

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF
FLORIDA IN AND FOR PALM BEACH
COUNTY

JEFFREY EPSTEIN,

No. 50 2009 CA 040800XXXXMBAG

Plaintiff/Counter-Defendant, JUDGE HAFELE

v.

BRADLEY J. EDWARDS, et al.,

Defendant/Counter-Plaintiffs.

**MOTION FOR RECONSIDERATION OF ORAL
SUMMARY JUDGMENT RULING AND REQUEST FOR ORAL ARGUMENT**

Plaintiff/Counter-Defendant, Jeffrey Epstein, moves for reconsideration of this Court's non-final oral ruling denying summary judgment because, for the reasons stated in this motion, Defendant/Counter Plaintiff Bradley J. Edwards' malicious prosecution claim fails as a matter of law on an essential element: the absence of probable cause for Epstein's underlying lawsuit. The Court has yet to hear argument from the parties on the issue of probable cause. Oral argument is therefore respectfully requested.

Preface

In its May 19, 2014 order granting Epstein's motion for summary judgment, this Court recounted the following background facts:

[Epstein] filed suit against [Edwards]. Edwards then filed a counter-claim against Epstein. Epstein subsequently dismissed his Complaint without prejudice. The counter-claim proceeded, undergoing several amendments. As it now stands, the Fourth Amended Counterclaim has two causes of action: abuse of process and malicious prosecution. Epstein moved for summary judgment arguing that the litigation privilege applies to both the abuse of process and malicious prosecution claims.

(App. 1).¹ In addition to arguing the application of the litigation privilege, Epstein's motion for summary judgment alleged that the suit he filed against Edwards, which is the basis of Edwards' malicious prosecution action, was supported by probable cause.

At the outset of the hearing held January 27, 2014 on Epstein's motion for summary judgment, the Court orally denied summary judgment as to probable cause, and directed the parties to address the litigation privilege issue.² The Court entered its written order granting summary judgment in favor of Epstein upon application of

¹ The Court is familiar with the allegations in Epstein's original and amended complaints. The second amended complaint named Edwards in a cause of action for abuse of process, arising out of a fraudulent Ponzi scheme perpetrated by attorneys and staff of the law firm of Rothstein, Rosenfeldt, and Adler ("RRA"), where Edwards was a partner who prosecuted actions against Epstein which were marketed by RRA to investors with the promise of multi-million dollar recoveries. Epstein's allegations included false pleadings, altering prior sworn testimony, harassing investigations, vexatious discovery, fraudulent misrepresentations, false witness statements, and legal extortion.

² The entirety of the Court's oral ruling on probable cause was the following: "But I just feel like the probable cause aspect just carries with it too many factual issues for me to rule as a matter of law, so I don't think that I can grant relief on the probable cause issue vel non. So if you will, please move on...." (App. * at 19-20). Thereafter, the Court heard argument solely as to the litigation privilege.

the litigation privilege based upon the then binding precedent of *Wolfe v. Foreman*, 128 So. 3d 67 (Fla. 3d DCA 2013). Final judgment was thereafter entered in favor of Epstein.

Edwards appealed the judgment as it pertained to his malicious prosecution action, during which time the Fourth District issued *Fischer v. Debrincat*, 169 So. 3d 1204 (Fla. 4th DCA 2015), holding that the litigation privilege did not apply to a malicious prosecution action and certifying to the Supreme Court of Florida conflict with *Wolfe*. In Edwards' appeal, the Fourth District reversed based upon *Fischer*, and again certified conflict. *Edwards v. Epstein*, 178 So. 3d 942 (Fla. 4th DCA 2015). Epstein filed for review in the Supreme Court. The Supreme Court resolved the conflict in *Debrincat v. Fischer*, No. SC15-1477, 2017 WL 526508 (Fla. Feb. 9, 2017), holding that the litigation privilege does not bar a malicious prosecution action. Based upon *Debrincat*, the Supreme Court declined to review the decision of the Fourth District in this case. [TO BE VERIFIED]

Epstein seeks reconsideration of the Court's oral ruling on the ground that the record and applicable law demonstrate that the issue of probable cause does indeed present a question of law for determination by the Court.

