IN THE SUPREME COURT OF THE STATE OF NEVADA

KRISTINA MARIE NOVOTNY,
Appellant,
vs.
GENERAL NUTRITION CORPORATION, A PENNSYLVANIA CORPORATION, D/B/A GNC; LAS VEGAS METROPOLITAN POLICE DEPARTMENT; DETECTIVE BRUCE BLAIR; SCOTT PAUL VEST; EDWARD BORQUEZ; AND STEVE LOVE;
Respondents.

No. 40092

FILED

FEB 19 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant, Kristina Novotny, appeals from district court orders granting summary judgment and denying her motion for leave to file a second amended complaint.[1] We affirm.

FACTUAL AND PROCEDURAL HISTORY

Kristina Novotny worked for a General Nutrition Company (GNC) outlet as a salesperson. Part of her duties included making the daily after hours deposit into a nearby bank night depository machine. On January 28, 1998, Novotny signed GNC's deposit log, thereby taking responsibility for that day's deposit of $1,037.27. Although Novotny adamantly asserted that she made the deposit, GNC's bank never received it. GNC and the bank attempted to locate the deposit to no avail.

In April 1998, GNC fired Novotny for violating the company's cash handling policy. Per instructions from GNC, the store manager filed

[1]See NRAP 3A.

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a voluntary statement with the Las Vegas Metropolitan Police Department (LVMPD) regarding the missing deposit. In the report, the manager recited his attempts to recover the money, including the contacts with Novotny, Loomis Fargo (the bank deposit security and transportation company) and GNC's bank, and the bank's failed attempt to locate the deposit bag by dismantling the night deposit machine. The manager also provided LVMPD with his notes from his investigation, the deposit verification log, the cash register tapes and the register recapitulation envelope. In an area on the voluntary statement form designated "This Portion to be Completed by Officer," a police officer described the offense as an "embezzlement."

In April 1999, after examining the documents provided by the store manager, respondent Bruce Blair, a detective with LVMPD, submitted a sworn request for an embezzlement prosecution to the Clark County District Attorney's office. Based upon the investigative file, a deputy district attorney eventually approved a prosecution by way of criminal complaint for felony theft. A justice of the peace approved the arrest warrant and, sometime later, police arrested Novotny, holding her in custody for a brief period. The state ultimately dropped the charge after Novotny underwent a polygraph examination.

Novotny subsequently sued GNC, several of its employees, Detective Blair, the police officer who took the manager's voluntary statement, LVMPD, Clark County Sheriff Jerry Keller, GNC's bank, Loomis Fargo, and the shopping mall in which the GNC store was located.

Following the district court's dismissal of most of Novotny's claims, the district court permitted her to file an amended complaint against all of the same defendants. The amended complaint included 42

U.S.C. § 1983 claims against LVMPD, Detective Blair and Sheriff Keller; malicious prosecution against GNC and its employees; and negligence claims against the shopping mall, the bank and Loomis Fargo. Novotny subsequently filed a motion seeking leave to file a second amended complaint.

Thereafter, the district court either dismissed the action or granted summary judgment as to all defendants. The court also denied Novotny's motion to file a second amended complaint. Novotny's appeal is restricted to the summary judgment orders in favor of GNC and its employees on the malicious prosecution claims, the summary judgment orders in favor of LVMPD and Detective Blair, and the order refusing her second amended complaint.[2]

DISCUSSION

This court reviews orders granting summary judgment de novo.[3] Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law.[4] In determining whether summary judgment is warranted, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party.[5]

Malicious prosecution

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[2]The appeals concerning the shopping mall, the bank and Loomis Fargo have been dismissed; see also infra n.11.

[3]White Cap Indus., Inc. v. Ruppert, 119 Nev. ___, ___, 67 P.3d 318, 319 (2003).

[4]Id.

[5]Id.

On appeal, Novotny argues that the district court erred in granting summary judgment to GNC and its employees on her malicious prosecution claim. She asserts factual issues exist regarding whether "GNC should have reported this matter to the police and charged her with a felony." We agree with the district court that Novotny failed to allege sufficient evidence to establish a claim of malicious prosecution.

The elements of a malicious prosecution claim are: "(1) a lack of probable cause to commence the prior action; (2) malice; (3) favorable termination of the prior action; and (4) damages."[6] Additionally, a plaintiff must demonstrate that police officers commenced criminal prosecution at the direction, request or pressure from the defendants.[7]

Novotny failed to present a prima facie case of malicious prosecution. She alleged that GNC's manager filed a police report, which GNC knew or should have known would cause LVMPD to file criminal charges against Novotny without investigating the manager's voluntary statement. In Lester v. Buchanan, when a business merely files a police report, which it believes to be true, but was not further involved in the decision to institute criminal proceedings, the defendant cannot be held liable for commencing the criminal action against the plaintiff.[8] Lester is controlling here. First, Novotny conceded that all of the facts in the manager's voluntary statement to LVMPD were true, that the manager did not accuse her of embezzlement in his voluntary statement or otherwise and that the manager did not list the crime as an

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[6]Lester v. Buchanen, 112 Nev. 1426, 1428, 929 P.2d 910, 912 (1996).

