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STATE OF MINNESOTA

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DISTRICT COURT

COUNTY OF HENNEPIN

BY _____ DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

FOURTH JUDICIAL DISTRICT

Chris Gregerson,

Plaintiff,

vs.

Court File No. 27-CV-09-13489

_____, Inc., _____,
Morgan Smith, Boris Parker, and Vladimir
Kazaryan, Smith & Raver, LLP, Saliterman &
Siefferman, PC and Bassford Remele, PA

**MEMORANDUM AND ORDER RE
MOTION FOR SUMMARY JUDGMENT**

Defendants.

The matter before the Court is Defendants Boris Parker, Saliterman & Siefferman and Bassford Remele's motion for summary judgment.

Appearances:

Chris Gregerson appeared pro se.

Paul C. Peterson, Esq., and William L. Davidson, Esq., appeared on behalf of Defendants Boris Parker, Saliterman & Siefferman, PC, and Bassford Remele, PA.

Morgan G. Smith, Esq., appeared on behalf of himself and Defendant Smith & Raver LLP.

Based upon all the files, records, and proceedings herein, including the arguments of counsel, the Court makes the following **ORDER**:

1. Defendants' motion for summary judgment is **GRANTED**.
2. The attached memorandum is incorporated herein as if set forth in full.

DATED: 1/29/10

BY THE COURT:



John Q. McShane
Judge of District Court

MEMORANDUM

Defendants Boris Parker, Saliterman & Siefferman and Bassford Remele (collectively “Parker Defendants”) move for summary judgment on Plaintiff’s claims of malicious prosecution and conspiracy. Defendants Morgan Smith and Smith & Raver (collectively “Smith Defendants”) have joined the Parker Defendants’ motion.

Plaintiff Chris Gregerson (Gregerson) is suing the attorneys who represented his opponents in a copyright infringement lawsuit he began in 2006, attorneys Boris Parker and Morgan Smith. Gregerson has also named the law firm that the attorneys were with at the time they represented Gregerson’s opponents and now. Gregerson also sued the individual defendants ██████████, Inc., and ██████████, but has settled and released his claims against those defendants.

Gregerson’s initial claims against the attorneys and their firms were for malicious prosecution, abuse of process, and conspiracy. Gregerson’s abuse of process claim was dismissed by this Court, leaving only the malicious prosecution and conspiracy claims at issue in this motion. Gregerson also claims that the Defendant law firms are vicariously liable for Parker’s and Smith’s conduct under the doctrine of respondeat superior. Gregerson brought a motion to add a claim for punitive damages against Defendants, which was denied by this Court.

LEGAL STANDARD

Summary judgment is appropriate where there are no genuine issues of material fact, and where the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *DLH, Inc. v. Russ*, 566 N.W.2d 60, 68 (Minn. 1997). When faced with a motion for summary judgment under Rule 56, the Court is to first determine whether a genuine issue of material fact exists. The moving party has the burden of proof and the evidence must be viewed in the light most favorable to the nonmoving party. *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn.

1982). The mere existence of a factual dispute does not, by itself, make summary judgment inappropriate. Rather, the fact in dispute must be material. *Pischke v. Kellen*, 384 N.W.2d 201, 205 (Minn. Ct. App. 1986). A material fact is one that will affect the result or outcome of the case, depending upon its resolution. *Zappa v. Fahey*, 310 Minn. 555, 556, 245 N.W.2d 258, 259–60 (1976). Any doubt regarding the existence of a genuine fact issue will be resolved in favor of its existence. *Rathbun v. W.T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974). The non-moving party may not rely on general statements of fact to oppose a motion for summary judgment; rather, it must identify specific facts that establish the existence of a triable issue. *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

FACTS

Plaintiff has sued Defendants for malicious prosecution and conspiracy to commit the tort of malicious prosecution for actions taken in previous state and, later, federal litigation in 2006 over an alleged copyright violation. Defendants Morgan Smith and Smith & Raver, LLP (“Smith Defendants”) originally represented Vilana. Defendants Boris Parker, Saliterman & Siefferman, PC and Bassford Remele (“Parker Defendants”) took over representation of Vilana in March, 2006.

In the federal litigation, Gregerson accused Defendant [REDACTED] and his business, [REDACTED], Inc., of taking a copyrighted photograph off his website, misappropriating it for their business use, and refusing to compensate Gregerson despite his demands. [REDACTED] based his and [REDACTED]’s refusal to pay on the grounds that they had already paid a man named “Michael Zubitskiy” for the photographs.

