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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3819-15T2

ANTHONY MASTROFILIPPO and
DIANE MASTROFILIPPO,

Plaintiffs-Appellants,

v.

BOROUGH OF LITTLE FERRY, OFFICER
JOHN CLARK, OFFICER SAMUEL AGUILAR,
SERGEANT JAMES WALTERS, LIEUTENANT
SCOTT KRAL,¹ MICHAEL CAPABIANCO,
GINO TESSARO,² CHIEF RALPH VERDI and
DETECTIVE CRAIG HARTLESS,

Defendants-Respondents,

and

ANGELA OROZCO,

Defendant.

Submitted June 26, 2017 – Decided July 14, 2017

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
3552-12.

¹ Improperly pled as "Cowl."

² Improperly pled as "Tedesco."

Law Offices of Louis A. Zayas, L.L.C., attorneys for appellants (Louis A. Zayas, of counsel and on the brief; Alex Lee, on the brief).

Hanrahan Pack, L.L.C., attorneys for respondents (Thomas B. Hanrahan, of counsel and on the brief; Kathy A. Kennedy, on the brief).

PER CURIAM

Anthony and Diane Mastrofilippo (plaintiffs) appeal from four orders³ cumulatively dismissing the complaint pursuant to Rule 4:6-2(e) against the Borough of Little Ferry (Borough), Officer John Clark, Officer Samuel Aguilar, Sergeant James Walters, Lieutenant Scott Kral, Michael Capabianco, Gino Tessaro, Chief Ralph Verdi, and Detective Craig Hartless (collectively referred to as the Borough defendants). We reverse the orders dismissing the pleadings, remand for further proceedings on the discovery issue, and affirm the administrative dismissal against Orozco.

Plaintiffs have had a history of conflict with their neighbor, Orozco, and over time, this conflict expanded to the Borough

³ As to the Borough defendants, they appeal from an August 2, 2013 order denying plaintiffs' discovery motion and granting Borough defendants' cross-motion for a protective order and to dismiss counts one, two, three, and six of the complaint pursuant to Rule 4:6-2(e); and an August 23, 2013 order denying plaintiffs' motion to amend the complaint. As to defendant Angela Orozco, plaintiffs appeal from a June 12, 2015 order denying their motion to vacate an order administratively dismissing counts four and five of the complaint for lack of prosecution; and an April 1, 2016 order denying reconsideration.

defendants. Mr. Mastrofilippo filed an administrative complaint against Lieutenant Kral because he was dissatisfied with Lieutenant Kral's response to an altercation involving Mr. Mastrofilippo. Lieutenant Kral had responded to Mr. Mastrofilippo's call to police and allegedly told him "if you don't like your neighbors why don't you sell your house and move out of Little Ferry?" Lieutenant Kral later pulled Mr. Mastrofilippo over for driving while using his mobile phone, but then released him with a warning. Mr. Mastrofilippo had contacted the Borough's Administrator, Mr. Capabianco, to report code violations on Orozco's property. When the Borough issued Orozco a violation, Orozco allegedly confronted Mr. Mastrofilippo and he called the police. When the police arrived, Orozco told the police that Mr. Mastrofilippo had allegedly sexually assaulted her (the "underlying criminal case"). Mr. Mastrofilippo later emailed Mr. Capabianco reporting more property violations by Orozco, but Mr. Capabianco responded by informing Mr. Mastrofilippo of violations on his property instead.

A municipal court judge held a probable cause hearing in the underlying criminal case. The parties dispute the details of what occurred between Mr. Mastrofilippo and Orozco. At the hearing, Orozco testified that he harassed her sexually. The municipal court judge found that probable cause existed, and the police

arrested Mr. Mastrofilippo. The Bergen County Prosecutor's Office subsequently dismissed the underlying criminal case.

In May 2012, plaintiffs filed this complaint against Orozco and the Borough defendants. Plaintiffs alleged municipal liability under 42 U.S.C.A. § 1983 (Count One); malicious prosecution (Count Two); false arrest (Count Three); defamation per se by Orozco (Count Four); negligent property damage by Orozco (Count Five); and loss of consortium (Count Six). Plaintiffs filed a motion to compel production of personnel files and internal affairs records of the Borough defendants. Defendants cross-moved seeking a protective order and to dismiss the complaint for failure to state a cause of action pursuant to Rule 4:6-2(e). On August 2, 2013, the judge denied plaintiffs' motion and granted the Borough defendants' cross-motion and dismissed Counts One, Two, Three, and Six of the complaint.

