SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0613-21

FRANK DELLI SANTI,

Plaintiff-Appellant,

v.

HOME DEPOT CORP.,[1]
JORGE RENTAS, ED DAISEY,
and JAY WARGIE,

Defendants-Respondents.

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Submitted December 14, 2022 – Decided January 30, 2023

Before Judges Accurso, Firko, and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1313-19.

Frank Delli Santi, appellant pro se.

Lewis Brisbois Bisgaard & Smith, LLP, attorneys for respondents (Brent A. Bouma, of counsel and on the brief).

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[1] Defendant's correct corporate designation is Home Depot U.S.A., Inc. In this opinion, we refer to this defendant as Home Depot.

PER CURIAM

Plaintiff Frank Delli Santi appeals from the trial court's grant of summary judgment and dismissing his evidence tampering, false imprisonment, false arrest, malicious prosecution, and negligent hiring, training, and supervision claims. Plaintiff also appeals from an order denying his motion for reconsideration. Having considered plaintiff's arguments in light of the record and applicable principles of law, we affirm.

I.

Viewed in the light most favorable to plaintiff, Templo Fuente De Vida Corporation v. National Union Fire Insurance Company of Pittsburgh, 224 N.J. 189, 199 (2016), the pertinent facts are as follows. While a customer in defendant Home Depot's Dover store, plaintiff was detained by Home Depot's employee, defendant Jorge Rentas, a loss prevention specialist, for approximately forty minutes and accused of shoplifting. The police were called and arrested plaintiff.

The criminal complaint charged plaintiff with "purposely altering, transferring, or removing any label, price tag or marking indicia of value or any other markings[,] which aid in determining value affixed to any merchandise, specifically described as a scal[e] blaster-water conditioner[,] specifically by

covering an original bar code with an altered one." N.J.S.A. 2C:20-11B(3). The value of the scale blaster-water conditioner was $179. The State alleged plaintiff removed a bar code or tag from his right pocket for a $23.06 vent fan, placed it on the item, and paid $23.06 at the self-checkout instead of the $179 retail price for the scale blaster-water conditioner.

The criminal case proceeded on multiple days and testimony was elicited on behalf of the State, but the case was ultimately dismissed for lack of prosecution. Thereafter, plaintiff filed his Law Division complaint against defendants Home Depot, Rentas, Jay Wargie,[2] and Ed Daisey, Home Depot's organized retail crime investigator. Plaintiff sought compensatory and punitive damages. Following discovery, defendants moved for summary judgment. The court granted the motion.

In a written statement of reasons, the court concluded that plaintiff's opposing papers failed to either admit or deny defendants' statement of material facts as required by Rule 4:46-2(b). The court also noted that plaintiff failed to provide a counterstatement of material facts, and therefore failed to demonstrate the existence of a genuine issue of fact warranting a trial. In its undisputed findings of fact, the court concluded plaintiff "removed a bar code or tag from

[2] Plaintiff never served Wargie and the claims against him were dismissed.

his right pocket and placed it on the scale blaster[-]water conditioner." The court noted plaintiff was well known at the Dover Home Depot store based on his prior purchases and "extensive return history of non-receipted items," spanning the course of six years. Rentas investigated the incident, detained plaintiff, and contacted the police for further investigation.

The court highlighted that no reasonable jury could find defendants lacked probable cause to detain plaintiff or report the shoplifting to police because plaintiff did not dispute: (1) he only paid $23.06 for the scale blaster-water conditioner as opposed to the $179 retail price; (2) a tag had been placed over the Universal Product Code (UPC) of the item resulting in the lower price charged; and (3) plaintiff previously purchased the same make and model of the scale blaster-water conditioner at least twenty times and received $5,854.26 in store credit. The court also found plaintiff failed to cite any facts showing a lack of probable cause. A memorializing order was entered.

Plaintiff then moved to vacate the summary judgment dismissal and to reinstate the complaint. The court construed the motion as one for reconsideration under Rule 4:49-2. Plaintiff's motion for reconsideration was denied substantially for the same reasons expressed in the court's statement of

reasons granting summary judgment to defendants. A memorializing order was entered. This appeal followed.