[REDACTED] and [REDACTED] brought counter-claims against Gregerson including defamation, deceptive trade practices, trademark infringement, interference with contractual relationships,

and unjust enrichment. The trademark infringement and unjust enrichment claims were dismissed. The claims of deceptive trade practices, interference with contractual and business relationships and appropriation survived summary judgment.

The federal court eventually found for Gregerson on all counts. Judge Ann Montgomery found that there was no credible evidence to support the belief Zubitskiy was the source of the photos, no genuine dispute as to Gregerson's ownership of the photos, and that Vilana showed a flagrant disregard for Gregerson's rights as a copyright holder.

ANALYSIS

In the present lawsuit, Plaintiff accuses the Parker Defendants of conspiring and willfully participating in a fraudulent defense of [REDACTED] and [REDACTED], as well as asserting false counterclaims and false evidence supporting those claims. Plaintiff argues that each of the alleged false claims and evidence advanced by Defendants involve [REDACTED]'s and [REDACTED]'s dealings with Zubitskiy.

To succeed on a claim for malicious prosecution, Plaintiff must demonstrate that: (1) the claims asserted against him were brought without probable cause or reasonable belief that the claimant would ultimately prevail on the merits; (2) the claims were instituted and prosecuted with malicious intent; and (3) the action was terminated in Plaintiff's favor. See *Jordan v. Lamb*, 392 N.W.2d 607, 609 (Minn. Ct. App. 1996). In Minnesota, actions for malicious prosecution are "carefully circumscribed" and are "not favored in law." *Lundberg v. Scoggins*, 335 N.W.2d 235, 236 (Minn. 1983). This caution is particularly apt when those claims are asserted against the attorneys for a former adversary. *Hoppe v. Klapperich*, 28 N.W.2d 780, 792 (1947). When assessing a malicious prosecution claim against an attorney, the rule is that the attorney may rely

on a client's statements as a basis for exercising judgment and providing advice, unless the client's representations are known to be false. *Id.*

To avoid a claim for malicious prosecution a party asserting a claim is required to have only a "reasonable belief" that probable cause exists. *Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. Ct. App. 2006). If an attorney proceeds upon facts stated to him by his client, believing those facts to be true, and if those facts, if true, would constitute probable cause for instituting such a prosecution, then the attorney is exonerated and not liable for a claim of malicious prosecution. *Hoppe*, 28 N.W.2d at 792.

The Parker Defendants argue they are entitled to summary judgment on Plaintiff's malicious prosecution and conspiracy claims on several grounds, including: (1) Gregerson has failed to offer any evidence regarding the first two elements of a malicious prosecution claim, namely, that the claims were brought without probable cause and were prosecuted with malicious intent; (2) the defenses and counterclaims asserted in the federal litigation were not predicated on the existence of Zubitskiy or the photo agreement--therefore, ██████████'s alleged misrepresentations regarding Zubitskiy are irrelevant; and (3) Defendants are immune from liability under the *Noerr-Pennington* doctrine.

The Parker Defendants argue they not only had a right to rely on ██████████'s sworn testimony regarding the existence of Zubitskiy and ██████████'s dealings with him, but a professional obligation to present their client's contested version of the facts. The Parker Defendants offer the fact that three of their claims against Gregerson survived summary judgment in the federal litigation as evidence that they were brought with probable cause.

The Parker Defendants also assert that Plaintiff has failed to offer any evidence of malicious intent on the part of the Parker Defendants. The only arguments submitted by Plaintiff

on this point are general averments that the Parker Defendants were aware of ██████'s malice toward Gregerson and "acted to further it."

Additionally, the Parker Defendants maintain that the federal claims against Gregerson did not involve the Zubitskiy issue. In Plaintiff's briefing, he focused his malicious prosecution arguments on the defamation counterclaim asserted against him in the federal litigation.

Defendants cite to the fact that their defamation counterclaim made no explicit mention or reference to Zubitskiy, but instead concerned unrelated remarks posted on Gregerson's website.

Lastly, the Parker Defendants argue they are entitled to *Noerr-Pennington* immunity. Under this doctrine, one who files a lawsuit is protected from tort liability. *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Only "sham" lawsuits fall outside the cloak of immunity that *Noerr-Pennington* provides. *Porous Media*, 186 F.3d at 1080. The Parker Defendants argue that their federal claims were not a "sham" as a matter of law, considering the fact that three of the claims survived summary judgment.