Plaintiffs filed a motion to amend the complaint seeking to plead three additional counts: conspiracy to file baseless criminal charges under 42 U.S.C.A. § 1983 (Count Seven), retaliatory prosecution in violation of plaintiffs' First Amendment rights under 42 U.S.C.A. § 1983 (Count Eight), and abuse of process (Count Nine). On August 23, 2013, the motion judge denied plaintiffs' motion to amend the complaint. She also granted the Borough defendants' cross-motion to dismiss the amended

complaint against them. Plaintiffs appealed from both August 2013 orders, but we dismissed the appeal as interlocutory.⁴

On June 12, 2015, a different judge denied plaintiffs' motion to vacate an administrative dismissal as to Orozco. He issued a written decision concluding that plaintiffs' counsel failed to submit a certification in support of the motion, and that the court had dismissed plaintiffs' claims without prejudice against Orozco in August 2012, well before the motion to vacate. On April 1, 2016, the same judge denied plaintiffs' motion for reconsideration of the June 12 order. In denying the reconsideration motion on the merits, the judge concluded that plaintiffs failed to show exceptional circumstances. He then dismissed the claims against Orozco with prejudice.

On appeal, plaintiffs argue that the judge erred by granting the Borough defendants' Rule 4:6-2(e) motions. They maintain primarily that probable cause is a question for the jury and the judge made findings of fact. Plaintiffs also contend that the court erroneously denied their motions to amend the complaint, compel discovery, and vacate the administrative dismissal as to Orozco.

⁴ Mastrofilippo v. Borough of Little Ferry, No. A-0584-13 (App. Div. Feb. 19, 2015).

I.

We begin by addressing plaintiffs' contention that the judge erred by dismissing their municipal liability, malicious prosecution, false arrest, and loss of consortium claims. They assert that the judge improperly relied on the finding of probable cause in the underlying criminal case. At this stage, plaintiffs' allegations, if proven, sufficiently state claims for these causes of action.

We review a grant of a motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under Rule 4:6-2(e) that governed the trial court. See Frederick v. Smith, 416 N.J. Super. 594, 597 (App. Div. 2010), certif. denied, 205 N.J. 317 (2011). "[I]n reviewing a complaint dismissed under Rule 4:6-2(e)[,] [the court's] inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Green v. Morgan Props., 215 N.J. 431, 451 (2013) (quoting Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). "[P]laintiffs are entitled to every reasonable inference of fact[,]" and "[t]he examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id. at 452 (third alteration in original) (quoting Printing Mart-Morristown, supra,

116 N.J. at 746). "[T]he test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown, *supra*, 116 N.J. at 746 (quoting Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)).

As to municipal liability, plaintiffs alleged that the Borough defendants violated 42 U.S.C.A. § 1983, which provides that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

To establish a claim under this section, a plaintiff must prove that the "defendants acted under color of state law and deprived him of a well-established federal constitutional or statutory right." Wildoner v. Borough of Ramsey, 162 N.J. 375, 385 (2000). Where the basis for a plaintiff's claim is Section 1983, false arrest, or malicious prosecution, like here, the existence of probable cause will generally be an absolute defense. *Id.* at 389.

The judge weighed the soundness of the evidence considered by the municipal court judge. In her statement of reasons, the judge wrote:

In order to sustain a claim for municipal liability ([Count One]), malicious prosecution ([Count Two]), or false arrest ([Count Three]), plaintiff[s] bear[] the burden of demonstrating that the criminal proceeding and arrest was initiated without probable cause Here, a municipal judge made a judicial finding, based on the testimony of Orozco, that probable cause existed for the underlying charges. The court finds, based on a review of Orozco's testimony as set forth in plaintiff[s'] complaint, that the municipal court's determination was founded on sound evidence before it from which a reasonable inference of probable cause could be drawn Plaintiff[s have] not overcome the rebuttable presumption that probable cause existed for the municipal court to initiate a criminal proceeding against him.

[(Emphasis added).]

The judge made findings of fact rather than limiting her analysis to whether the complaint "ma[de] allegations which, if proven, would constitute a valid cause of action." Kieffer v. High Point Ins. Co., 422 N.J. Super. 38, 43 (App. Div. 2011) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). Importantly, when "the facts giving rise to probable cause are themselves in dispute[,]" the jury is to decide if probable cause existed. LoBiondo v. Schwartz, 199 N.J. 62, 93 (2009). Plaintiffs alleged that the Borough defendants acted in

their capacity as policy-makers and law enforcement officials to "falsely and maliciously" arrest Mr. Mastrofilippo, thereby depriving him of his "rights to be free from malicious prosecution, false arrest, and abuse of process, and his right to petition the government and right to free speech."

