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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. CACE15003338 DIVISION 25 JUDGE Carol-lisa Phillips

Robert Leverett
Plaintiff(s) / Petitioner(s)
v.
Capacity Insurance Company, et al
Defendant(s) / Respondent(s)
______________________________/

FINAL ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Defendants' Amended Motion for Final Summary Judgment ("MSJ"), filed on April 9, 2019. The Court, having reviewed Defendants' Motion, Plaintiff's Response to Amended Motion for Summary Judgment, Defendant Keith Bolen's Supplemental Memorandum of Law in Support of Defendants' Amended Motion for Final Summary Judgment, having considered the record and applicable law, having heard argument of counsel on January 18, 2022, and being otherwise duly advised in the premises, hereby finds as follows:

The instant action arises from Plaintiff, Robert Leverett's ("Leverett"), Amended Complaint alleging malicious prosecution against the following remaining Defendants: Capacity Insurance Company ("Capacity"), Focus Claim Managers, LLC ("FCM"), Keith Bolen ("Bolen"), and Orion Whitlock ("Whitlock"). Bolen and Whitlock were employees of both Capacity and its claim handling unit, FCM. Leverett argues that the Defendants provided false, misleading or incomplete information to the Department of Financial Services ("DFS") to commence a criminal investigation against him. Leverett maintains the referral was made without probable cause and with malice. Both Defendants' Answer and the MSJ state the affirmative defenses

of: 1) entitlement to statutory immunity pursuant to section 626.989(4)(c), Florida Statutes, which provides immunity from civil liability for reporting suspected insurance fraud, and 2) that probable cause existed for the referral, noting that both DFS and the State Attorney found probable cause for criminal charges.

I. **FACTS**

On August 26, 2012, a fire was ignited at the Red Carpet Inn when a guest left a cigarette burning on the mattress in Room 207. In addition to damages from the fire, the motel suffered water damage from extinguishing the fire. Sai Jal, LLC, d/b/a the Red Carpet Inn, retained Plaintiff Leverett, as its public adjuster for the Insurance Claim. Capacity insured the Red Carpet Inn. Leverett's letter to Capacity on August 30, 2012 stated:

> *As you know, the insured suffered a fire loss on August 26, 2012. The General Contractor has estimated the period of restoration will exceed 6 months. Based on a review of the loss, it appears the Contents Loss will exceed the $50,000.00 coverage limit and the Business Income w/ Extra Expense will exceed the $50,000.00 coverage limit. With respect to the building,* ***64 rooms*** *have sustained either fire, smoke/soot or water damage. The truss trails have sustained fire damage and an engineer is inspecting the trusses to determine the extent of the damage. I would recommend a reserve of $750,000.00 for the building at this time.*

(DFS Report 2).

On October 1, 2012, Sai Jal, LLC submitted a Sworn Proof of Loss Statement, prepared by Leverett, claiming **$686,416** in building damages and **$69,147** of content damages (for a total of $**755,563**). Here, Sai Jal, LLC stated that 24 rooms were damaged as well as the exterior of the building, roof and stairs. Sai Jal, LLC contracted with Roy Marshall ("Marshall") at MIT Restoration LLC for demolition and repair of the property.

Capacity's general contractor, BRC, and engineer, Grant Renne ("Renne") of Donan Engineering, determined the loss amount to be **$138,768.** Capacity's professionals found only six (6) rooms were directly affected, and at most twelve (12) sustained any damage. The two

estimates reflected a significant disparity in the number of rooms affected by the fire, as well as the quality of the structure, and the contents of the rooms. Thus, Capacity believed the Sworn Proof of Loss Statements, prepared by Leverett, overly inflated the loss and were sufficient to raise a suspicion of fraud and a referral to the DFS.

Section 626.989(6), Florida Statutes, *requires* that insurers and their employees report suspected fraudulent activity to the Division of Investigative and Forensic Services. Capacity retained legal counsel to assist on this particular claim, and this attorney, who is not a defendant in the present case, prepared the report to DFS, supporting documentation, and several affidavits. The Division of Investigative and Forensic Services, mentioned in the statute, resides within DFS. Defendant Keith Bolen ("Bolen"), the Capacity claims representative with the most knowledge of the Sai Jal, LLC claim, delivered the complaint to DFS.

Meanwhile, because of the variations in the damage estimates, the parties proceeded to an appraisal process in June 2013. Their individually chosen appraisers failed to reach an agreement, and an umpire was appointed. The Umpire valued the total loss at **$306,167.72.** Leverett's estimate was still 2 ½ times the Umpire's Appraisal, or approximately $450,000 too high.

In September 2013, Detective Scott Kiso ("Kiso"), DFS Fraud Division, who is also not a defendant in the present case, issued a three count Investigative Report finding: probable cause that Plaintiff Leverett engaged in an ongoing scheme to defraud Capacity, probable cause for a false and fraudulent insurance claim, and probable cause for attempted grand theft.

