that the grand jury proceedings were otherwise "significantly irregular." Appellant does not dispute that the grand jury indicted her on one count of theft in violation of R.C. 2913.02(A)(2). However, she contends that a genuine issue of material fact exists to rebut the presumption of probable cause established by the indictment. Specifically, appellant contends that the grand jury proceedings were irregular because the grand jury was never informed that she had returned the rental property. However, at her deposition, appellant was questioned about the grand jury proceedings and acknowledged there was nothing untruthful or inaccurate in the transcript. Further, appellant has not set forth any evidence demonstrating that the evidence presented to the grand jury was anything but the result of the prosecutor's uncontrolled discretion.

{¶37} Because reasonable minds can only conclude that Aaron's and Merz had probable cause to initiate criminal proceedings against appellant, appellant's claim for malicious prosecution fails as a matter of law, regardless of whether she can establish the remaining two elements of her claim. Accordingly, we need not address whether Aaron's or Merz acted with malice or whether the criminal proceedings terminated in appellant's favor before concluding that the trial court appropriately entered summary judgment in favor of Aaron's and Merz on appellant's malicious prosecution claim. The first assignment of error is overruled.

{¶38} Appellant's second assignment of error contends that genuine issues of material fact precluded the trial court's entry of summary judgment in favor of Aaron's and Merz on appellant's claim for abuse of process. Again, we disagree.

{¶39} In order to maintain a claim for abuse of process, a plaintiff must show " '(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.*, 75 Ohio St.3d 264, 270, 1996-Ohio-189, quoting *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, 298.

{¶40} To prevail on a claim for abuse of process, a plaintiff must prove that "one used process with an ulterior motive, as the gist of the offense is found in the manner in which process is used." *Ruggerio v. Kavlich,* 8th Dist. No. 92909, 2010-Ohio-3995, ¶28, citing *Nicolazzo v. Yoingco,* 149 Ohio Misc.2d 44, 2007-Ohio-7269. " 'The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club.' Simply, abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order." (Internal citations omitted.) *Robb* at 271 (abusing process to coerce members of a yacht club to vote in their favor).

{¶41} Appellant contends that a genuine issue of material fact exists as to the second element of her abuse of process claim. Specifically, appellant maintains that Aaron's and Merz instituted the criminal proceedings against her in an attempt to accomplish an ulterior purpose for which those proceedings were not designed, i.e., to save the cost of a civil replevin action. Merz testified at his deposition that once payment on a rental agreement was more than 60 days overdue, Aaron's could proceed with either

a civil replevin action or a criminal action against a delinquent rentee. Merz stated that over the course of his employment as a general manger with Aaron's, he filed an equal number of replevin and criminal actions. Merz further stated that Aaron's usual policy was to file a replevin action only if Aaron's had a correct current address for the delinquent rentee. In his affidavit, Merz stated that because the certified letter Aaron's sent to appellant was returned unclaimed, Aaron's did not know if the address it had on file for appellant was correct. Merz further testified that one of the factors in determining whether to file a criminal complaint was whether the rentee had made less than half of the rental payments. It is undisputed that appellant had made less than half of the rental payments on both the furniture and the television.

{¶42} Moreover, R.C. 2913.72 provides support for the conclusion that criminal prosecution against appellant is valid under Ohio law. That statute specifically addresses evidence that may be considered in a theft prosecution against the rentee of property under circumstances where the rentee ceases making the required rental payments and fails to return the property or make arrangements acceptable with the renter to return the property. Although R.C. 2913.72 is an evidentiary statute, it supports the conclusion that the type of conduct engaged in by appellant, that is, not making the required rental payments, retaining the property, and ignoring Aaron's repeated efforts to recover the property, is subject to criminal prosecution under R.C. 2913.02.

{¶43} Viewing the evidence in a light most favorable to appellant, we find that such evidence does not create a genuine issue of material fact as to whether the criminal proceeding against appellant was perverted by Aaron's and Merz in order to achieve "an

ulterior purpose for which [it was] not designed," that is, to save the cost of a civil replevin action.

{¶44} Moreover, in *Hershey v. Edelman,* 187 Ohio App.3d 400, 2010-Ohio-1992, this court recently addressed a claim for abuse of process that is premised upon the filing of a criminal complaint. We stated at ¶44:

> Defendant's counterclaim for abuse of process is premised on the filing of a police report. Yet the claim does not assert the improper use of process *after* it has been issued. Under *Yaklevich,* one of the key components in an abuse-of-process action is proof that an improper purpose was sought to be achieved by the use of a lawfully brought *previous* action. Here, defendant has not produced evidence raising a genuine issue of material fact as to whether there was improper activity that occurred *after* the police report was made and the "process" was set in motion. A claim alleging abuse of process asserts that the action or process itself (here, the filing of the police report) was proper or filed with sufficient probable cause, but that the proceeding itself was perverted or corrupted in order to accomplish an ulterior purpose. Defendant has failed to allege that anything improper or corrupt occurred after the process was set in motion that would serve to pervert the proceeding.

(Emphasis sic.)

{¶45} As in *Hershey,* appellant's claim for abuse of process is premised upon the filing of a criminal complaint. Appellant has failed to allege that anything improper or corrupt occurred after the criminal complaint was filed and the process was set in motion that would serve to pervert the criminal proceeding.

{¶46} For the foregoing reasons, we conclude that appellant has failed to satisfy the second element of her abuse of process claim. Accordingly, the trial court properly found that Aaron's and Merz are entitled to judgment as a matter of law on appellant's claim for abuse of process. The second assignment of error is overruled.

{¶47} Having overruled both of appellant's assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and FRENCH, J., concur.

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