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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2240-22**

EDDIE DURHAM,

Plaintiff-Appellant,

v.

**TOWNSHIP OF EDISON,
DETECTIVE CHARLES
ZUNDEL, and PATROLMAN
ALAN SCIARILLO, JR.,**

Defendants-Respondents.

Argued April 30, 2024 – Decided June 20, 2024

Before Judges Gooden Brown and Natali.

On appeal from the Superior Court of New Jersey, Law
Division, Middlesex County, Docket No. L-8352-20.

Daniel R. Bevere argued the cause for appellant (Piro,
Zinna, Cifelli, Paris & Genitempo, LLC, attorneys;
Daniel R. Bevere, on the brief).

Brian A. Bontempo argued the cause for respondents
(James P. Nolan and Associates, LLC, attorneys; Brian
A. Bontempo, on the brief).

PER CURIAM

Plaintiff Eddie Durham appeals a February 17, 2023 Law Division order granting defendants Township of Edison, Detective Charles Zundel, and Patrolman Alan Sciarillo, Jr.'s motion for summary judgment and dismissing his malicious prosecution complaint. We affirm.

I.

We begin by reviewing the facts in the summary judgment record, taken in the light most favorable to plaintiff as the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). In August 2018, Senate Maxwell contracted to purchase a home on Sine Road in Edison from Bellie Holdings, LLC (Bellie). At his deposition, plaintiff testified he was the president of Bellie¹ and further explained the company served as "a holding company for flipping houses." Paul Bader was plaintiff's real estate agent, as he had been on at least ten prior occasions. In the process of the sale, the parties' attorneys exchanged emails on September 27, 2018. Maxwell's attorney asked Bellie's counsel to "confirm that [the] seller will obtain [the] final [certificate of

¹ Plaintiff testified his father was the only other member of Bellie, but was "not involved in any day-to-day" activities.

occupancy, or] CO after closing." Plaintiff directly responded, stating "I . . . definitely will."

Plaintiff testified Bader had always obtained the CO in their past engagements, and accordingly plaintiff "assumed" he "was going to take care of the CO" with respect to the Sine Road sale. When asked why he didn't say Bader would be responsible for the CO in his September 27th email, plaintiff stated Bader was copied on the email and he had "done multiple transactions with [him] so it's already understood" that Bader, and not he, would get the CO. Plaintiff added he had "never seen a CO" and "the way it works is once the realtor obtains the CO they send it directly to the attorney" and not to him. Although plaintiff was not present at the closing, he testified he "assumed" the CO was provided because there would have been no closing without it.

On September 29, 2018, Edison Police Department Officers Westover and Errico responded to a "report of an unwanted guest" at the Sine Road residence. According to the police report, plaintiff "came by the house to make sure the new owner (Maxwell) had not gone into the house" because "the house still belong[ed] to him because he never received the money after the closing" earlier in the day.

Maxwell and her attorney were inside the house when plaintiff arrived and stated he "wanted them to leave until they paid the money owed." The police report noted Officer Westover "advised all parties that this is a civil matter which would have to be handled accordingly," but noted "all paperwork was signed by both seller and buyer, and Maxwell [was] the legal owner."

On October 2, 2018, Maxwell went to the Edison Police Department and stated the CO she received was forged. According to the report authored by Officer Sciarillo, Maxwell advised she had recently purchased the Sine Road home and at the closing, received "a signed copy of a Township of Edison Certificate of Continued Occupancy form (CCO)," which listed the owner as Bellie Holdings, LLC, and "purported to show that the \$150 fee was paid" on September 27, 2018, and "allegedly collected by an Edison employee with the initials 'JB.'"

Maxwell explained she went to Code Enforcement on October 1, 2018, to "verify the paperwork and any restrictions," when Township employees informed her "they had no record of [the CCO] and . . . the signature on the CCO did not match anyone's signature in the office." Following an internal investigation, Code Enforcement contacted Maxwell later the same day to confirm "the document was not legitimate." She stated Code Enforcement called

her and "said that the document[] was forged, and that there's actually no temporary occupancy." She also provided Officer Sciarillo the names of people associated with the sale, including Bader and Bellie's attorney, as well as Bellie.