The Applicable Law

In Florida, "an action for malicious prosecution is a serious matter." *Cent. Fla.*

Mach. Co., Inc. v. Williams, 424 So. 2d 201, 203 (Fla. 2d DCA 1983). Malicious prosecution actions are “not generally favored” in Florida. *Id.* at 202.

There are six elements that must be established in order to prove malicious prosecution: 1) the commencement of a judicial proceeding; 2) its legal causation by the present defendant against the plaintiff; 3) its bona fide termination in favor of the plaintiff; 4) the absence of probable cause for the prosecution; 5) malice; 6) damages. *Duval Jewelry Co. v. Smith*, 102 Fla. 717, 136 So. 878, 880 (1931). The fourth element is at issue here.

In *Goldstein v. Sabella*, 88 So. 2d 910 (Fla. 1956), the Supreme Court of Florida explained the meaning of probable cause in the context of a malicious prosecution action as follows:

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.” *Dunnavant v. State*, Fla., 46 So. 2d 871, 874 [(Fla. 1950)]. This, as well as other acceptable definitions of the term, indicates that one need not be certain of the outcome of a criminal or civil proceeding to have probable cause for instituting such an action.

Id. at 910.

“Probable cause in the context of a civil suit is measured by a lesser standard than in a criminal suit.” *Wright v. Yurko*, 446 So. 2d 1162, 1166 (Fla.5th DCA 1984).

“The standard for establishing probable cause in a civil action is extremely low and easily satisfied.” *Gill*, 82 F. Supp. 2d at 1364. Even in the criminal context, such as when analyzing probable cause to support a search warrant, probable cause can be inferred from the facts. *See State v. Powers*, 388 So. 2d 1050, 1051 (Fla. 4th DCA 1980).

Once the movant for summary judgment tenders competent evidence to support his motion, the opposing party must come forward with counter-evidence sufficient to reveal a genuine issue of material fact. *Glasspoole v. Konover Constr. Corp. South*, 787 So. 2d 937, 938 (Fla. 4th DCA 2001). A complete failure of proof of any essential element of a party’s cause of action necessarily renders all other facts offered by the non-moving party immaterial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

“Just because conflicting evidence exists does not mean probable cause is a jury question.” *C.A. Hansen Corp. v. Wicker, Smith, Blomqvist, Tutan, O’Hara, McCoy, Graham & Lane, P.A.*, 613 So. 2d 1336 (Fla. 3d DCA 1993) (emphasis supplied); *see also Rivernider v. Meyer*, 174 So. 3d 602, 604-05 (Fla. 4th DCA 2015) (trial court properly entered summary judgment against malicious prosecution claimant where underlying proceeding was commenced with probable cause); *Northwest Florida Home Health Agency v. Merrill*, 469 So. 2d 893 (Fla. 1st DCA

1985)(in a malicious prosecution suit for reporting the termination of a nurse to the Board of Nursing, whether the defendant had probable cause to report the nurse was a question of law even though the nurse's testimony denied the truth of the charges leading to the termination); *Dorf v. Usher*, 514 So.2d 68, 68 (Fla. 4th DCA 1987) ("Although some of the facts may be in dispute, the trial court correctly found that there was no dispute with respect to the material facts on those elements. Probable cause then became a question of law for the court.").

"Probable cause only becomes a question for the jury when *material* facts are disputed." *Endacott v. Int'l Hospitality, Inc.*, 910 So. 2d 915, 922 (Fla. 3d DCA 2005)."When the facts relied upon to show probable cause are undisputed, "the existence or nonexistence of probable cause is a pure question of law to be determined by the court under the facts and circumstances of each case.'" *Id.* (citations omitted) (citing *City of Pensacola v. Owens*, 369 So.2d 328 (Fla.1979)).