[7]Id. at 1429, 929 P.2d at 913.

[8]Id.

embezzlement. Second, Novotny's opening brief concedes that Detective Blair made the actual determination as to the nature of the charge, i.e., embezzlement. Third, the crime "embezzlement" was written in on the voluntary statement form in a section set aside for completion by a police officer. Finally, the manager assisted Novotny in seeking new employment. Thus, even in the light most favorable to Novotny, the record does not establish an issue of fact that GNC or any of its employees either maliciously accused Novotny of embezzlement, filed a false police statement or that GNC improperly persuaded the police, district attorney or justice of the peace to commence criminal proceedings. We therefore conclude that the district court did not err in granting GNC's motion for summary judgment.

42 U.S.C. § 1983

Novotny cryptically argues that the district court erred in granting LVMPD and Detective Blair's motion for summary judgment. She asserts that Detective Blair's insufficient investigation, lack of training, lack of probable cause to request a warrant for her arrest and lies in his affidavit supporting his request for the warrant all remove any immunity LVMPD and Detective Blair might have in connection with her § 1983 claims.

We conclude the district court did not err in granting summary judgment in favor of LVMPD and Detective Blair. Federal courts have clearly established that, in order to pierce a police officer's qualified immunity in a 42 U.S.C. § 1983 claim, the test is not whether the affidavit in support of arrest was itself sufficient to establish probable

cause, but rather, whether the affidavit contained objectively reasonable facts to show that the officer believed probable cause existed.[9]

The manager's statement, upon which Detective Blair based his affidavit, detailed GNC's attempts to find the missing deposit. This provided Detective Blair with evidence to make an objectively reasonable conclusion that probable cause existed to issue the arrest warrant. While Novotny's experts concluded that the detective's affidavit was based upon "lies," these accusations do nothing to undercut the truth of the facts presented to Detective Blair, or that the evidence was sufficient to justify initiation of an embezzlement or theft prosecution. In short, the characterizations of the detective's observations as lies are simply criticism of the thoroughness of the investigation.

Further, an independent determination of probable cause by the Clark County District Attorney and a justice court preceded the issuance of criminal process against Novotny. The district attorney's independent determination of probable cause and filing of a criminal complaint "immunizes investigating officers . . . from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time."[10] Novotny failed to present evidence to rebut this presumption. Therefore, we conclude that the district court

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[9]Thompson v. Reuting, 968 F.2d 756, 760 (8th Cir. 1992); Malley v. Briggs, 475 U.S. 335, 344-45 (1986) ("Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost.").

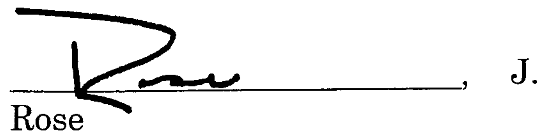
[10]Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981).

correctly granted summary judgment in favor of LVMPD and Detective Blair.[11]

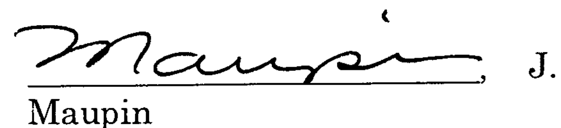
CONCLUSION

We find no merit to Novotny's claims on appeal. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[12]



_________________________, J.
Rose



_________________________, J.
Maupin

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[11]Novotny also contends that the district court erred by dismissing Sheriff Keller as a defendant, failing to permit her to take the sheriff's deposition and denying her motion to file a second amended complaint. Novotny does not present a cogent argument how or why the district court erred. Further, Novotny's notice of appeal does not specifically mention the district court's order dismissing Sheriff Keller from this case and the record on appeal does not contain a ruling prohibiting Novotny from taking the sheriff's deposition. We have reviewed the record on appeal and find no error in the district court's rulings. See, e.g., Tinch v. State, 113 Nev. 1170, 1175 n.3, 946 P.2d 1061, 1064 n.3 (1997) (cryptic argument unsupported by citation to authority will not be considered on appeal); NRAP 3(c) ("The notice of appeal . . . shall designate the judgment, order or part thereof appealed from.").

[12]This matter was submitted for decision by a panel of this court comprised of Justices Rose, Leavitt, and Maupin. Justice Leavitt having died in office on January 9, 2004, this matter was decided by a two-justice panel.

cc: Hon. Sally L. Loehrer, District Judge
Fitzgibbons & Anderson
Law Offices of John P. Foley
Alverson Taylor Mortensen Nelson & Sanders
Rawlings Olson Cannon Gormley & Desruisseaux
Clark County Clerk