DEFENDING FEDERAL AND STATE MALICIOUS PROSECUTION CLAIMS AGAINST RETAILERS

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Unfortunately, many retail establishments are sued as a result of lawful and proper arrests for shoplifting or other crimes committed on store grounds. Usually, the plaintiff in such a case, brings a federal Section 1983 malicious prosecution claim, along with a state malicious prosecution claim. The discussion below is a brief synopsis of some of the common issues dealt with in defending retail establishments against such claims.

In a Section 1983 federal malicious prosecution claim, a plaintiff must show that:

(1) the defendant is a state actor;

(2) the defendant initiated a criminal proceeding;

(3) the criminal proceeding ended in plaintiff's favor;

(4) the proceeding was initiated without probable cause;

(5) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and

(6) the plaintiff suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.

Estate of Smith v. Marasco, 318 F.3d 497, 521 (3rd Cir. 2003); Johnson v. Knorr, 477 F.3d 75, 82 (3d Cir. 2007).

With respect to the first prong (whether the defendant is a state actor), in Cruz v. Donnelly, 727 F.2d 79 (3d Cir. 1984), the United States Court of Appeals for the Third Circuit dealt with a case in which there was the common allegation that the store detectives were working in concert with the local police and were, hence, a "state actor." Specifically, in Cruz, a private store employee was suspicious that the plaintiff had stolen merchandise. The store employee called the local police

department who sent two police officers to investigate. The police officers forcibly escorted the plaintiff into the store's office and, at the store's request, strip searched the plaintiff. After finding no store property on him, the police officers allowed the plaintiff to put his clothes back on and then escorted him from the premises. The plaintiff later brought a Section 1983 action against the police officers and the store employee, in which he alleged that he had been detained and searched without probable cause. The store employee was granted summary judgment because he was not a state actor. The plaintiff appealed the summary judgment order to the Third Circuit, where he argued that the store manager acted in concert with the police officers which made him a state actor. The Third Circuit disagreed, holding that the plaintiff had failed to plead or prove the existence of a pre-arranged plan by which the police substituted the judgment of private parties for their own official authority. Absent allegations or facts tending to show such a plan, the Third Circuit held the store employee could not be said to have engaged in the "concerted" or "joint action" with the police necessary to bring them within the scope of a Section 1983 claim. Id. The Third Circuit then issued the following test to determine whether a private store employee was acting under "color of law":

(1) the police have a pre-arranged plan with the store; and

(2) under the plan, the police will arrest anyone identified as a shoplifter by the store without independently evaluating the presence of probable cause.

Id. at 81. See also, Chapman v. Acme Markets, Inc., 1998 U.S. Dist. LEXIS 2402 (E.D. Pa. 1998). "Merely calling the police, furnishing information to the police, or communicating with a state official does not rise to the level of joint action necessary to transform a private entity into a state actor." Collins v. Christie, 2007 U.S. Dist. LEXIS 61579, *11-*12 (E.D. Pa. 2007). "Significant concerted action . . . must exist between state actors and a private individual to merit . . ."

characterizing a private party as a state actor. Heilman v. T.W. Ponessa & Assoc., 2008 U.S. Dist. LEXIS 6875 *1, *35 (M.D. Pa. 2008).

Notwithstanding the foregoing, in order to allege such a conspiracy as that needed to turn a private actor into a state actor, it is necessary that the plaintiff "must make 'specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events'" Panayotides v. Rabenold, 35 F. Supp. 2d 411 (E.D. Pa. 1999), aff'd., 210 F.3d 358 (3rd. Cir. 2000)(quoting Hammond v. Creative Financial Planning, 800 F. Supp. 1244 (E.D. Pa. 1992)). Thus, many complaints will fail at the outset due to the plaintiff's inability to make such specific allegations.

With respect to the fourth prong (probable cause), when analyzing whether there is probable cause to initiate criminal proceedings, a court must examine whether there is "a reasonable ground of suspicion supported by circumstances sufficient to warrant an ordinary prudent man in the same situation" to believe that a party has committed an offense. Strickland v. Univ. of Scranton, 700 A.2d 979, 984 (Pa. Super. 1997). See also Wright v. City of Philadelphia, 409 F.3d 595, 602 (3rd. Cir. 2005); Commonwealth v. Williams, 941 A.2d 14, 27 (Pa. Super. 2007)("Probable cause to arrest exists when the facts and circumstances within the . . . officer's knowledge and of which the officer has reasonably trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested."). "The proper inquiry in a Section 1983 claim based upon false arrest or misuse of the criminal process is not whether the person arrested in fact committed the offense, but whether the arresting officer had probable cause to believe that the person arrested had committed the offense." Warren v. Twp. of Derry, 2007 U.S. Dist. LEXIS 19537 *1, *24 (M.D. Pa. 2007). The fact that a Magisterial District

Judge finds probable cause for the charges to be bound over to the Court of Common Pleas constitutes "weighty evidence" that defendants had probable cause to make a criminal complaint. See Snell v. Duffy, 2004 U.S. Dist. LEXIS 520 (E.D. Pa. 2004). As stated by the Pennsylvania Superior Court in Cosmas v. Bloomingdales Bros., 660 A.2d 83 (Pa. Super. 1995):

> In the present case, District Justice M. William Peterson heard evidence on February 15, 1987, and decided to hold appellant over for trial. While this determination is not conclusive, it is affirmative evidence that appellees did in fact have probable cause to initiate the criminal proceedings against appellant. Since appellant has not alleged any procedural infirmities, or that appellees lied or withheld evidence at the preliminary hearing, that proceeding stands untainted and is considered weighty evidence in the probable cause determination.