Grounds for Reconsideration

The detailed and documented facts from Epstein's affidavit quoted below, along with the undisputed facts recounted in his summary judgment motion, demonstrate that Epstein had a reasonable ground of suspicion against Edwards supported by the circumstances of the Ponzi scheme and the use of Edwards' cases against Epstein, thereby meeting the extremely low and easily satisfied standard for

probable cause for filing a lawsuit. In pertinent part, Epstein's affidavit summarized the following as probable cause for the filing of his suit against Edwards:

I filed the Action against Rothstein and Edwards because, based on the facts described below and in the Summary Judgment Motion, I believed at the time of filing my original Complaint that these two individuals, and other unknown partners of theirs at Rothstein, Rosenfeldt, Adler ("RRA"), engaged in serious misconduct involving a widely publicized illegal Ponzi scheme operated through their law firm (the "Ponzi Scheme") that featured the very civil cases litigated against me by Edwards which were being used to defraud potential investors in the Ponzi Scheme.

In early November 2009, stories in the press, on the news, and on the internet were legion about the implosion of RRA, the Ponzi Scheme perpetrated at that firm, and the misuse in the Ponzi Scheme of certain civil cases then being litigated against me by RRA partner, Edwards. The cases Edwards was litigating against me, which are described in the Summary Judgment Motion (the "Epstein Cases"), were being used to defraud investors out of millions of dollars and to fund the RRA Ponzi Scheme.

In November 2009, I also became aware of news stories that as a result of the Ponzi scheme at RRA, the Florida Bar had commenced investigations into over one-half of the attorneys employed by RRA.

At or about the same time in November 2009, I also became aware that the law firm of Conrad Scherer filed a Complaint against Scott Rothstein and others, Razorback Funding, LLC, et al. v. Scott W. Rothstein, et al., Case No. 09-062943(19) (hereinafter referenced as the "Razorback Complaint"), on behalf of some of the Ponzi Scheme investors.

Upon reviewing the Razorback Complaint, I learned that the Razorback Complaint detailed the use of the Epstein Cases (*i.e.*, the cases being litigated against me by Edwards) to defraud investors in the Ponzi

Scheme; including, but not limited to, improper discovery practices and other methods to bolster the cases.³

Prior to my filing the initial Complaint in the Action, I also became aware that the Federal government filed an Information against Scott Rothstein, which included allegations of RRA as an “Enterprise” in which Rothstein and his yet unidentified co-conspirators engaged in a racketeering conspiracy, money laundering conspiracy, mail and wire fraud conspiracy, and wire fraud, and specifically alleged that (a) potential investors were told by Rothstein and other co-conspirators that confidential settlement agreements were available for purchase; (b) settlements were allegedly available in amounts ranging from hundreds of thousands of dollars to millions of dollars and could be purchased at a discount and repaid to the investors at face value over time; (c) Rothstein and other co-conspirators utilized the offices of RRA and the offices of other co-conspirators to convince potential investors of the legitimacy and success of the law firm, which enhanced the credibility of the purported investment opportunity; (d) Rothstein and other co-conspirators utilized funds obtained through the Ponzi Scheme to supplement and support the operation and activities of RRA, to expand

³ Among the allegations in the Razorback Complaint regarding the Epstein cases are the following. “Representatives of D3 were offered ‘the opportunity’ to invest in a pre-suit \$30,000,000.00 court settlement against Epstein involving a different underage female plaintiff. To augment his concocted story, Rothstein invited D3 to his office to view the thirteen banker’s boxes of actual case files in Jane Doe in order to demonstrate that the claims against Epstein were legitimate and that the evidence against Epstein was real. In particular, Rothstein claimed that his investigative team discovered that there were high-profile witnesses onboard Epstein’s private jet where some of the alleged sexual assaults took place and showed D3 copies of a flight log purportedly containing names of celebrities, dignitaries and international figures. Because of these potentially explosive facts, putative defendant Epstein had allegedly offered \$200,000,000.00 for settlement of the claims held by various young women who were his victims.... Additionally, Rothstein used RRA’s representation in the Epstein case to pursue issues and evidence unrelated to the underlying litigation but which was potentially beneficial to lure investors into the Ponzi scheme. For instance, RRA relentlessly pursued flight data and passenger manifests regarding flights Epstein took with other famous individuals ... RRA also inappropriately attempted to take the depositions of these celebrities in a deliberate effort to bolster Rothstein’s lies.” (Ex. *** 2 at 2-3; R. 810-11).