The following May, the State Attorney of the Ninth Judicial Circuit delivered a five-count Information charging Leverett with fraudulent activities. Then, an Orange County Judge found

probable cause to arrest Leverett on the offenses.

Later, Assistant State Attorney Stephen W. Browning ("Browning"), noting deficiencies in DFS' investigation, determined, "[w]hile it's likely that D did attempt to overbill Capacity for damage, the evidence is insufficient to prove any sort fraud beyond a reasonable doubt." (SAO NP Memo 2). Thus, Browning decided to *nolle prose* the case.

II. **SUMMARY JUDGMENT STANDARD**

Effective May 1, 2021, Florida Rule of Civil Procedure 1.510, Summary Judgment, was amended to conform to Rule 56 of the Federal Rules of Civil Procedure. Rule 56(a) mandates that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion." Fed.R.Civ.P. 56(a).

Under the federal standard, a party seeking summary judgment always bears the initial burden of informing the Court of the basis for the motion and identifying the portions of the record which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Furthermore, "there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Id*. The burden on the moving party may be discharged by showing the Court that there is an absence of evidence to support the non-moving party's case. *Id.* at 325. Alternatively, a non-moving party who bears the burden of proof at trial, must go beyond the pleadings and by his/her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." *Id*. at 324.

III. **ANALYSIS**

A. **Malicious Prosecution**

> To prevail in a malicious prosecution suit, a plaintiff must prove: (1) The commencement or continuance of an original criminal or civil judicial proceeding. (2) Its legal causation by the present defendant against the plaintiff who was defendant in the original proceeding. (3) Its bona fide termination in favor of the present plaintiff. (4) The absence of probable cause for such proceeding. (5) The presence of malice therein. (6) Damage conforming to legal standards resulting to plaintiff. If any one of these elements is lacking, the result is fatal to the action.

Burns v. GCC Beverages, Inc., 502 So. 2d 1217, 1218 (Fla.1986).

Plaintiff Leverett bears the burden of proof at trial to prove each element of malicious prosecution by a preponderance of the evidence. “Summary judgment should be entered against the party that fails to sufficiently establish the existence of an element essential to their case, on which the party would bear the burden of proof at trial.” *See In re: Amendment to Florida Rule of Civil Procedure 1.510*, 309 So. 3d 192 (Fla. 2020). The parties dispute elements (4) and (5). Leverett maintains that the referral by Defendants to DFS was not supported by probable cause and was made in bad faith or with malice. To advance this argument, Leverett offers “six critical pieces of evidence,” for which he claims the facts are in dispute. However, the Court finds that none of these six pieces of evidence raise a genuine issue of material fact. These are briefly discussed below.

1. The Amount of Water used to Put Out the Fire.

The DFS Investigation Summary Report states, “The OFD was able to extinguish the fire with approximately 150 gallons of water.” Leverett claims that this was a false statement provided in Bolen’s Affidavit. However, Bolen’s Affidavit clearly states this was the amount of water used by **the responding fire personnel**. The 150 gallons used is further supported by the Orland Fire Department (“OFD”) in their incident report. (OFD Report 10). The OFD Incident Report also states that civilians were using a pre-plumbed building fire hose on the fire when they arrived. (OFD Report 8, 9, 10-11). The OFD Incident Report was available to DFS.

It was DFS's choice, not Bolen's, to phrase the water usage this way in its report. These facts are not in dispute. Therefore, the Court finds no intentional wrong doing was done by Defendants nor do genuine issues of material fact exist.

2. The Number of Rooms Asserted to Have Been Damaged.

Leverett claims that his letter (quoted above), dated August 30, 2012, was inaccurately represented because when he used the number "64" he was referring to the total number of rooms in the hotel, not those damaged. However, his letter clearly states, "*With respect to the building,* ***64 rooms have sustained*** *either fire, smoke/soot or water* ***damage****."* (emphasis added). Also, the building only has fifty-six (56) rooms. The final Proof of Loss Statement prepared by Leverett listed damage to twenty-four (24) rooms. Capacity noted six (6) rooms directly affected, and six (6) indirectly affected by the incident. This information is accurately conveyed in the DFS Investigative Report. These facts are not in dispute. Therefore, the Court finds no intentional wrongdoing was done by Defendants nor do genuine issues of material fact exist.

3. Capacity Pressured Marshall to Sign a False Affidavit.

Mr. Marshall signed an affidavit, prepared by Capacity counsel on October 22, 2012, which outlined his estimates of the damages and the services he performed. Paragraph 15 of the affidavit states that the estimate to repair/replace seven (7) of the rooms was included at the sole request of Leverett or his engineer. These rooms did not receive emergency services or demolition by Marshall. Exhibit B of the affidavit supported his invoice amount of $49,109.50. Subsequently, Marshall learned his affidavit was used in an investigation of Leverett. He produced a second affidavit on November 21, 2013, where he stated, "*It is my belief if I had not signed the affidavit I would not have been paid."* There is nothing in the record to

corroborate Marshall's "belief." More importantly, this is not a material fact that would affect the probable cause determination. Therefore, the Court finds no wrongdoing done by Defendants nor do genuine issues of material fact exist.

