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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0441-14T4

MICHAEL DIXON,

Plaintiff-Respondent,

v.

BRIAN KARGMAN and BK TRUCKING, INC.,

Defendants-Appellants.

Submitted October 19, 2015 – Decided November 6, 2015

Before Judges Accurso and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket No. L-1894-12.

Hoffman DiMuzio, attorneys for appellants (Dante B. Parenti and Jeremiah J. Atkins, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendants Brian Kargman and BK Trucking, Inc. appeal from a final judgment entered after a two-day bench trial awarding plaintiff Michael Dixon $45,935 in damages on his claim for malicious prosecution. We affirm.

Kargman is the principal of BK Trucking, a trucking company transporting perishables along the eastern seaboard. Plaintiff drove a truck for defendants for almost a year in 2007 and 2008, transporting commodities to and from locations in Virginia, Delaware, Pennsylvania, New York and Massachusetts from defendants' terminal in Newfield. On October 24, 2008, Kargman got a call from someone identifying himself as Kevin Johnson who claimed to have seen a BK driver siphoning fuel from his truck into another truck on Weehawkin Street in Philadelphia. The number on the truck matched the truck driven by plaintiff.

Kargman claimed he reviewed his files before contacting the police and signing a criminal complaint on October 28 alleging plaintiff had stolen diesel fuel, after which plaintiff was arrested. Kargman testified before the grand jury that plaintiff lived on the same street in Philadelphia as Johnson, that plaintiff would fuel up at 3:00 in the afternoon at Kargman's terminal in Gloucester County and then drive to Philadelphia where he would siphon the fuel from his truck using a pump and resell it for $2 cash to other truckers in his neighborhood. Afterward, plaintiff would drive immediately to Exit Seven on the New Jersey Turnpike and refuel at the Pilot Truck Stop where defendants maintained a fuel account. Kargman testified before the grand jury that he found a fuel pump,

hoses, Teflon tape and rubber gloves in plaintiff's truck, all of which smelled of diesel fuel.

Plaintiff was indicted for theft. Three years later, plaintiff was tried to a jury and found not guilty of all charges. Following his acquittal, he filed this malicious prosecution action in which he represented himself through trial. He has not appeared on this appeal.

Only plaintiff and Kargman testified. After hearing the testimony and reviewing the evidence, Judge McMaster issued a fourteen-page written opinion detailing her reasons for finding plaintiff had proved his case. She found plaintiff "extremely credible and earnest." She described plaintiff's evidence as detailed and reliable and consistent with his theory of the case. In contrast, she found Kargman "less credible." The judge described him as "evasive and somewhat hostile, aggravated and argumentative about having to respond to questions presented by" plaintiff, his former employee. She found him "unable to address the inconsistencies in [his] own paperwork" and evidencing an inability to remember key points.

Plaintiff proved to the court's satisfaction that there is no Weehawkin Street in Philadelphia, that consistent with defendants' records, plaintiff lived in Georgia, not Philadelphia, that the siphoning equipment Kargman claimed he

found in plaintiff's truck was never produced, that defendants' own documents are inconsistent regarding plaintiff's fuel purchases and that third-party documents produced by plaintiff including, toll receipts, traffic tickets, credit card receipts, and airline tickets contradict the records defendants produced to prove plaintiff was stealing fuel.

Measuring plaintiff's proofs against the elements of a cause of action for malicious prosecution, which requires plaintiff to "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, 394 (2008) (quoting Helmy v. City of Jersey City, 178 N.J. 183, 190 (2003)), the judge found plaintiff had carried his burden on each point. Specifically, the judge found no dispute that the criminal action was instituted by Kargman and that it terminated favorably to plaintiff. The case turned on whether Kargman had probable cause to believe that plaintiff was stealing fuel and whether his instigation and continued prosecution of the claim was actuated by malice.

Although acknowledging defendants' claim that plaintiff was indicted by the grand jury, Judge McMaster found it not

dispositive of the issue of probable cause. See Helmy, supra, 178 N.J. at 191 ("Although a grand jury indictment is prima facie evidence of probable cause to prosecute, when the facts underlying it are disputed, the issue must be resolved by the jury."). She rejected Kargman's claim that "he was not driving the train," finding that he was "absolutely responsible" for "put[ing] the train in motion with unfounded suspicion and conjecture." The judge found defendants' own documents, had they been properly maintained and reviewed, could not substantiate the criminal complaint he filed against plaintiff. She concluded:

> Based on this one unreliable piece of information [the report from the unknown caller], an ordinary cautious person, under these circumstances, would not believe the accused to have committed the offense without an even cursory review of their own paperwork and business records which were easily accessible and that the defendant admittedly maintained on a daily, weekly and /or monthly basis. His unfounded suspicion based on one completely unknown caller did not constitute reasonable or probable cause. The defendant did not have an honest belief that the plaintiff was guilty and therefore, the complaint was falsely brought. There was no just cause or excuse to sign the [c]omplaint against this [p]laintiff especially being aware of his prior stellar performance as an employee. Therefore, the element of malice may be inferred from the lack of reasonable or probable cause.

Defendants appeal claiming the trial court erred in finding that Kargman lacked probable cause for his criminal complaint and was motivated by malice. Accordingly, their appeal is limited to their disagreement with the trial judge's factual findings. They do not challenge the quantum of damages the court awarded.

We, of course, are bound by a strict standard of review of those factual findings. As the Supreme Court has unequivocally held, "[f]inal determinations made by the trial court sitting in a non-jury case are subject to a limited and well-established scope of review: 'we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011) (quoting In re Trust Created By Agreement Dated December 20, 1961, ex rel. Johnson, 194 N.J. 276, 284 (2008) and Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974) (internal quotation and editing marks omitted)).

Applying that standard here, defendants have given us no cause to upset the careful fact-finding of the trial judge. Although it is well established that malicious prosecution is

not a favored cause of action because citizens should not be inhibited in reporting those suspected of crime, "[o]n the other hand, one who recklessly institutes criminal proceedings without any reasonable basis should be responsible for such irresponsible action." Lind v. Schmid, 67 N.J. 255, 262 (1975).

We are satisfied the trial judge appropriately balanced the competing public policy concerns in weighing the evidence before her. We affirm substantially for the reasons expressed in Judge McMaster's comprehensive and well-reasoned written decision.

Affirmed.