RRA by the hiring of additional attorneys and support staff, to fund salaries and bonuses, and to acquire larger and more elaborate office space and equipment in order to enrich the personal wealth of persons employed by and associated with the RRA Enterprise.

Prior to filing the initial Complaint in the Action, consistent with the allegations made by the press, in the Razorback Complaint, and in the Rothstein Information, it was clear that the activity in the Epstein Cases being litigated by Edwards intensified substantially during the short six (6) months during which Edwards was a partner at RRA from April 2009 through the end of October 2009.⁴ Furthermore, during that six (6)-month period, questionable discovery like that detailed in the Razorback Complaint had taken place in the Epstein Cases being litigated against me by Edwards, including Edwards noticing the depositions of famous dignitaries and celebrities such as Bill Clinton, Donald Trump and David Copperfield, who appeared to have no connection whatsoever to any claims of misconduct made by Edwards's clients.

Equally consistent with the allegations in the press and in the Razorback Complaint that the Epstein Cases were being deliberately misused for purposes unrelated to the litigation in order to lure investors into the Ponzi Scheme is the fact that on July 24, 2009, Edwards filed a two hundred thirty-four (234) page, one fifty-six (156) count federal complaint against me on behalf of a plaintiff, LM, for whom Edwards was already prosecuting a case against me in state court involving the very same facts alleged in the federal complaint. The complaint was filed in federal court, but was never served on me or prosecuted, leading me to conclude that the only reason it was filed was to enhance the case files shown at the offices of RRA to potential investors in the Ponzi Scheme.

⁴ Edwards admitted in his March 23, 2010 deposition that there were between \$300,000 and \$500,000 in litigation and investigation related expenditures on the Epstein Cases during that short period of time during which he was a partner at RRA. Yet, Edwards testified that expenditures on the Epstein Cases during the preceding eight months, when the cases were not being prosecuted by RRA, may not have even exceeded \$25,000. (App.* at 6; [USE * R. 813-14])

Also while a partner at RRA, Edwards filed a motion in Federal court in which he requested that the court order me to post a fifteen million dollar bond in the Jane Doe case. This case, according to the Razorback Complaint, was being touted at that time to investors in the Ponzi Scheme. In connection with that motion, Edwards filed papers discussing my net worth and filed supplemental papers purporting to list in great detail my vehicles, planes and other items of substantial value, all at a time when, according to the accounts in the press, the Information and Razorback Complaint, the Ponzi Scheme was unraveling and the need for new investors in the Ponzi Scheme was becoming urgent. The court rejected the Motion, calling it “devoid of evidence.”

The material facts relied upon by Epstein to justify the filing of his lawsuit are not in dispute. The question of probable cause is therefore properly presented by Epstein for summary disposition by this Court in his favor. *See, e.g., Cent. Fla. Machinery* (affidavits of summary judgment movant sued for malicious prosecution revealed sufficient information to support finding that there was probable cause for filing initial lawsuit).

Edwards’ Arguments Regarding Probable Cause are Without Merit

In “Edwards’ Opposition to Epstein’s Motion for Summary Judgment” (“Edwards’ Opp.”), Edwards relies upon incorrect probable cause standards. Edwards’ responded to the probable cause issue as follows:

As established by the record, Epstein did, in fact, lack probable cause to assert his claims against Edwards (see discussion above). Epstein’s purported reliance on public filings, including the Scherer Complaint

against Rothstein is unavailing. As discussed above, the evidence warrants the finding that Epstein knew that Edwards was legitimately pursuing the claims on behalf of his clients which included the effort to secure testimony from Epstein's close confidants. Therefore, Epstein cannot rely upon the referenced public documents to support his claims against Edwards given he knows that information to be untrue and he refuses to answer questions about the veracity of the information.

