UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

DR. ALVIN C. PROFFIT,	)	
	)	
Plaintiff,	)	Case No. 1:01CV00121
	)	
v.	)	**OPINION AND ORDER**
	)	
WILLIAM DALE RING,	)	By: James P. Jones
	)	United States District Judge
Defendant.	)	

Charles H. Smith, III, Gentry Locke Rakes & Moore, Roanoke, Virginia, for Plaintiff; Mark M. Caldwell, III, Sands Anderson Marks & Miller, P.C., Radford, Virginia, for Defendant.

In this malicious prosecution action, I find that there are genuine issues of material fact left for trial and deny the defendant's request for summary judgment.

I

The plaintiff Dr. Alvin C. Proffit, the former superintendent of schools in Grayson County, Virginia, filed this action against William Dale Ring, the county's building inspector, seeking damages for alleged malicious prosecution.[1] Proffit

[1] Jurisdiction of this court exists pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2002). The plaintiff also named Jimmy Don Bolt, the Commonwealth's attorney for Grayson County, as a defendant and asserted a claim under the Virginia Civil Conspiracy Act, Va. Code Ann. §§ 18.2-499,

alleges that on September 8, 2000, Ring, acting maliciously and without probable cause, obtained a criminal warrant charging Proffit with failing to obtain a building permit for a school construction project and concealing work prior to an inspection. A nolle prosequi was later entered on motion of the Commonwealth's attorney. Proffit contends that the criminal prosecution damaged his reputation and caused him to suffer humiliation and mental anguish and seeks both compensatory and punitive damages.

Early on in this case the defendant Ring moved for summary judgment. I denied the motion without prejudice in order that the parties might submit to mediation. That mediation has failed and Ring has renewed his motion for summary judgment. He contends that Proffit is unable to prove a case of malicious prosecution under Virginia law because (1) Ring acted with advice of counsel in obtaining the warrant; (2) the dismissal of the charge was the result of a compromise settlement; and (3) Ring is entitled to immunity under the circumstances of the case. In response, the plaintiff asserts that summary judgment is inappropriate because there are genuine

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-500 (Michie 1996). However, upon motions of the defendants, I dismissed the action against defendant Bolt and dismissed the civil conspiracy claim. *See Proffit v. Ring*, No. 1:01CV00121, 2002 WL 126610, at *5-6 (W.D. Va. Jan. 28, 2002).

issues of material fact as to these issues. The renewed motion has been briefed and is ripe for decision.[2]

The summary judgment record reveals the following facts relevant to the pending motion, viewed in the light most favorable to the non-movant.

The defendant Ring, as county building inspector, had the duty to enforce state law regarding building permits. He and other Grayson County officials felt that the local school system had been lax in the past in complying with the law in regard to certain school building projects. On August 1, 2000, David G. Cornett, an employee of the school system, obtained on behalf of the Grayson County School Board a building permit from Ring's office to erect an above ground storage tank to be used to fuel school buses. The next day Ring decided that the permit had been improperly issued because the scope of the work had not been accurately disclosed and plans had not been submitted. He directed his assistant to "void" the permit, although William Cox, the director of maintenance for the school system, denies that he knew that the permit had been voided. A contractor for the school board had leveled off the site on July 31, 2000, and on August 7, 2000, a concrete pad or foundation was poured for the storage tank.

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[2] I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

After discussing the matter with J. D. Bolt, the prosecuting attorney for Grayson County, and other members of county government, Ring went to a state magistrate and swore to a criminal complaint, resulting in the issuance of criminal warrants. The three defendants named on the complaint signed by Ring were Proffit, Cox, and Ruth S. Andrews, the chairperson of the Grayson County School Board. The criminal complaint charged that the accused persons "on or about August of 2000 . . . failed to obtain a building permit before beginning work on a 10,000 gallon storage tank [and] concealing [sic] work prior to the required inspection by pouring concrete slab."[3]

On October 3, 2000, the three defendants with their respective attorneys appeared before the General District Court of Grayson County to face the charges. Prosecutor Bolt then advised the court as follows:

> MR. BOLT: The Grayson County Building Inspector has concluded that all parties hereto will strive to adhere to the principles of absolute compliance with the uniform statewide building code and all requirements of the building inspector's office here in Grayson County and also the BOCA, the Building Officials Code and Administrator's requirements.

[3] Violations of the Virginia Uniform Statewide Building Code are deemed a misdemeanor and are punishable upon conviction by a fine not exceeding $2,500 for the first offense. *See* Va. Code Ann. § 36-106 (Michie Supp. 2002).

> Therefore, the Commonwealth also concurs with the above statement and therefore the Commonwealth would ask for a nol pros in all three (3) charges.
>
> THE COURT: Well, thank you, Mr. Bolt.
>
> MR. MOORE [Proffit's counsel]: No objection, Your Honor.

(Tr. 5.) The other attorneys also expressed no objection and the court then proceeded to dismiss the charges.