II.

Plaintiff contends the court erred in granting summary judgment to defendants because he properly responded to defendants' statement of material facts. He also asserts Rentas tampered with evidence; falsely imprisoned him in the security room at the Home Depot store; there was no probable cause to arrest him; defendants engaged in malicious prosecution; and defendants negligently hired, trained, and supervised their employees. Plaintiff claims that the determination of these issues is proper for the jury to decide.

We review a grant or denial of a motion for summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). In doing so, we apply the same standard as the trial court, deciding first whether there is a genuine issue of material fact and, second, whether the movant is entitled to judgment as a matter of law. R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

"By its plain language, Rule 4:46-2 dictates that a court should deny summary judgment only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'"

Brill, 142 N.J. at 529. To determine whether there is a genuine issue of material fact, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

A. Statement of Material Facts

Plaintiff argues the court incorrectly found that he failed to answer defendants' statement of material facts. Rule 4:46-2(b) provides:

> A party opposing [a summary judgment] motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R[ule]. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record.

Here, the record supports the court's conclusion that plaintiff failed to admit or deny each of the facts contained in defendants' statement of material facts in violation of Rule 4:46-2(b). A party opposing summary judgment is

required to offer more than mere "proffer[s]" of information that may support future "inquiry;" the opposing party must point to competent record evidence establishing a genuine issue of material fact at the time of their opposition. See R. 4:46-2(c) (providing that summary judgment "shall be rendered . . . if the pleadings, depositions, answers to interrogatories[,] and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment as a matter of law.") Moreover, plaintiff did not present his counterstatement of facts "in separately numbered paragraphs together with citations to the motion record," as Rule 4:46-2(b) requires. "Competent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful' arguments." Hoffman v. Asseenontv.com., Inc., 404 N.J. Super. 415, 426 (App. Div. 2009).

Plaintiff's opposing papers did not raise a genuine issue of material fact. Therefore, defendants' facts were a "deemed admission" for purposes of the motion. Ibid. We are unpersuaded by plaintiff's purported reply papers that contained an exhibit entitled "UNDISPUTED MATERIAL FACTS," because the exhibit was untimely and inappropriately submitted and therefore, did not preclude summary judgment for defendants. See R. 4:46-2(b). The court was correct in its analysis and reversal is unwarranted.

B. Evidence Tampering

Plaintiff also contends Rentas tampered with the evidence the State used against him in the criminal action. Specifically, plaintiff claims Rentas fabricated exhibit S-5, the scan of his driver's license, created a fake UPC label, and that Home Depot's representatives knew the exhibit was fraudulent. Without S-5, plaintiff contends the police lacked probable cause to arrest him and issue a complaint.

Before addressing evidence tampering, we address the issue of probable cause. In the context of a false arrest or false imprisonment claim, "[p]robable cause exists if at the time of the arrest 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [suspect] had committed or was committing an offense.'" Connor v. Powell, 162 N.J. 397, 409 (alterations in original) (quoting Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000)). "In determining whether probable cause existed, a court should consider the 'totality of the circumstances,' including the police officer's 'common and specialized experience.'" Bayer v. Twp. of Union, 414 N.J. Super. 238, 263 (App. Div. 2010) (citations omitted).

In Carollo v. Supermarkets General Corporation, 251 N.J. Super. 264, 270 (App. Div. 1991), when analyzing probable cause under N.J.S.A. 2C:20-11, we held: "[c]learly, the probable cause which will constitute a defense to a false arrest action is the same as the probable cause conferring merchant's immunity from a false arrest action under the shoplifting statute." We emphasized, "[t]he reasonable belief which constitutes probable cause does not require the merchant's employee to evaluate the totality of the circumstances, both inculpatory and exculpatory, as a trier of fact guided by a reasonable doubt standard." Id. at 271.