(Edwards' Opp. at 11-12) (exhibit reference omitted).

Edwards' speculations about Epstein's subjective beliefs, even if true (which they are not), are irrelevant. Probable cause to act is not measured by the subjective belief of the actor, even under the more stringent standard of probable cause applicable to criminal cases. "[T]he concept of probable cause is grounded upon a standard of objective reasonableness." *Hawxhurst v. State*, 159 So. 3d 1012, 1013 (Fla. 3d DCA 2015). "The existence of probable cause is measured by an objective standard, not based on an officer's underlying intent or subjective motivation." *Hernandez v. State*, 784 So.2d at 1128 (quoting *State v. [REDACTED]*, 588 So. 2d 286, 287 (Fla. 3d DCA 1991)).

Accordingly, "[t]he principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an *objectively reasonable* police officer, amount to reasonable suspicion or to probable cause". *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

“Therefore, a police officer’s subjective belief regarding the existence or non-existence of probable cause for a warrantless arrest is neither dispositive of, nor generally relevant to, this issue.” *Hawxhurst*, 159 So. 3d at 1014. *See also State v. Jennings*, 968 So. 2d 694, 696 (Fla. 4th DCA 2007) (“The officers in this case had probable cause to search the occupants of the vehicle once they smelled the marijuana. That they may have articulated a subjective intent to search for officer safety did not change the fact that the smell of marijuana smoke provided an objectively reasonable basis for the search.”). Edwards’ contention that Epstein’s subjective intent and motivation are relevant for determining the essential element of the lack of probable cause to support the underlying lawsuit must be rejected.

Edwards places great reliance upon events that took place in 2010 and years thereafter, well after Epstein filed suit in 2009. (Edwards’ Opp. at 4-7). Such post-lawsuit events are legally irrelevant because the probable cause determination is controlled by the facts relied upon by Epstein at the time he filed his complaint. *See Gill v. Kostroff*, 82 F.Supp. 2d 1354, 1364 (M.D. Fla. 2000) (“A determination of whether probable cause exists is based on the facts known by the defendant in the malicious prosecution action at the time the underlying action was initiated, not some later point in time.”) (applying Florida law).

Edwards also argues that he “cannot be liable” for the acts alleged in Epstein’s

lawsuit (Edwards' Opp. at 4), and that Epstein would not have been able to prove damages. (Edwards' Opp. at 5). Whether Epstein would have prevailed in his lawsuit is irrelevant to the determination whether there was probable cause to file the lawsuit. *See Fee, Parker & Lloyd, P.A. v. Sullivan*, 379 So. 2d 412, 418 (Fla. 4th DCA 1980) ("One need not be certain of the outcome of a criminal or civil proceeding to have probable cause for instituting such an action.").

Edwards does not dispute that in filing the lawsuit, Epstein relied upon public documents. Probable cause to file suit is properly found where the plaintiff relied upon public records. *See, e.g., EMI Sun Village, Inc. v. Catledge*, No. 13-cv-21594, 2013 WL 5435780 (S.D. Fla. 2013) (dismissing malicious prosecution action where "ample probable cause to bring the underlying litigation based on the evidence of a fraudulent scheme" was shown by public records). *Id.* at *4. Edwards' retort is a non-sequitur -- that Epstein was guilty of criminal misconduct involving Edwards' clients. (Edwards' Opp. at 4-5). Epstein's undisputed reliance upon the public records is sufficient to support probable cause to file suit. Epstein's suit was based upon the fraudulent scheme advanced by RRA and Edwards, and their misconduct in pursuing illegitimate and unfounded cases, separate and apart from the merits of the Epstein's criminal matters.