Superintendent Proffit had no direct or personal involvement in the construction of the fuel storage tank or in obtaining the building permit. Ring testified that he had not obtained the warrant against the Grayson County School Board (to whom the building permit had been issued) because "it was not suggested that I do that." (Ring Dep. 206.) Ring talked to Bolt before he obtained the warrant but according to Ring, Bolt "did not make a recommendation or suggestion to swear it out against any individual." (*Id.* 207.) Bolt agrees that he did not direct that the individuals be prosecuted. He recalls that Ring advised him in mid-August of 2000 that the school system had started a foundation for a storage tank without obtaining a permit, but that Ring had not told him that a permit had been issued to the school board. Bolt testified that he had decided to nolle pros the cases because "I felt like that there was an agreement that there would not be any further violations of the

building code." (Bolt Dep. 84-85.) This understanding came from a "consensus" of the attorneys and not from any of the defendants. (*Id.* 85.)

Proffit swears that he did not enter into any agreement as to the dismissal of the charge against him nor did his attorney advise him of any such agreement. He believes that Bolt asked for a dismissal solely because "they didn't have a case." (Proffit Dep. 90.)

II

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Under Virginia law,[4] the necessary elements of a malicious prosecution action are: (1) that the prosecution was instituted by the now defendant; (2) that it terminated

[4] The parties agree that Virginia law applies. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

in a manner not unfavorable to the now plaintiff; (3) that is was without probable cause; and (4) that it was malicious. *See Wiggs v. Farmer*, 135 S.E.2d 829, 831 (Va. 1964). The absence of probable cause creates a presumption of malice. *See id.*

Even aside from the question of whether Ring had probable cause to believe that the law had been violated in connection with the construction of the storage tank by the school board, there is a genuine issue of fact as to whether there was probable cause regarding the criminal liability of the plaintiff Proffit. Under state law, the local school board is a body corporate, *see* Va. Code Ann. § 22.1-71 (Michie 2000), in which is exclusively vested the power to operate, maintain, and supervise local schools, *see Bradley v. School Bd.*, 462 F.2d 1058, 1067 (4th Cir. 1972). Whether Proffit had sufficient responsibility for compliance with the building code to be criminally liable for these acts is a question that remains for trial.[5]

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[5] Where a criminal offense requires proof of criminal intent, a corporate officer may not be convicted unless the officer personally did the criminal acts alleged, or they were done under his direction or with his permission. *See Bourgeois v. Commonwealth*, 227 S.E.2d 714, 718 (Va. 1976) (involving prosecution of president of corporation for grand larceny where money was paid to corporation under false pretenses). However, a criminal violation of a so-called public welfare statute may be punished without proof of criminal intent and a corporate officer may be guilty without proof of direct involvement if the officer failed to exercise his or her power and responsibility to prevent the violation. *See United States v. Park*, 421 U.S. 658, 671 (1975) (involving prosecution of president of large national food store chain for adulteration of food sold in stores in violation of federal law); *Rooney v. Commonwealth*, 500 S.E.2d 830, 833 (Va. Ct. App. 1998) (recognizing doctrine). It has been held that a corporate officer may be convicted of a misdemeanor violation of the Uniform State Building Code under this responsible-corporate-officer doctrine without proof of the officer's knowledge or direct participation in the violation. *See State v. Arkell*, 657 N.W.2d

Ring has testified that the naming of the individuals as defendants in the criminal prosecution was a "mistake" for which he has "apologized." (Ring Dep. 199, 302.) While Ring suggests that the "mistake" in prosecuting Proffit was that of the magistrate, it is uncontested that Ring supplied the names of the accused to the magistrate. No explanation has yet been given why it would have been necessary for Ring to provide the magistrate with the names of the three criminal defendants had he intended solely to prosecute the school board. Based on all of the circumstances, the jury must determine whether Ring was responsible for instituting the criminal prosecution of Proffit.

Acting under advice of counsel is proof of probable cause in a malicious prosecution action, so long as the attorney received a full, correct, and honest disclosure of the relevant facts before advising that probable cause existed for the prosecution. *See Chipouras v. A J & L Corp.*, 290 S.E.2d 859, 861 (Va. 1982). I agree with the plaintiff that genuine issues of material fact exist as to whether attorney Bolt was supplied with all of the relevant facts and whether Ring followed his advice.

Ring also contends that the malicious prosecution action is barred because the dismissal of the criminal charge was the result of a voluntary settlement. "A

883, 888 (Minn. Ct. App. 2003).

voluntary compromise of a criminal prosecution, by the procurement or with the consent of the accused, in itself defeats a recovery in a subsequent action for malicious prosecution based upon the criminal proceeding." *Glidewell v. Murray-Lacy & Co.*, 98 S.E. 665, 669 (Va. 1919). The reason for the rule is that a dismissal of the charge on this basis is not a favorable termination for the purposes of a malicious prosecution action. *See Leonard v. George*, 178 F.2d 312, 313 (4th Cir. 1949).

The evidence thus far presented leaves an issue of fact as to whether there was an agreed settlement of the criminal charge against Proffit. Proffit denies it and the transcript of the court proceeding does not show it. Although the Commonwealth's attorney recalls that he "felt" there was a "consensus" among the attorneys, that is insufficient evidence for me to enter summary judgment.

Finally, while the defendant contends that he is entitled to immunity, as I have previously held in this case, such immunity would only exist if he had acted with probable cause. *See Proffit v. Ring*, 2002 WL 126610, at *5. In view of the unresolved issues of fact in the case, I am unable to make that determination.

III

For these reasons, it is **ORDERED** that the defendant's Second Motion for Summary Judgment [Doc. No. 30] is denied.

ENTER: June 2, 2003

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United States District Judge