4. Capacity Manipulated Renne's Affidavit Testimony.

This affidavit, signed on February 6, 2013, was also prepared by Capacity counsel. Paragraph 16 of the affidavit states, "During the September 4, 2012 site inspection I was asked by Mr. Leverett if I wanted to join him at Rachel's for a meal with adult entertainment. I declined and advised him my opinion could not be bought." In Renne's deposition testimony he explains that what he actually responded to the invitation was, "My opinion is not going to be altered by a couple of lap dances." Capacity counsel told him she altered it in an attempt to professionalize it, or clean it up. Renne explained that he was not sure what Leverett's intent was but Renne merely made it into a joke and then it was over. Renne stated that he had a 30 second phone conversation with DFS in which he said his affidavit was factual. DFS did not inquire about the "Rachel's comment." He continues to maintain that other than the "clean up" of his statement, the affidavit's substance is 100% accurate. This fact also is not in dispute. Therefore, the Court finds no intentional wrongdoing done by Defendants nor do genuine issue of material fact exist.

5. The Report Contains Inaccurate Information Re: Improperly Cancelling a Site View.

Leverett alleges that paragraph 19 of Bolen's Affidavit suggested a "nefarious purpose" for the cancelation of a site visit leading Kiso to believe Leverett was trying to hide something. Bolen's statement was, "Mr. Leverett stated that no owners were available to give access to the property on October 26, 2012. However, surveillance from that date shows that Nick Patel was in fact on the property." As reflected in the record, the site visit was discussed in an email

exchange between the parties. The visit was set for Friday, October 26, 2012 at 9:00 am. On Wednesday evening, Leverett emailed that he had an unexpected meeting in Miami on Friday and asked to re-schedule the meeting the following week. Within the hour, Capacity's counsel responded asking if the insured or an employee could provide access on Friday due to the need to timely inspect the damage. Counsel stated she would keep the appointment as scheduled until she heard back. Leverett did not respond until early Friday morning (12:58 am) to cancel. These facts are not in dispute. Bolen may have mistakenly inferred that because Leverett still canceled the appointment, no one was available to give access to the property. However, this would merely be a miscommunication. Therefore, the Court finds no intentional wrong doing done by Defendants nor do genuine issues of material fact exist.

6. The Umpire Appraisal Award.

As previously discussed, the Umpire valued the total loss at $306,167.72**.** This amount is between Capacity's $138,768 estimate and Everett's $755,563 claim. Leverett argues that Capacity *undervalued the damage and never reported the Umpire's Appraisal to DFS*. However, Bolen first submitted Capacity's complaint to DFS in late 2012 and the matter did not go to the Umpire until June 2013. DFS could have inquired as to the status of the claim for its report. Nevertheless, even in comparison to the Umpire's Appraisal, Leverett's estimate was still 2 ½ times, or approximately $450,000 too high. These facts are not in dispute. Therefore, the Court finds no intentional wrongdoing done by Defendants nor do genuine issue of material fact exist.

In the present case there are no genuine issues of material fact and the undisputed facts establish that there was probable cause for the referral to DFS. "A person need not be sure of the result of an eventual trial to have probable cause to start a prosecution." *Gallucci v. Milavic,* 100 So. 2d 375, 377 (1958). Also, the Plaintiff has failed to establish, by a preponderance of

the evidence, proof of malice or bad faith by any Defendant. Further, this Court reviewed, over 1400 documents and did not uncover a "smoking gun." Therefore, the Defendants are entitled to summary judgment as a matter of law because Plaintiff Leverett cannot prove the elements to support a claim for malicious prosecution.

B. **Immunity**

Alternatively, the Court holds that the Defendants are entitled to immunity pursuant to section 626.989, Florida Statues, which states:

> In the absence of fraud or bad faith, a person is not subject to civil liability for libel, slander, or any other relevant tort by virtue of fling reports, without malice, or furnishing other information, without malice, required by this section or required by the department or division under the authority granted in this section, and no civil cause of action of any nature shall arise against such person . . .

§ 626.989(4)(c).

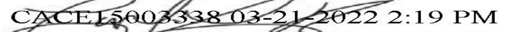
For the same reasons in support of probable cause above, wherein the Court did not find the presence of bad faith or malice by any Defendant, the Defendants are also entitled to immunity for reporting the suspected insurance fraud as required by statute.

III. **CONCLUSION**

Accordingly, after due consideration, it is:

ORDERED AND ADJUDGED that the Defendants' Amended Motion for Final Summary Judgment is hereby **GRANTED** and Final Summary Judgment is entered in favor of the Defendants. The Court reserves jurisdiction to entertain motions for attorney's fees and costs, if any.

DONE and **ORDERED** in Chambers, at Broward County, Florida on 03-21-2022.



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Hon. Carol-lisa Phillips
CIRCUIT JUDGE
Electronically Signed by Carol-lisa Phillips

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