Id. at 87-88. More specifically, the report of a store security guard may, by itself, provide the sole source of probable cause necessary for a valid arrest. See Karkut v. Target Corp., 453 F. Supp. 874, 884 (E.D. Pa. 2006)("the law is well established that the report of a seemingly trustworthy security guard provides probable cause for an arrest."); Merkel v. Upper Dublin School District, 211 F.3d 782 (3rd. Cir. 2000)(citing Gramenos v. Jewel Co., Inc., 797 F.2d 432 (7th Cir. 1986)("Police have reasonable grounds to believe a guard at a supermarket. We need not say that police always are entitled to act on the complaint of an eyewitness; a guard is not just any eyewitness. The chance that [security guards are] pursuing a grudge . . . is small . . . [because the] store will insist that the guard err on the side of caution [, as it] does not want to embarrass and anger an honest customer-not only because this is bad for business but also because a false charge of a crime may lead to costly tort litigation under state law.")). See also Lynch v. Doanld Hunter Safeguard Sec., Inc., 2000 U.S. Dist. LEXIS 13248 *11 (E.D. Pa. 2001)("[w]hereas the uncorroborated statement of a security guard might not carry the day at trial, if the statement appears trustworthy, it is sufficient to establish

probable cause. Furnished with such a statement, a police officer is not required to continue his or her investigation to test the suspect's claim of innocence"). Id. at *11 (citing Merkle, 211 F. 3d at 790 n.8; Gramenos, 797 F. 2d at 439).

With respect to the sixth prong (the concept of seizure), in order to establish a "seizure," for Fourth Amendment purposes, as a consequence of a legal proceeding, a plaintiff needs to demonstrate a significant deprivation of pretrial liberty by showing that her court appearance was secured by means of bail, the issuance of an arrest warrant, incarceration, or restrictions on her travel. DiBella v. Borough of Beachwood, 407 F.3d 599, 603 (3d Cir. 2005). In Wiltz v. Middlesex County Office, 249 Fed. Appx. 944, 949 (3rd Cir. 2007), cert denied, 2008 U.S. LEXIS 2736 (2008), the Third Circuit held that although the plaintiff alleges that she was arrested, she "does not allege that she was incarcerated, required to post bond, maintain contact with Pretrial Services, refrain from traveling, or that she endured any other 'post-indictment' deprivation of liberty as a result of the legal proceedings,. . . ." Thus, there could be no claim for malicious prosecution. Similarly, the United States District Court for the Middle District of Pennsylvania has noted, "[t]he Third Circuit Court of Appeals has held that the requirement to appear at court proceedings, without more, does not constitute a seizure for purposes of a Fourth Amendment malicious prosecution claim." Esposito v. Galli, 2006 U.S. Dist. LEXIS 55288, *27 (M.D. Pa. 2006)(citing DiBella v. Borough of Beachwood, 407 F. 2d 599, 603 (3rd Cir. 2005)).

In addition to the foregoing, normally, a private individual, such as a individually named store detective defendant, is liable for malicious prosecution only if he "provides knowingly false statements to an official to initiate charges or directs or pressures an official to initiate charges, thereby making the officer's intelligent use of discretion impossible." Bradley v. Gen. Accident Ins.

Co., 778 A.2d 707, 711 (Pa. Super. 2001). "One is justified in launching a criminal prosecution if the facts convince him, as a reasonable, honest and intelligent human being, that the suspected person is guilty of a criminal offense. The arresting person may be in error, but if his error is an honest one, not motivated by personal malice, bias or revenge, the law will hold him harmless, regardless of the eventual result of the criminal prosecution." Neczypor v. Jacobs, 169 A.2d 528, 530 (Pa. 1961).

With respect to state law claims for malicious prosecution, the elements of a state law claim are essentially the same as for a federal claim, with the exception that the defendant need not be a state actor and the plaintiff need not allege a violation of the United States Constitution. See Gatter v. Zappile, 67 F. Supp.2d 515, 519 (E.D. Pa. 1999). In Pennsylvania, a plaintiff alleging common law malicious prosecution must show that: (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice. Merkel, 211 F.3d at 791. Most importantly, a state law malicious prosecution claim, like its federal counterpart, requires a lack of probable cause.