

IN THE UTAH COURT OF APPEALS

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Brigham Agler and Jayme Olson,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiffs and Appellants,)	
)	Case No. 20060332-CA
v.)	
)	
Kevin Scheidle and Meshwerks,)	F I L E D
Inc.,)	(December 14, 2006)
)	
Defendants and Appellees.)	2006 UT App 495

Third District, Salt Lake Department, 050909770
The Honorable Tyrone E. Medley

Attorneys: J. Bryan Quesenberry, Stephen Quesenberry, and D.
Scott Davis, Provo, for Appellants
Jerome Romero, Salt Lake City, for Appellees

Before Judges Davis, McHugh, and Orme.

DAVIS, Judge:

Plaintiffs Brigham Agler and Jayme Olson appeal the trial court's grant of Defendants Kevin Scheidle and Meshwerks Inc.'s motion for summary judgment. See Utah R. Civ. P. 56(c). Plaintiffs also appeal the trial court's denial of their motion brought under rule 56(f) of the Utah Rules of Civil Procedure. See id. 56(f). We affirm.

Plaintiffs first contend that genuine issues of material fact exist regarding their malicious prosecution claim. We will affirm a grant of summary judgment 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 as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. 56(c). "Because the determination of whether summary judgment is appropriate presents a question of law, [appellate courts] accord no deference to the trial court's decision and instead review it for correctness." DOIT, Inc. v. Touche, Ross & Co., 926 P.2d 835, 841 (Utah 1996).

A malicious prosecution claim has four elements: "(1) A criminal proceeding instituted or continued by the defendant against the plaintiff; (2) termination of the proceeding in favor of the accused; (3) absence of probable cause for the proceeding; [and] (4) 'malice,' or a primary purpose other than that of bringing an offender to justice." Amica Mut. Ins. Co. v. Schettler, 768 P.2d 950, 959 (Utah Ct. App. 1989) (alteration in original) (quotations and citation omitted). Only the probable cause and malice elements are disputed here.

A defendant in a malicious prosecution claim "has probable cause only when a reasonable man in his position would believe, and the defendant does in fact believe, that he has sufficient information as to both the facts and the applicable law to justify him in initiating the criminal proceedings without further investigation or verification." Hodges v. Gibson Prods. Co., 811 P.2d 151, 158 (Utah 1991) (quotations and citation omitted). The undisputed facts establish that immediately prior to their departure from Meshwerks, Plaintiffs copied software "tools" and digitized 3D models from Meshwerks's computers without the knowledge or consent of Defendants. The record also supports Defendants' belief that these items were proprietary.¹ Indeed, in their opposition to Defendants' motion for summary judgment, Plaintiffs admit that Meshwerks believed that its digitized 3D models were proprietary. A reasonable person in Defendants' position would believe, and the record supports Defendants' belief, that these undisputed facts constituted a theft worthy of initiating criminal proceedings without the need for further investigation. See id. The undisputed facts show that Defendants had probable cause.

Plaintiffs list numerous facts in support of their claim that disputed facts preclude summary judgment. However, the facts cited by Plaintiffs are either immaterial or irrelevant to the determination of probable cause. Summary judgment is precluded not "simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted." Heglar Ranch, Inc. v. Stillman, 619 P.2d 1390, 1391 (Utah 1980). The fact that Plaintiffs may have taken work home in the past is

¹The sworn affidavit of Defendant Kevin Scheidle in support of Defendants' motion for summary judgment states that "Meshwerks considers their digitized 3D models to be proprietary, and it maintains an inventory of these data files for promotional purposes as well as for licencing to its customers." Similarly, the affidavit states that "Meshwerks considered the tools to be proprietary," and that Scheidle had the phrase "Property of Meshwerks, Inc." embedded into the software tools.

immaterial to whether Plaintiffs committed theft by taking 3D models and software tools from Meshwerks at the close of their employment. Similarly, the notions that Plaintiffs did not believe that the 3D models and software tools were proprietary or that Defendants gave them implied consent to take the items, even if true, have no bearing on whether Defendants reasonably believed that Plaintiffs had stolen from Meshwerks. Finally, Defendant Scheidle's alleged copying of files from his previous job is irrelevant here.

"[T]he mere existence of genuine issues of fact . . . does not preclude the entry of summary judgment if those issues are immaterial to resolution of the case.'" Burns v. Cannondale Bicycle Co., 876 P.2d 415, 419 (Utah Ct. App. 1994) (omission in original) (quoting Horgan v. Indus. Design Corp., 657 P.2d 751, 752 (Utah 1982)). All of the disputed facts cited by Plaintiffs are immaterial. Therefore, we determine "that there is no genuine issue as to any material fact" regarding Plaintiffs' failure to meet the probable cause element of their malicious prosecution claim. Utah R. Civ. P. 56(c).