Rentas reported and testified that he saw plaintiff place a UPC label on top of the existing UPC label on the scale blaster-water conditioner. Moreover, Rentas further testified that he knew plaintiff had targeted this particular item on prior occasions because he consistently returned them in exchange for store credit. Each time an item is returned, the customer must present their driver's license to receive a refund. Plaintiff presented his driver's license when he brought back items to the store. Therefore, Home Depot had a well-documented history establishing plaintiff's returns. In fact, Home Depot had flagged plaintiff for "ticket switching" according to Rentas because of his "very extensive history of non-receipted returns." Plaintiff's assertion that S-5 was fabricated is nothing

more than pure speculation. We now turn to plaintiff's contention that Rentas tampered with evidence.

A person commits evidence tampering under N.J.S.A. 2C:28-6

> if, believing that an official proceeding or investigation is pending or about to be instituted, [they]:
>
> (1) Alters, destroys, conceals or removes any article, object, record, document or other thing of physical substance with purpose to impair its verity or availability in such proceeding or investigation; or
>
> (2) Makes, devises, prepares, presents, offers or uses any article, object, record, document or other thing of physical substance knowing it to be false and with purpose to mislead a public servant who is engaged in such proceeding or investigation.

Under the facts presented to the court here, its finding that there was no evidence tampering was based upon substantial credible evidence in the record. Plaintiff presented no evidence to establish S-5 was fabricated. Plaintiff did not dispute the authenticity of S-5 when responding to Home Depot's motion for summary judgment, and his counterstatement was devoid of any facts supporting evidence of tampering. Clearly, Rentas had an "honest belief" that plaintiff had shoplifted by altering the price. Lo Biondo v. Schwartz, 199 N.J. 62, 93 (2009).

C. False Imprisonment

Plaintiff also challenges the court's decision dismissing his false imprisonment claim. He claims he provided sufficient evidence that Rentas falsely imprisoned him in the second-floor security room at Home Depot. Rentas spotted plaintiff in the store because "he dresses a certain way . . . had these brand new pair of white shoes on, that kind of stood out, and he had a very familiar outfit." Plaintiff had been on the store's "radar" and Rentas had "run-ins with him" on two previous occasions.

"False imprisonment is 'the constraint of the person without legal justification.'" Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 591 (2009) (quoting Mesgleski v. Oraboni, 330 N.J. Super. 10, 24 (App. Div. 2000)). The cause of action has two elements: "an arrest or detention of the person against [their] will" and "lack of proper legal authority or legal justification[,]" with the second element being the key element. Ibid. Here, N.J.S.A. 2C:20-11(e) sets forth the scope of that legal authority:

> A law enforcement officer, or a special officer, or a merchant, who has probable cause for believing that a person has willfully concealed unpurchased merchandise and that he can recover the merchandise by taking the person into custody, may, for the purpose of attempting to effect recovery thereof, take the person into custody and detain him in a reasonable manner for not more than a reasonable time, and the taking into

> custody by a law enforcement officer or special officer or merchant shall not render such person criminally or civilly liable in any manner or to any extent whatsoever.
>
> Any law enforcement officer may arrest without a warrant any person [they have] probable cause for believing has committed the offense of shoplifting as defined in this section.
>
> A merchant who causes the arrest of a person for shoplifting, as provided for in this section, shall not be criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing that the person arrested committed the offense of shoplifting.

The statute, in relevant part, creates a qualified immunity for merchants who, with probable cause, detain willful shoplifters for a "reasonable time." N.J.S.A. 2C:20-11(e). "Merchant" is defined in the statute as "any owner or operator of any store or other retail mercantile establishment, or any agent, servant, employee, lessee, consignee, officer, director, franchisee or independent contractor of such owner or proprietor[.]" N.J.S.A. 2C:20-11(a)(4) (emphasis added).

Our Legislature has provided statutory immunity to merchants who reasonably detain individuals "they have cause to believe are concealing or stealing unpurchased merchandise." N.J.S.A. 2C:20-11(e). Where the merchant has probable cause to believe a person has shoplifted, the merchant "shall not be

criminally or civilly liable in any manner or to any extent whatsoever where the merchant has probable cause for believing the person arrested committed the offense of shoplifting." Ibid.