Plaintiffs have sufficiently stated a claim for malicious prosecution. To establish malicious prosecution, a "plaintiff must prove (1) that the criminal action was instituted by the defendant against the plaintiff, (2) that it was actuated by malice, (3) that there was an absence of probable cause for the proceeding, and (4) that it was terminated favorably to the plaintiff." Brunson v. Affinity Fed. Credit Union, 199 N.J. 381, 393-94 (2009) (quoting Helmy v. City of Jersey City, 178 N.J. 183, 190 (2003)). Malice is "the intentional doing of a wrongful act without just cause," and a lack of probable cause alone is insufficient to establish malice. Id. at 395-96 (quoting McFadden v. Lane, 71 N.J.L. 624, 630 (E. & A. 1905)).

Plaintiffs alleged that Borough police officers "with knowledge of the history between [p]laintiffs and Orozco, recklessly disregarded the inconsistencies in Orozco's accusations, and charged [Mr.] Mastrofilippo in retaliation for his complaints about the Police Department." Plaintiffs further maintained that the Borough defendants actively encouraged Orozco

to file charges against Mr. Mastrofilippo, that the municipal court judge was misled into finding probable cause, and they point out that the underlying criminal case was ultimately dismissed. At this stage, we consider simply whether the cause of action is suggested by the alleged facts, not whether the facts are true.

Plaintiffs have also stated a claim for false arrest. "To state a claim for false arrest under the Fourth Amendment, a plaintiff must establish: (1) that there was an arrest; and (2) that the arrest was made without probable cause." James v. City of Wilkes-Barre, 700 F.3d 675, 680 (3d Cir. 2012). There is no dispute that Mr. Mastrofilippo was arrested. Plaintiffs maintained, as discussed above, that the Borough defendants and Orozco misled the municipal court judge into finding probable cause.

The same is true for plaintiffs' loss of consortium claim. A loss of consortium claim is "intended to compensate a person for the loss of a spouse's 'society, companionship and services due to the fault of another.'" Kibble v. Weeks Dredging & Constr. Co., 161 N.J. 178, 190 (1999) (quoting Wolfe v. State Farm Ins. Co., 224 N.J. Super. 348, 350 (App. Div.), certif. denied, 111 N.J. 654 (1988)). Plaintiffs alleged that the Borough defendants' "actions have caused marital issues between [them]" and that "[t]here is a lot of tension in the household[.]"

II.

We also conclude that the court erred by denying plaintiffs' motion to amend the complaint to include causes of action for conspiracy, retaliatory prosecution, and abuse of process.

Rule 4:9-1 governs motions to amend the pleadings. Our Supreme Court has construed this rule to "'require[] that motions for leave to amend be granted liberally,' even if the ultimate merits of the amendment are uncertain." Prime Accounting Dep't v. Twp. of Carney's Point, 212 N.J. 493, 511 (2013) (alteration in original) (quoting Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 456 (1998)). The Court stated, however, that

[o]ne exception to that rule arises when the amendment would be "futile," because "the amended claim will nonetheless fail and, hence, allowing the amendment would be a useless endeavor. [C]ourts are free to refuse leave to amend when the newly asserted claim is not sustainable as a matter of law. . . . [T]here is no point to permitting the filing of an amended pleading when a subsequent motion to dismiss must be granted."

[Ibid. (second and third alterations in original) (quoting Notte v. Merchs. Mut. Ins. Co., 185 N.J. 490, 501 (2006)).]

Such is not the case here.

Plaintiffs should have been allowed to add a claim for civil conspiracy. A civil conspiracy is defined as a

combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or an injury upon another, and an overt act that results in damage.

[LoBiondo, supra, 199 N.J. at 102 (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 177 (2005)).]

The focus of a civil conspiracy claim is the underlying wrong rather than the conspiracy itself. Banco Popular, supra, 184 N.J. at 178. In the amended complaint, plaintiffs alleged that the Borough defendants "encouraged [Orozco] to fabricate allegations of sexual misconduct" and "suppressed exculpatory evidence that would have exonerated [Mr. Mastrofilippo]" in furtherance of the conspiracy to file baseless charges against him, thereby depriving him "of his constitutional rights to be free from false arrest, malicious prosecution, and abuse of process."

Plaintiffs should also be allowed to add a claim for retaliatory prosecution under Section 1983.

To prove the Section 1983 claim for retaliation under the First Amendment, a plaintiff must prove that: (1) "the activity in question was protected"; (2) that "his interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees"; and (3) that "the protected activity was a substantial or motivating factor in the alleged retaliatory action."