When Officer Sciarillo asked who forged the document, Maxwell responded she was "going after the seller, the agent, as well as the lawyer." Officer Sciarillo attempted to clarify, asking "[s]o this was given to you from them," to which Maxwell stated "[c]orrect, I don't know (indiscernable), but the City . . . did not give me temporary occupancy." Officer Sciarillo then confirmed with Maxwell she knew the seller only as "Bellie Holdings," but she identified Bellie's counsel and Bader as its agent.

Following the meeting with Maxwell, Officer Sciarillo spoke with Code Enforcement employees, including Julie Britton, who he suspected was the 'JB' referenced on the CO. At his deposition, Officer Sciarillo testified "the initials basically led to her" based on his knowledge of department personnel. According to the police report, Britton advised Officer Sciarillo "the document was not real . . . she ha[d] no record of any CCO being issued to that residence," and "she did not recognize the signature." Officer Sciarillo also contacted Construction Official John Soltesz, who "echoed what Ms. Britton had stated earlier, further confirming that the document was indeed fraudulent." Soltesz

also noted Code Enforcement "had sent violations via certified mail to the sellers" on October 1, 2018.

Subsequently, Det. Zundel took over investigating the case. According to his report, he first contacted Maxwell, who confirmed the information previously conveyed to Officer Sciarillo. He also spoke to Code Enforcement staff, including Soltesz and Technical Assistant Pattie Leary. Det. Zundel reported Soltesz and Leary "were aware of the fraudulent document and had been in communication with Ms. Maxwell, Paul Bader, and Eddie Durham." They also informed Det. Zundel they had held a meeting with Bader, during which "Bader admitted to them that the CCO had been altered so he and [plaintiff] could close on the date of appointment." Det. Zundel confirmed at his deposition Code Enforcement never told him "that Mr. Bader and Mr. Bader alone forged this [CO]."

Det. Zundel spoke to plaintiff and Bader by phone "in an attempt to schedule an interview," to which both informed him "the[y] would contact their attorneys and return [his] call," but never did so. After approximately a month had passed, plaintiff's counsel contacted Det. Zundel and "stated he would call [Det. Zundel] in a week to schedule and [sic] interview" with plaintiff. According to the police report, plaintiff's counsel never called back despite Det.

Zundel leaving "several voice messages." Following "a lengthy period of time not hearing from these parties," Det. Zundel contacted the prosecutor, who authorized complaints issued January 21, 2019 against Bader, Bellie, and plaintiff for forgery, tampering with government documents, and falsifying/tampering with records.

At his deposition, Det. Zundel testified he provided the prosecutor with "all the information [he] had as far as . . . talking with Ms. Maxwell, not hearing back from [plaintiff's] counsel." He also confirmed he "explained to [the prosecutor] the whole thing" and advised "according to the 2C code, we could charge [plaintiff] with this and this," but the prosecutor "said no, charge him with this, this, and this." He confirmed the prosecutor's office "ma[d]e the ultimate determination as to whether [plaintiff] gets a complaint issued against him."

In his deposition, plaintiff disputed several of the statements made in Det. Zundel's report. For example, as to the statement that he and Bader were "involved in the sales transaction ... [at] Sine Road," he stated he "wasn't involved in a sales transaction" as he "wasn't involved with anything in terms of CO related to the town" and neither he nor Bader were "at the closing." With respect to the communications between Soltesz, Leary, plaintiff, and Bader,

plaintiff denied ever having "a conversation regarding the CO issue with anybody from the town," and stated "[t]he only conversation [he] ever had with the town related to this property was with the permits."

Plaintiff also testified that during the investigation, he was contacted by FBI Agent Bill Kryzmien, who worked on a previous case against him. Although he was not aware how Agent Kryzmien knew about the incident involving the Sine Road CO, plaintiff explained the agent asked him "what happened and how [plaintiff] was involved."