In Henry v. Shopper's World, 200 N.J. Super. 14, 17 (App. Div. 1985), we considered the issue of what constitutes a reasonable detention under N.J.S.A. 2C:20-11(e). Recognizing the significant costs to a retail store of protecting its products and avoiding losses, we held as a matter of law that a thirty-to-forty-five-minute detention was not unreasonable under the statute. Henry, 200 N.J. Super. at 17. Here, plaintiff was detained by Home Depot employees for a reasonable period of time—forty minutes—that falls squarely within this framework. And, a sufficient amount of time was allowed for Home Depot's employees to question plaintiff, report the incident to the store's designee for such matters, and allow for plaintiff to make a phone call. Based upon our de novo review, under Henry, we find no evidence to support plaintiff's claim his detention was unreasonable under the circumstances, especially in light of his lengthy history of non-receipted returned items. Id. at 18-19.

D. Malicious Prosecution

Plaintiff also contends defendants engaged in malicious prosecution against him and that Rentas intentionally targeted him. Malicious prosecution

"is the employment of process for its ostensible purpose, although without reasonable or probable cause." Earl v. Winne, 14 N.J. 119, 128 (quoting Ash v. Cohn, 119 N.J.L. 54, 58 (E. & A. 1937)). A plaintiff alleging malicious prosecution must prove: "(1) a criminal act action was instituted by this defendant against this plaintiff; (2) there was an absence of probable cause; (3) the action was motivated by malice; and (4) the action was terminated favorably to the plaintiff." LoBiondo, 199 N.J. at 90 (quoting Lind v. Schmid, 67 N.J. 255, 262 (1975)). "Although each factor is distinct, 'evidence of one may be relevant with respect to another.'" Ibid. "Nevertheless, each element must be proven, and the absence of any one of these elements is fatal to the successful prosecution of the claim." Ibid. (citations omitted).

Here, the undisputed facts provided by Home Depot established probable cause that plaintiff shoplifted. The criminal charges, although dismissed for failure to prosecute, were sustainable; therefore, there was no malicious prosecution. The record indicates the criminal matter was dismissed for lack of prosecution rather than a termination in favor of plaintiff. Plaintiff failed to proffer one scintilla of evidence of malice by defendants.

E. Home Depot's Hiring, Training, and Supervision of Employees

In his complaint, plaintiff alleged Home Depot negligently hired, trained, and supervised its employees, which led to his false arrest. Specifically, plaintiff contended Home Depot negligently hired and failed to supervise Rentas when it knew of the "two fictitious non-receipt reports" prepared by its investigators and relied upon by Rentas in having plaintiff prosecuted. The court found plaintiff cited no facts whatsoever in the record in support of this cause of action. Moreover, plaintiff did not present any evidence of the non-existence of Home Depot's training procedures; whether those training procedures were followed; whether those training procedures failed to conform to industry standards; or whether Home Depot's failure to have procedures or implement them "created a risk" that was the proximate cause of his harm.

"Consistent with Restatement § 219(2)(b), New Jersey courts recognize the tort of negligent hiring, 'where the employe[r] either knew or should have known that the employee was violent or aggressive, or that the employee might engage in injurious conduct toward third persons.'" Davis v. Devereux Found., 209 N.J. 269, 292 (2012) (quoting Di Cosala v. Kay, 91 N.J. 159, 173 (1982)).

"[T]he tort of negligent hiring has as its constituent elements two fundamental requirements. Di Cosala, 91 N.J. at 173. The first involves the

knowledge of the employer and foreseeability of harm to third persons." Ibid. "The second required showing is that, through the negligence of the employer in hiring the employee, the latter's incompetence, unfitness or dangerous characteristics proximately caused the injury." Id. at 174. Plaintiff did not present any facts or evidence to illustrate Rentas's conduct was unfit, incompetent, dangerous, or injurious. Therefore, plaintiff's negligent hiring, training, and supervising claims were properly dismissed summarily.

To the extent we have not specifically addressed any remaining arguments raised by plaintiff, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.