STATE OF MICHIGAN

COURT OF APPEALS

RICHARD J. MENEREY, JR., and HEIDI MENEREY,

Plaintiff-Appellant,

v

JAMES SMITH, BETTY SMITH, d/b/a NORTHEASTERN WINDOW AND DOOR, and BRENT A. MITCHELL,

Defendants-Appellees.

UNPUBLISHED
June 21, 1996

No. 182372
LC No. 94-008925-NZ

Before: Marilyn Kelly, P.J., and Neff and J. Stempien,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order of the circuit court granting summary disposition to defendants and dismissing plaintiffs' complaint with prejudice. We affirm.

I

The case stems from an embezzlement scheme allegedly perpetrated by plaintiff Richard Menerey. Defendant James Smith contacted defendant Mitchell after he discovered that Menerey had sold approximately $219 of gutters without logging the sale into the computerized cash register. Smith's suspicions were raised when he noted that a sale of nearly identical gutters, identified by the parties as transaction "51," was listed on the computer print out, but that sale was for approximately $104 less than the sale made by Menerey. Following his investigation, Mitchell submitted the case to the local prosecutor who decided to try defendant for embezzlement. Menerey, however, was not bound over because the district court determined, after the preliminary examination, that probable cause did not exist suggesting that Menerey committed the crime.

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* Circuit judge, sitting on the Court of Appeals by assignment.

II

Plaintiffs first argue that the trial court erred in granting summary disposition before discovery was completed because plaintiffs were deprived of the opportunity to prove that Menerey did not commit the crime charged. Although we agree that it is generally improper to grant summary disposition before discovery is complete, that rule applies only to disputed issues. See *DSS v Aetna Casualty*, 177 Mich App 440, 446; 443 NW2d 420 (1989). Further, if discovery does not stand a chance of uncovering factual support for the opposing party's position, summary disposition is properly granted. See *Crawford v Michigan*, 208 Mich App 117, 122-123; 527 NW2d 30 (1994).

Here, the issue plaintiffs claim they were precluded from proving is not relevant to this case. Whether the crime was actually committed is not an element of either malicious prosecution or false arrest. See *Payton v Detroit*, 211 Mich App 375, 394-395; 536 NW2d 233 (1995); *Young v Barker*, 158 Mich App 709, 720; 405 NW2d 395 (1987). Thus, whether defendant committed the underlying crime is of no consequence to whether he will succeed in this case. As a result, we conclude that the trial court did not err in granting summary disposition too early.

III

Plaintiffs next argue that a question of fact existed regarding whether there was probable cause to support his arrest and prosecution. We review de novo the trial court's determination to grant summary disposition. *Barr v Mt Brighton Inc*, 215 Mich App 512, 515; 546 NW2d 273 (1996).

Plaintiffs argue that because the transaction recorded by the computer was proven to be proper, no embezzlement took place. Again, however, the focus on whether he committed the underlying crime is misplaced. The question is whether sufficient cause existed to support the charge. On our examination of the record we conclude that it did. First, merely because the $219 check was cashed by the Smiths does not prove that no embezzlement took place. The cash register balanced at the end of the day on which the $219 check was written, but the check was not included in the transaction log. Accordingly, there should have been a $219 overage or, if transaction "51" was questionable, an approximately $104 overage. In other words, the record reflects that plaintiff had the opportunity to place the $219 check in the register and take out the appropriate amount of cash to make the register balance.

Also, we find it especially important that during the investigation, Menerey did not provide the excuse on which he relied at his preliminary examination and here. When asked why the $219 transaction was not recorded in the computer, plaintiff stated that it was because the register was in "training mode" because he was training another employee, Kathy Travis. When the police officer contacted Travis, however, she indicated that she was not training on the day in question because her training had ended some time before that date. At the preliminary examination and on appeal, however, Menerey claims that the register was in training mode because he was providing an estimate. The fact that Menerey's initial story did not check out supports the conclusion that probable cause existed.

Menerey also attempts to create a fact issue by suggesting that the Smiths failed to fully disclose exculpatory information to the police. See *Lewis v Farmer Jack*, 415 Mich 212, 219 n 4; 327 NW2d 893 (1982). Menerey suggests that, even assuming transaction "51" was legitimate, no overage showed up because James Smith took the $219 check out of the cash register without indicating that he had done so, and failed to inform the police of that fact. Smith, however, testified at Menerey's preliminary examination that he took checks out of the register at the latest at approximately 10:30 a.m. on the day in question, and that the $219 transaction did not occur until approximately 3:00 p.m. Accordingly, it cannot be argued that the Smiths withheld information from the police.

Further, whether transaction "51" was a proper transaction is also not the issue. The question is whether the facts demonstrated probable cause to believe Menerey committed embezzlement. Because the cash register balanced on a day when there should have been at least some overage, we conclude that probable cause existed. Accordingly, we conclude that the trial court properly granted defendants' motions for summary disposition with regard to false arrest.

IV

Finally, we address plaintiffs' claim that defendants are guilty of malicious prosecution. With regard to defendant Mitchell, this claim must fail because plaintiffs do not allege that Mitchell knowingly swore to false facts. See *Payton supra*, at 395. With regard to defendants Smiths, the claim must fail because the police made an independent investigation and the prosecutor instituted charges based on that investigation and the recommendation of the police department, not solely on the information provided by the Smiths. See *Simmons v Telcom Credit Union*, 177 Mich App 636, 639; 44 NW2d 739 (1989). Further, as we have already determined, the record does not support plaintiffs' allegation that the Smiths withheld exculpatory information. Accordingly, the trial court properly granted summary disposition as to that claim.

Affirmed.

/s/ Marilyn Kelly
/s/ Janet T. Neff
/s/ Jeanne Stempien