Plaintiff stated he forwarded "evidence showing that [he] did nothing wrong" to the agent, who later informed him he had attempted to show the evidence to Det. Zundel, who allegedly was "not interested in viewing" it. Plaintiff did not know why Agent Kryzmien was "going through all this for [him]" or why he was "contacting the police department," but believed it was the agent's "constitutional obligation" to view and present exculpatory evidence to other law enforcement agencies.

Officer Sciarillo denied any communication with anyone from the FBI about plaintiff or the incident. Although Det. Zundel mentioned he had received calls from an FBI Agent and relayed that information to the prosecutor, he did not describe what was discussed, if anything.

Plaintiff identified as the exculpatory evidence an undated text message exchange between him and Bader, consisting of the following:

Plaintiff: Question for you.. I spoke to Dan [Bevere, plaintiff's counsel] and the detective told him that when you went to talk to the construction official, you told them I told you to make up the [CO].. That[']s where the conspiracy charge is coming from. I don't think you did[,] but if you did[,] I just want to know how I'm going to approach it..

Bader: No, I didn't. In fact[,] they were confused and thought I was you and not the realtor. Still don't know if they totally understood when I left.

Plaintiff: The detective is a liar!

Bader: Didn't bring you up with being involved with it at all.

In July 2018, plaintiff was indicted by a Middlesex County grand jury and charged with third-degree conspiracy to tamper with public records, N.J.S.A. 2C:28-7(a)(2) and 2C:5-2(a)(1); third-degree tampering with public records, N.J.S.A. 2C:28-7(a)(2); third-degree forgery, N.J.S.A. 2C:21-1(a)(2) and 2C:2-6; fourth-degree falsifying records, N.J.S.A. 2C:21-4(a) and 2C:2-6; and second-degree misconduct by corporate official, N.J.S.A. 2C:21-9(c). Bader and Bellie were also indicted.

At the grand jury hearing, Officer Sciarillo was the sole witness for the State. He confirmed that Maxwell "was given a CCO" when she closed on the

property, which "was given to him [sic] by . . . someone . . . by the name of . . . Eddie Durham." Officer Sciarillo also agreed the "CCO purported to . . . have been . . . obtained from . . . the Township" and Maxwell "said that [the seller] paid a \$150, a fee for . . . obtaining that CCO."

Officer Sciarillo, in his deposition, explained his "basis for believing and testifying that [plaintiff] was involved in a crime" was "the investigative processes conducted by Det[.] Zundel that w[ere] listed in his report." Specifically, he confirmed "[a]ny testimony that [he] gave before the grand jury regarding [plaintiff] specifically and his involvement in the crimes that were charged would have been based upon Det[.] Zundel's report."

Plaintiff disputed several of the statements made by Officer Sciarillo, including that Maxwell was "given a CCO," that plaintiff gave Maxwell the CO, and that plaintiff "paid \$150, a fee for obtaining that CCO." Plaintiff highlighted that in a bodycam video of Officer Sciarillo's conversation with Maxwell, Maxwell never mentioned his name or claimed he sent her the CO directly, and Officer Sciarillo "specifically asked that question, where she got it from, and she says it was emailed."

Bader later pled guilty to third-degree forgery and received three years' pretrial intervention. The same day of Bader's plea, the State dismissed the

indictments against plaintiff and Bellie. Plaintiff testified the indictment was dismissed "because Paul [Bader] admitted to forging the CO all by himself and me not knowing anything about it," although he admitted he was not present for that admission.

At his deposition, plaintiff detailed the deleterious effects on his personal and professional life as a result of the investigation and criminal case. Specifically, he stated, "it had a huge mental and physical effect on [him]," he suffered "anxiety, sleepless nights"; was "brought . . . back to a very dark place"; and went through "a lot of anxiety and heartache and emotional distress." He also testified extensively to the damage to his reputation allegedly caused by the false charges, including certain economic losses.