Edwards argues that his misconduct alleged in Epstein's lawsuit had a "sound

legal basis”. (Edwards’ Opp. at 6). Edwards’ argument, while a potential defense on the merits, is not relevant to the determination whether Epstein possessed probable cause at the time the lawsuit was filed. As noted, whether Epstein would have prevailed on the merits has no bearing upon the determination whether he possessed probable cause to file suit based upon Edwards’ misconduct in connection with the RRA fraudulent scheme. *Fee, Parker & Lloyd, [REDACTED], supra.*

Finally, Edwards attempts to negate the probable cause that existed at the time Epstein filed suit based upon adverse inferences Edwards seeks to draw from Epstein’s invocations of his Fifth Amendment privilege against self-incrimination. This argument fails for two reasons. First, the invocations took place post-filing and are therefore irrelevant to the determination whether probable cause existed at the time the lawsuit was filed. *Gill, supra.*

Second, even under the higher standard for probable cause in the criminal context, it is well settled that probable cause must be judged by the facts that existed at the time of the defendant’s arrest, not evidence subsequently learned or provided to the prosecution. *Maily v. Jenne*, 867 So. 2d 1250, 1251 (Fla. 4th DCA 2004) (“Probable cause is judged by the facts and legal state of affairs that existed at the time of the arrest.”); *Fla. Game & Freshwater Fish [REDACTED] v. Dockery*, 676 So.2d 471, 474 (Fla. 1st DCA 1996) (“Hindsight should not be used to determine whether

a prior arrest or search was made with probable cause. Events that occur subsequent to the arrest cannot remove the probable cause that existed at the time of the arrest.”) (citations omitted) (emphasis added); *McCoy v. State*, 565 So. 2d 860, 861 (Fla. 2d DCA 1990) (holding that hindsight should not be used to determine whether a prior arrest or search was made with probable cause); *Dodds v. State*, 434 So. 2d 940, 942 (Fla. 4th DCA 1983) (holding that events that occur subsequent to the arrest cannot remove the probable cause that existed at the time of the arrest). “[A]n identification or a report from a single credible victim or eyewitness can provide the basis for probable cause” *City of St. Petersburg v. Austrino*, 898 So.2d 955, 960 (Fla. 2d DCA 2005) (emphasis added).⁵

The same principles of probable cause apply in a malicious prosecution case, *see, e.g., Fee, Parker & Lloyd, P.A.*, 379 So. 2d at 418 (“[W]e find the facts within Mr. Parker’s knowledge at the time suit was filed sufficient to constitute probable cause for the commencement of the malpractice action.”), *see also*, Fla. Std. Jury Instruction 406.4 (“Probable cause means that at the time of [instituting] [or]

⁵ Paragraph 20 of Epstein’s original complaint demonstrates his reliance upon such a report from a single credible victim or eyewitness sufficient to demonstrate for probable cause: “Ft. Lauderdale attorney William Scherer represents multiple Rothstein related investors. He indicated in an article that RRA/Rothstein had used “the Epstein ploy ... as a showpiece as bait. That’s the way he raised the money. He would use ... cases as bait for luring investors into fictional cases. All the cases he allegedly structured were fictional. I don’t believe there was a real one in there.”

[continuing] a [criminal] [civil] proceeding against another, the facts and circumstances known to [(defendant)] [(other person)] were sufficiently strong to support a reasonable belief that (claimant) [had committed a criminal offense] [the [claim] [proceeding] was supported by existing facts].”), but with even greater deference to the decision to seek redress through the filing of a civil lawsuit because, as noted, the standard for satisfying probable cause is lower than that applicable to criminal case. *Wright, supra*.

CONCLUSION

The case for summary judgment in favor of Epstein on Edwards’ cause of action for malicious prosecution is compelling based upon the undisputed facts delineated above which support a finding that there was probable cause as a matter of law at the time Epstein filed his complaint.

WHEREFORE, Epstein respectfully seeks reconsideration and an opportunity for the parties to be heard at oral argument on this motion.

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