Next, Plaintiffs assert that factual issues remain regarding whether Defendants acted maliciously when they initiated criminal proceedings. The malice element means that Defendants initiated criminal proceedings for "a primary purpose other than that of bringing an offender to justice." Amica Mut. Ins. Co., 768 P.2d at 959. "[I]n proving malice in a civil action it is not necessary to prove actual spite, ill will or grudge, but it is only necessary to prove wrongful or improper motive." Johnson v. Mount Ogden Enters., 23 Utah 2d 169, 460 P.2d 333, 335 (1969). However, the record is void of any evidence beyond Plaintiffs' speculation that Defendants initiated criminal proceedings in order to retaliate against Plaintiffs for leaving Meshwerks. Rather, the undisputed facts establish that Defendants acted for the legitimate purpose of protecting company property. Thus, the undisputed facts show the absence of malice, which precludes Plaintiffs from succeeding on their malicious prosecution claim. The trial court's grant of summary judgment was proper. See Utah R. Civ. P. 56(c).

Plaintiffs also argue that issues of material fact remain with regard to their abuse of process claim. "[T]o establish a claim for abuse of process, a claimant must demonstrate '[f]irst, an ulterior purpose; [and] second, an act in the use of the process not proper in the regular prosecution of the proceedings.'" Anderson Dev. Co. v. Tobias, 2005 UT 36, ¶65, 116 P.3d 323 (second and third alterations in original) (quotations and citation omitted). Respecting the ulterior purpose element, Plaintiffs again allege that disputed material facts remain

regarding whether Defendants used the civil lawsuit to retaliate against them for leaving Meshwerks. Again, this inference is not supported by the facts, which indicate that Defendants brought the civil suit to enjoin Plaintiffs from using Meshwerks's software tools and 3D models. Respecting the abuse of process element, Plaintiffs again cite the immaterial fact that they had been allowed to take work home with them prior to leaving the company as evidence of improper process. However, the record reveals no abusive tactics or other improper use of process by Defendants during the civil case. Thus, "there is no genuine issue as to any material fact" regarding the abuse of process claim and Defendants are "entitled to a judgment as a matter of law." Utah R. Civ. P. 56(c). We affirm the trial court's grant of Defendants' motion for summary judgment.

Finally, Plaintiffs contend that the trial court erred by denying their motion to continue discovery under rule 56(f) of the Utah Rules of Civil Procedure.² See id. 56(f). "[W]e review a trial court's decision to grant or deny a rule 56(f) motion under the abuse of discretion standard. Under this standard, we will not reverse unless the decision exceeds the limits of reasonability." Crossland Sav. v. Hatch, 877 P.2d 1241, 1243 (Utah 1994) (quotations and citations omitted). "[R]ule 56(f) motions . . . should be granted liberally unless they are deemed dilatory or lacking in merit." Salt Lake County v. Western Dairymen Coop., Inc., 2002 UT 39, ¶24, 48 P.3d 910. While "the courts in this state have never established a 'bright line' rule for determining when a party has had sufficient time to initiate discovery[,]" our courts have held that four months is enough time to complete discovery. Crossland, 877 P.2d at 1244.

Here, the parties agreed to a discovery deadline of January 31, 2006, at a case management conference held on August 29, 2005. Plaintiffs filed their rule 56(f) motion on December 14, 2005, and the hearing on the motion took place in March 2006. Thus, nearly four months elapsed without Plaintiffs even attempting to depose Scheidle or conduct other necessary discovery, and Plaintiffs had over six weeks to conduct discovery after the motion was filed. Further, Plaintiffs do not allege that Defendants denied them a reasonable opportunity to conduct Scheidle's deposition. Cf. Strand v. Associated Students of the Univ. of Utah, 561 P.2d 191, 194 (Utah 1997) (ruling that rule 56(f) motion was not dilatory because moving party had been

²Because the record does not contain a transcript of the hearing on Plaintiffs' rule 56(f) motion, see Utah R. Civ. P. 56(f), we review this issue based on the pleadings and other relevant parts of the record.

denied a "reasonable opportunity" to depose necessary witnesses and conduct needed discovery). As such, Plaintiffs' rule 56(f) motion was dilatory and it was well within the trial court's discretion to deny the motion.

James Z. Davis, Judge

I CONCUR:

Carolyn B. McHugh, Judge

I CONCUR IN THE RESULT:

Gregory K. Orme, Judge