Plaintiff filed his first complaint against the Township and Det. Zundel on December 3, 2020, which he amended on October 25, 2021 to add Officer Sciarillo as a defendant. He alleged (1) Det. Zundel and the Township maliciously prosecuted him by charging him with criminal offenses related to the forgery absent probable cause, (2) that malicious prosecution violated his "civil rights under the New Jersey State Constitution" and therefore the New Jersey Civil Rights Act, N.J.S.A. 10:6-1 to -2 (NJCRA), and (3) Officer Sciarillo's false testimony before the grand jury which ultimately indicted

plaintiff "constitute[d] malicious prosecution/abuse of process² in violation of [p]laintiff's civil rights under the New Jersey State Constitution" and the NJCRA. Plaintiff asserted his damages included "(1) legal fees and costs to defend and secure dismissal of the criminal charges, (2) emotional distress and suffering and (3) loss of reputation in the community." In their answer, defendants denied liability and asserted several defenses, including immunity under the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to -12-3 (NJTCA).

After the close of discovery, defendants moved for summary judgment. They contended plaintiff failed to demonstrate probable cause or malice, as required for his malicious prosecution claims, because the police investigation and the prosecutor's charges were supported by "Ms. Maxwell's report, [her] complaint . . . all these reports from these officers . . . emails going back and forth [regarding the sale and the CO] . . . [and] a previous altercation where [plaintiff] says he's the seller of this property." Further, they argued the officers had "never heard of [plaintiff] before this happened" and had no reason to "have

² Although plaintiff identified this claim in the complaint as "malicious prosecution/abuse of process," at all times thereafter he, along with defendants and the court, characterized it solely as a malicious prosecution claim. We do the same.

any sort of malice" toward him. Defendants also argued plaintiff failed to prove damages on any of his claims.

In addition to plaintiff's failure to satisfy the elements of his claims, defendants argued summary judgment was appropriate because Officer Sciarillo and Det. Zundel were each entitled to qualified immunity and good faith immunity under the NJTCA. They also asserted plaintiff's claims against the Township were improper "because plaintiff has failed to show any sort of pattern or practice of improper conduct by the municipal entity" as required by Monell v. Dep't. of Soc. Servs., 436 U.S. 658, 690-91 (1978).³

³ A public entity may be held liable for violations of constitutional rights under the NJCRA or its federal counterpart, 42 U.S.C. § 1983 "only if it causes harm through 'the implementation of "official municipal policy.'"" Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165, 190-91 (2021) (quoting Lozman v. City of Riviera Beach, 585 U.S. 87, 95 (2018)); see also Monell, 436 U.S. at 691 (holding "Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort"). In other words, a public entity is "not legally accountable solely because of the acts of one of its employees—acts that do not represent official policy—under the doctrine of respondeat superior." Winberry Realty, 247 N.J. at 191. Plaintiff did not argue, before the court or on appeal, that any Township policy caused his injuries, and we therefore deem any such argument waived. See Green Knight Capital, LLC v. Calderon, 469 N.J. Super. 390, 396 (App. Div. 2021) (holding "[a]n issue not briefed on appeal is deemed waived" (quoting Woodlands Cmty. Ass'n v. Mitchell, 450 N.J. Super. 310, 319 (App. Div. 2017))).

Plaintiff responded first that his position as president of Bellie was insufficient to conclude there was probable cause that he forged the CO. He stressed his constitutional right to remain silent meant he was not compelled to speak to the officers and his silence could not be used to establish probable cause. He argued Maxwell never provided his name and "there was no evidence at that point in time [when the officers were investigating] that [plaintiff] was personally involved in the issuance of this forged [CO]." Plaintiff also maintained he adequately established damages, including legal fees, damage to his professional reputation, and emotional distress. As to the immunities claimed, plaintiff argued disputed factual issues prevented their application at this stage.