[Winters v. N. Hudson Reg'l Fire & Rescue, 212 N.J. 67, 89 n.5 (2012) (quoting Baldassare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001)).]

Plaintiffs alleged that the Borough defendants retaliated against Mr. Mastrofilippo for complaining of property violations, expressing his opinion about the Borough in a public newsletter, and filing complaints against Borough personnel.

The same is true for plaintiffs' abuse of process claim. "To be found liable for malicious abuse of process, a party must have performed additional acts 'after issuance of process which represent the perversion or abuse of the legitimate purposes of that process.'" Hoffman v. AsSeenOnTV.com, Inc., 404 N.J. Super. 415, 431 (App. Div. 2009) (quoting Baqlini v. Lauletta, 338 N.J. Super. 282, 294 (App. Div.), certif. denied, 169 N.J. 607 (2001)). "[P]rocess is not abused unless after its issuance the defendant reveals an ulterior purpose he had in securing it by committing further acts whereby he demonstrably uses the process as a means to coerce or oppress the plaintiff." Ibid. (quoting Ruberton v. Gabage, 280 N.J. Super. 125, 130 (App. Div.), certif. denied, 142 N.J. 451 (1995)).

Plaintiffs alleged that the Borough defendants encouraged Orozco to file the complaint and were willfully indifferent to the existence of exculpatory evidence. They argue that the Borough

defendants' omission of investigative facts to ensure Mr. Mastrofilippo's prosecution, excessive police presence at the probable cause hearings, and Capabianco's targeting of Mr. Mastrofilippo's property, sufficiently stated a cause of action for abuse of process.

Courts may deny a motion to amend the complaint if the amended complaint would be dismissed in a subsequent Rule 4:6-2(e) motion. Prime Accounting Dep't, supra, 212 N.J. at 511. Here, the motion judge dismissed plaintiffs' conspiracy claim, writing:

Plaintiffs alleged [the Borough defendants] induced Orozco to file a criminal complaint against plaintiff[s]. However, plaintiffs fail to cite to any legal authority for the proposition that [the Borough defendants] can be held liable for conspiracy to file an allegedly baseless criminal complaint . . . where a judge has independently decided that probable cause existed for an arrest.

The motion judge dismissed Count Eight, retaliatory prosecution in violation of plaintiffs' First Amendment rights under 42 U.S.C.A. § 1983, stating "the United States Supreme Court 'has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.'" (quoting Reichle v. Howards, 566 U.S. 658, 665, 132 S. Ct. 2088, 2093, 182 L. Ed. 2d 985, 992 (2012)). She then dismissed plaintiffs' abuse of process claim for the same reasons as the conspiracy and retaliatory prosecution claims.

The motion judge erred in dismissing the amended complaint for the same reasons she erred in dismissing Counts One, Two, Three, and Six above. The motion judge determined the existence of probable cause instead of searching the allegations in the amended complaint for valid causes of actions. Kieffer, 422 N.J. Super. at 43. Plaintiffs' ability to sufficiently prove all the elements to the causes of action in the pleadings will be left for another day.

III.

Plaintiffs contend that personnel records and internal affairs files of the named Borough defendants are highly relevant and likely to lead to admissible evidence (1) of inadequate training and supervision, and failure to discipline, to establish municipal liability under Section 1983 and (2) that probable cause was a pretext for false arrest and malicious prosecution.

We review a trial court's decision on discovery matters under an abuse of discretion standard. Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011). "That is, '[w]e generally defer to a trial court's disposition of discovery matters unless the court has abused its discretion or its determination is based on a mistaken understanding of the applicable law.'" Ibid. (alteration in original) (quoting Rivers v. LSC P'ship, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005)).

Here, the judge did not provide a sufficient explanation supporting her order denying plaintiffs' motion to compel in her statement of reasons, presumably because in the same order, she dismissed the claims against the Borough defendants and thus, the need for discovery became moot. The motion judge did note, however, that there is a strong public interest in maintaining the confidentiality of police personnel records and internal affairs files. See State v. Kaszubinski, 177 N.J. Super. 136, 138 (Law Div. 1980). Nevertheless, on remand, the court should address more fully plaintiffs' motion to compel these records now that we are reinstating the matter as to the Borough defendants.

Finally, we conclude that plaintiffs' remaining argument as to Orozco is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We therefore uphold the orders dated June 12, 2015 and April 1, 2016.

We reverse the orders dismissing the pleadings, remand for further proceedings on the discovery issue, and affirm the administrative dismissal against Orozco. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION