

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

REX B. LANTZ, JR.,)	
)	
Plaintiff,)	Case No. 2:00CV00024
)	
v.)	OPINION
)	
PAUL J. FISCHER,)	By: James P. Jones
)	United States District Judge
Defendant.)	

In this common law malicious prosecution action, I grant summary judgment for the defendant on the ground that the underlying criminal prosecution had been dismissed pursuant to a compromise agreement.

I

This is an action brought pursuant to the court’s diversity jurisdiction¹ in which the plaintiff seeks recovery under Virginia law² for the alleged malicious criminal prosecution of him by the defendant. After discovery, the parties filed cross motions

¹ See 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2000). The plaintiff is a resident of Alaska, although he lives part of the year in Virginia, and the defendant is a resident of Virginia. The plaintiff seeks damages in excess of \$75,000.

² The parties agree that Virginia law applies. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

for summary judgment pursuant to Federal Rule of Civil Procedure 56. The issues were briefed and orally argued, and the motions are ripe for decision.

The essential facts of the case, as disclosed by the summary judgment record,³ are as follows.

On Saturday, September 18, 1999, Paul J. Fischer, the defendant, submitted a sworn criminal complaint to a state magistrate in Lee County, Virginia, against Rex B. Lantz, Jr., the plaintiff. In the complaint, Fischer charged as follows:

[I was] sitting on 4-wheeler, [with] dog lying in grass beside me. I heard shot -- started 4-wheeler -- pulled out into road -- saw Rex Lantz walking toward me with pistol in hand. I said "you son of a bitch -- you shot at me." Then [I] left, went to house and called sheriff.

(Fischer Dep., Ex. 1.)

The magistrate issued a criminal warrant charging Lantz with the felony offense of attempted malicious wounding.⁴ Later that day Lantz was arrested by sheriff's deputies, taken to the courthouse, and released on his own recognizance.

Lantz obtained an attorney and appeared a week later for arraignment before a state judge. According to an affidavit of the state prosecutor, after talking to the

³ The parties have submitted transcripts of their discovery depositions as well as additional affidavits.

⁴ See Va. Code Ann. § 18.2-52 (Michie 1996). The criminal warrant is not part of the record, and the wording of the charge is thus not available.

attorney and to the complaining witness, the prosecutor suggested a “compromise settlement” by which the case would be continued for ninety days, and “if no further problems occurred and the parties had no further controversies,” the charge would be nolle prossed. (McElyea Aff.) Fischer and Lantz’s attorney agreed and the agreement was presented to the judge and approved. Thereafter, ninety days having elapsed without further difficulties, a nolle prosequi was entered pursuant to the agreement. Lantz later brought an action in state court to expunge the police and court records relating to the charge, which petition was granted by the court, without objection by the prosecuting attorney.

Lantz has a different version of the confrontation. He claims that a strange dog came into his yard and that he took his pistol out of a drawer, loaded with blanks, and walked into the yard and fired the gun in order to scare the dog away. He then walked towards his gate with the pistol in his pocket and saw Fischer on a four wheeler approximately two hundred feet away. He agrees that Fischer asked him if he was shooting at him, and he claims that he said, “Of course not, Paul.” (Lantz Dep. at 34.) Lantz went back into his house and wrote Fischer a letter, which read in part as follows:

Good morning Paul:

This morning I saw a dog in my gateway and I also saw the animal run down the fence line to my back lot a few minutes earlier. I also saw this same dog on the previous two days in my driveway at the gate. There are allot [sic] of loose dogs in the area which frequent my yard, including yours apparently, which I try to discourage if I see them repeatedly.

I have a 22 pistol that contains blanks which I use for this purpose. It does nothing more than make noise. It is discouraging that you stormed off mad when I shot a blank to discourage the dog. I also told you at that time that the pistol contained only blanks. I of course did not know that the dog was yours or that you were concealed behind the brush. I would have spoken to you if I had and regret that you left agitated.

I had hoped to make the peace with you but it certainly does appear that there is an underlying current of resentment on your part. Most unfortunate. If you think it is possible to become neighbors I would be very interested and you are welcome any time.

(Fischer Dep., Ex. 3.) Fischer did not receive the letter until the next week, after the warrant had been issued.

As far as the settlement of the criminal case is concerned, Lantz contends that he was unable to hear the proceedings before the judge and was only told by his attorney that there had been a motion to postpone the case for ninety days and that the parties were not to have any contact and that thereafter the case would be dismissed. (Lantz Dep. at 44.) He was not present at the discussions with his attorney and the prosecuting attorney. (*Id.* at 41.) His attorney told him that the prosecuting attorney needed to “appease” Fischer and that it was a “political settlement.” (*Id.* at 46.)

In his present motion for summary judgment, Fischer contends that the malicious

prosecution action is barred because the dismissal of the criminal charge was procured by a voluntary agreement of the parties, and thus, under established precedent, the plaintiff cannot prove all of the necessary elements of his cause of action.

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).

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327.

Under Virginia law, the necessary elements of a malicious prosecution action are: (1) that the prosecution was instituted by the now defendant; (2) that it terminated in a manner not unfavorable to the now plaintiff; (3) that it was without probable cause; and (4) that it was malicious. *See Wiggs v. Farmer*, 135 S.E.2d 829, 831 (Va. 1964). Moreover, as applicable to the present motion, “[a] 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 plaintiff argues that since the charge against him was a felony, he could not lawfully have agreed to its compromise, since Virginia law expressly authorizes private compromise of criminal actions only for certain misdemeanors. *See Va. Code Ann. § 19.2-151* (Michie 2000). However, “[t]he validity of the compromise . . . has nothing to do with the matter.” *Leonard*, 178 F.2d at 314. “The basis of the rule is, not that the agreement or compromise is a valid contract which fixes the rights of the parties, but that the plaintiff, by entering into the compromise and securing the dismissal of the criminal action thereby, estops himself from contending that it was instituted without

probable cause.” *Id.*

The plaintiff also contends that he did not understand the nature of the agreement by which the charge against him was dismissed. The evidence of the prosecuting attorney, however, is uncontested on this record as to the meaning and import of the agreement. While it is true that the plaintiff claims that he did not talk directly with the prosecuting attorney and was unable to hear the discussion at the bench with the judge when the agreement was approved, he was represented by counsel who did participate fully in the arrangement, and he is bound by his attorney’s consent.

Malicious prosecution actions are not favored, since they may conflict with the public policy encouraging the exposure of crime. *See Wiggs*, 135 S.E.2d at 831. Where, as here, the criminal defendant agrees to an arrangement by which his prosecution is terminated without a determination of the merits, it is just to preclude him from resurrecting the dispute in the guise of a civil action.⁵

⁵ It is true, as the plaintiff points out, that many of the cases holding that a settlement of the criminal action bars a later malicious prosecution claim, involved a situation in which the criminal charge arose over a debt owed by the criminal defendant, and which the defendant paid in settlement of the criminal case. *See Vitauts M. Gulbis, Termination of Criminal Proceedings as Result of Compromise or Settlement of Accused’s Civil Liability as Precluding Malicious Prosecution Action*, 26 A.L.R.4th 565 (1983). However, the question is not the nature of the consideration for the settlement, or even whether there was a valid contract, but the agreement of the criminal defendant to an arrangement by which the prosecution was terminated.

III

For the foregoing reasons, the motion of the defendant for summary judgment will be granted and final judgment entered in the case.

DATED: January 26, 2001

United States District Judge