After considering the parties' submissions and arguments, the court entered an order granting defendants' motion and dismissing the complaint. In its oral decision explaining its ruling, the court agreed with defendants that plaintiff had not demonstrated a lack of probable cause to establish his malicious prosecution claims. It noted police had "pretty solid information," including Bader's role as agent, plaintiff's role as "de facto owner because he's the sole owner of Bellie," the emails corroborating his ownership of the Sine Road

property, and the email in which plaintiff stated "I . . . definitely will" take care of the CO.

The court concluded "an inference could be drawn from that [email], that any resulting CO he had a part in securing." Despite plaintiff's claims that "he told Bader to take care of this," the court noted "he indicated in that email to his lawyer, 'I definitely will,' that he's going to take care of it." It rejected plaintiff's claims that defendants ignored exculpatory evidence allegedly provided by Agent Kryzmien, finding "really no proof" to support the allegation, and adding plaintiff's counsel never provided the allegedly exculpatory evidence to police despite Det. Zundel's requests and there being no Fifth Amendment concern implicated by his doing so.

The court also found it "very significant" that the prosecutor's office "authorized the signing and told [Det. Zundel] . . . what crimes to charge" because "at that point in time, it's really the prosecutor['s] office that was charging [plaintiff], not the Edison Police." Additionally, it noted a grand jury indictment is "an official finding of probable cause by an independent body." Thus, the court reasoned "the only way anybody could be liable—and specifically it would be [Officer] Sciarillo, not [Det.] Zundel—would be if

[Officer] Sciarillo lied to the grand jury, actually intentionally lied to the grand jury."

The court reviewed each portion of Officer Sciarillo's grand jury testimony plaintiff claimed was untrue and concluded the statements "may very well have been untrue," but Officer Sciarillo was "answering the questions to the best of his ability given the investigation at that point in time." For example, as to the statement that Maxwell was "given a CO," the court found "whether she was mailed a CO, whether she was handed a CO, whether . . . it came via text message, whether it came via email, she was given a CO," which was in her possession when she went to the police.

With respect to the statement that plaintiff gave Maxwell the CO, the court reasoned it was "a fair inference that the owner of Bellie Holdings and its alter ego, [plaintiff], provided the [CO]" based on his role as seller and the investigation up to that point. Ultimately, the court found "at the time that [Officer Sciarillo] testified, this [wa]s the best information he had, and it was accurate."

Next, as to damages, the court noted plaintiff was never arrested or taken to jail, and he had "no evidence to support" his speculation about others not wanting to deal with him or his claim for emotional distress. It found "[t]his is

just [plaintiff's] feeling, totally subjective, but he's got no evidence to support that people actually knew about it, that it hurt his reputation" beyond "pure speculation."

The court did not make any findings or legal conclusions with respect to defendants' claimed immunities or any shortcomings in plaintiff's ostensible Monell claim against the Township. This appeal followed.

II.

Before us, plaintiff first argues the court improperly granted summary judgment to defendants as, contrary to the court's conclusion, he established each of the elements for his malicious prosecution claims. Plaintiff focuses his argument on the third element, arguing "[t]his matter clearly lacked the probable cause to charge [plaintiff] with a crime," and probable cause is a "sufficiently fact-laden issue as to typically be a question for the jury." Specifically, he stresses (1) Maxwell "never identified [plaintiff] as having forged the [CO], nor stated that he was the one to provide her with the [CO] at the closing," (2) "no one from the Code Enforcement Department of the Township . . . was able to provide any evidence to the investigating officers that [plaintiff] was involved in the forgery," (3) "being a managing member of the LLC is simply insufficient evidence on its own to establish probable cause," and (4) plaintiff "tried to

provide [Det. Zundel] with exculpatory evidence," specifically text messages from Bader in which he allegedly admitted to forging the CO, via Agent Kryzmien "which Det[.] Zundel refused to consider." He also contends he was not required to provide a voluntary statement to defendants and asserts the Fifth Amendment requires his exercise of his right to remain silent not be used against him.

In requesting we affirm, defendants maintain the court correctly determined plaintiff did not prove each element of his claims, primarily because they had probable cause to refer the matter to the prosecutor. Specifically, they highlight "a victim of a crime reported a series of events and facts to [p]olice [o]fficers," and there was evidence "[p]laintiff was involved in the sale of the home and was involved in an altercation with the victim on a previous occasion [in] which he prevented the victim from occupying the home until the victim 'paid the money they owed.'" They also note neither plaintiff nor his attorney ever contacted Det. Zundel despite his claims of exculpatory evidence. Defendants also argue plaintiff was indicted on the charges, which they maintain evidences probable cause under Galafaro v. Kuenstler, 53 N.J. Super. 379, 554 (App. Div. 1958).

"We review decisions granting summary judgment de novo," C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 305 (2023), applying the same standard as the trial court, Townsend v. Pierre, 221 N.J. 36, 59 (2015). Like the motion judge, we "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." C.V., 255 N.J. at 305 (quoting Samolyk v. Berthe, 251 N.J. 73, 78 (2022)). "Summary judgment is appropriate if 'there is no genuine issue as to any material fact' and the moving party is entitled to judgment 'as a matter of law.'" Ibid. (quoting R. 4:46-2(c)).

We next turn to the substantive legal principles applicable to the issues raised by plaintiff. A common law claim for "[m]alicious prosecution requires the plaintiff to prove four elements: (1) a criminal action was instituted by this defendant against this plaintiff; (2) the action was motivated by malice; (3) there was an absence of probable cause to prosecute; and (4) the action was terminated favorably to the plaintiff." LoBiondo v. Schwartz, 199 N.J. 62, 90 (2009). "[E]ach element must be proven, and the absence of any one of these elements is fatal to the successful prosecution of the claim." Ibid.

Because the court and the parties primarily focused on whether defendants' actions were supported by probable cause, we likewise address that element. Probable cause is "not a high bar." Cruz v. Camden Cnty. Police Dep't, 466 N.J. Super. 1, 13 (App. Div. 2021) (quoting State v. Pinkston, 233 N.J. 495, 509 (2018)). "Probable 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 man in believing that the [suspect] had committed or was committing an offense.'" Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000) (alterations in original) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)).

Under New Jersey law, "the existence of probable cause is ordinarily a question of law, nevertheless, it becomes a mixed question of law and fact when the underlying facts . . . are in dispute." Jobes v. Evangelista, 369 N.J. Super. 384, 398 (App. Div. 2004). Further, "[a]lthough a grand jury indictment is prima facie evidence of probable cause to prosecute, when the facts underlying it are disputed, the issue must be resolved by the jury." Helmy v. City of Jersey City, 178 N.J. 183, 191 (2003).

We agree with the court plaintiff failed to establish a genuine and material factual question as to whether defendants lacked probable cause, primarily for

the reasons set forth in the court's oral ruling on this issue. At the time Det. Zundel contacted the prosecutor's office, the police had the following information: (1) plaintiff, as the president of Bellie, was the seller of the property on Sine Road; (2) plaintiff sent an email to his lawyer to be forwarded to Maxwell and her lawyer stating he "definitely will" take care of the CO for the sale of that property; (3) Maxwell received a CO at some point from plaintiff, or Bader or Bellie's attorney as his/Bellie's representatives; (4) Code Enforcement had no record of the CO Maxwell received; (5) Code Enforcement employees did not recognize the signature on the CO; and (6) Code Enforcement employees had a meeting with Bader, who allegedly "admitted to them that the CCO had been altered so he and [plaintiff] could close on the date of appointment." While we acknowledge plaintiff was not required to speak to the police, he presented nothing to Det. Zundel to dispute any of these facts suggesting his participation in the forgery, despite numerous requests by the detective. Plaintiff had every right to remain silent, but he cannot then complain when that silence leaves the evidence against him unrebutted.