Plaintiff alleges that the Parker Defendants had actual knowledge that ██████ lied regarding the existence of Zubitskiy and ██████'s alleged dealings with him, or at the very least, lacked probable cause for maintaining their counterclaims. Plaintiff's basis for this allegation is the fact that ██████ and his attorney Morgan Smith allegedly conceded during a pre-trial mediation that the copyrighted photos at issue belonged to Gregerson. Plaintiff argues that this admission put the Parker Defendants on notice in the later federal litigation that the copyrighted photos indisputably belonged to Gregerson.

Plaintiff also argues in this motion that the Defendants did not satisfy their obligation to verify the claims of their client. In support of this argument, Gregerson offered a number of ideas that he believes the Parker Defendants could have done to more effectively track down the

elusive Mr. Zubitskiy, but failed to do. Plaintiff argues that Defendants' failure to take the necessary steps to locate Zubitskiy equates to willful blindness regarding their client's misrepresentations and subjects them to liability for malicious prosecution.

CONCLUSION

Defendants' motion must be granted because Plaintiff has failed to offer evidence beyond general assertions and averments to support his malicious prosecution and conspiracy claims and therefore has failed to create a genuine issue of material fact for trial.

Plaintiff focuses his arguments on the allegation that ██████ lied about the existence of Zubitskiy and ██████'s alleged dealings with him. However, even if Plaintiff were to prove ██████'s testimony was untrue, that does not establish the fact that the Defendants knew those statements were untrue and does not necessarily establish a claim for malicious prosecution. It does appear to this Court that Vilenchick's claims regarding his dealings with Zubitskiy have minimal external factual support beyond ██████'s own sworn testimony. Regardless, there has been no definitive evidence presented either in the previous litigation or in this case that ██████'s claims about Zubitskiy were untrue. Despite no longer being a party in this case, there is no evidence to suggest ██████ has ever admitted that his representations regarding Zubitskiy were untrue to the Defendants or anyone else.

Based on a lack of conclusive evidence to the contrary, the Smith and Parker Defendants were entitled to rely on their client's sworn testimony as an evidentiary basis to assert their claims against Gregerson in the prior state and federal litigation. See *Hoppe*, 28 N.W.2d at 792. This Court finds that the Defendants had probable cause and a good faith basis for asserting their claims against Gregerson based on ██████'s testimony. Under Minnesota law, "if an attorney proceeds upon facts stated to him by his client, believing those facts to be true, and if those facts,


if true, would constitute probable cause for instituting such a prosecution, then the attorney is exonerated and not liable for a claim of malicious prosecution. *Id.*

Plaintiff has offered numerous assertions that cast doubt on the truthfulness of ██████'s claims. However, these assertions do not create a genuine issue of material fact for trial on a claim for malicious prosecution because they do not establish that the Defendants did not or could not believe those facts to be true. To the contrary, the Defendants not only were entitled to believe their client's disputed testimony, but had a professional obligation to resolve doubts about the veracity of their client's testimony in the client's favor. See *Minn. R. Prof. C. 3.3(a) (3) & Comment [8]* (2005). For these reasons, Plaintiff has failed to create a genuine issue of material fact with regard to the first element of malicious prosecution--that the Defendants lacked probable cause or a reasonable belief that they would ultimately prevail on the merits.

Plaintiff has also failed to create a genuine issue of material fact on the second element of a malicious prosecution claim, that of malicious intent. Plaintiff's "mere belief" that Defendants brought claims with malicious intent is insufficient to establish the existence of a genuine issue of material fact. See *Dunham v. Roer*, 708 N.W.2d 552, 569 (Minn. Ct. App. 2006). Since there is no evidence in the record to establish any malicious intent whatsoever on the part of the Defendants, Plaintiff has failed to create a genuine issue of material fact on this element.

Due to there being no genuine issue of material fact as to the first two elements of Plaintiff's malicious prosecution claim, this Court finds that Defendants are entitled to judgment as a matter of law. Therefore, Defendants' motion for summary judgment is granted with respect to Plaintiff's malicious prosecution claim.

Since there is no underlying tort remaining in this case, it follows that Defendants are also entitled to summary judgment on Plaintiff's conspiracy claim. See *Harding v. Ohio Cas. Ins. Co.*, 41 N.W.2d 818, 824 (1950).

A handwritten signature in black ink, appearing to be the initials 'AW' with a stylized flourish extending to the right.