For purposes of summary judgment, the totality of these circumstances was "sufficient to warrant a prudent man in believing that [plaintiff] had committed . . . an offense," namely, forgery and tampering with public records.

Wildoner, 162 N.J. at 389 (quoting Beck, 379 U.S. at 91). Even if the evidence did not directly establish plaintiff was solely responsible for the CO, at the very least it supported a reasonable belief that he was involved in its creation. As the court noted, "an inference could be drawn from [the September 2018 email], that any resulting CO [plaintiff] had a part in securing."

We are also not persuaded by the alleged factual issues plaintiff raises. It is clear the court did not find probable cause was established solely on plaintiff's "being a managing member of the LLC," as noted. Next, Maxwell may not have identified plaintiff by name or claimed that he alone forged the CO, but she identified Bellie, of which plaintiff is the president, as the seller, and identified the seller and/or its agents as responsible for providing her with the forged CO.

Similarly, that Code Enforcement did not specifically prove plaintiff's involvement in the forgery does not negate the other evidence it did provide tending to establish probable cause—their records did not reflect issuance of the CO, the signature on it did not match, and "Bader admitted to them that the CCO had been altered so he and [plaintiff] could close on the date of appointment." Specifically, Bader's statement to Code Enforcement as reflected in the police report did not take full responsibility for forging the CO or exculpate plaintiff, but rather suggested a reasonable inference plaintiff was involved in the forgery.

Plaintiff likewise failed to establish a genuine factual question as to his claim that FBI Agent Kryzmien attempted to provide exculpatory evidence that Det. Zundel willfully ignored. He provided no sworn statement by Agent Kryzmien, no dates when the agent allegedly contacted Det. Zundel, no description of how Agent Kryzmien came into possession of any evidence, and no explanation as to why plaintiff could not provide the evidence to Det. Zundel himself or through his counsel. Although Det. Zundel mentioned "receiving calls from the FBI agent" during his deposition, he did not state the agent presented him with any evidence, or that he had refused to accept such evidence.

Further, even indulging plaintiff's hearsay-laden testimony that Agent Kryzmien provided the text messages to Det. Zundel, we are not persuaded defendants' summary judgement application should have been denied. Contrary to plaintiff's characterization, Bader does not take sole responsibility for forging the CO in the messages. He only denies telling the Construction Official that plaintiff "told [him] to make up the [CO]" and states he "[d]idn't bring [plaintiff] up with being involved with it at all." No fair reading of these messages would lead to the conclusion Bader was solely responsible for the CO. In fact, one could read plaintiff's message asking Bader "how [plaintiff was] going to approach it," if Bader had stated he was involved as indicating some level of

collusion between the two. Simply put, none of the issues plaintiff identifies are sufficient to create a genuine and material factual question with respect to probable cause.

As our case law makes clear, the determination of probable cause must be based on "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information" at the time of arrest or issuance of summons. Wildoner, 162 N.J. at 389 (alteration in original) (quoting Beck, 379 U.S. at 91). Accordingly, Bader's subsequent confession taking sole responsibility for the CO and plaintiff's later deposition testimony about his and Bader's practice regarding COs are not relevant to the probable cause calculus.


We would be remiss were we not to mention, however, the undue weight placed on the grand jury indictment by the court. Although, as noted, an indictment represents "prima facie evidence of probable cause to prosecute," it is not dispositive, particularly "when the facts underlying it are disputed." Helmy, 178 N.J. at 191. We are satisfied, nevertheless, that the undisputed facts detailed in the court's ruling amply supported its ultimate conclusion on that point.

Because we conclude plaintiff failed to demonstrate a material factual question as to whether defendants lacked probable cause, each of his three

claims for malicious prosecution must fail. See LoBiondo, 199 N.J. at 90 (holding "the absence of any one of these elements is fatal to the successful prosecution of the [malicious prosecution] claim"). In light of our decision that plaintiff failed to establish an essential element of his claims, we need not and do not, reach the parties' remaining arguments.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION