Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-465

MARCH TERM, 2003

Ken Davis v. Charles Vile, Conrad Motyka, Salvatore Spinoza and State of Vermont	}	APPEALED FROM: Caledonia Superior Court DOCKET NO. 47-2-02 CaCv Trial Judge: Mark J. Keller

In the above-entitled cause, the Clerk will enter:

Plaintiff Ken Davis appeals the superior court' s dismissal of his complaint against the State and state officials, in which he alleged malicious prosecution, civil conspiracy, and violation of federal rights under color of state law. We affirm.

The present case stems from an administrative enforcement action in which the Agency of Natural Resources (ANR) alleged that certain logging activities of the Lyndonville Savings Bank and Trust Company in the summer of 1997 violated Vermont' s recently enacted " heavy cutting" law, 10 V.S.A. §2625. The law requires a permit to log forty or more acres of woodland below a certain density. Plaintiff, who was an outspoken critic of the law, had conducted the logging operation that led to the enforcement action. Although the enforcement action was directed against the bank, which was the landowner and responsible party under the law, plaintiff had agreed to indemnify the bank against any fines or penalties that might be imposed for violation of the law. The State was aware of this fact.

ANR imposed a $22,000 fine on the bank after initially alleging that the bank had cut plus or minus sixty-four acres without obtaining the required permit. The bank challenged the administrative order in the environmental court. One week before the scheduled hearing, the court granted ANR' s motion to amend its administrative order to allege that the heavy cut had taken place on forty or more acres. The day before the hearing, the bank served ANR with a motion for sanctions under V.R.C.P. 11, asserting that its decision to proceed with the enforcement action against the bank was patently frivolous because the agency had made so many mistakes in conducting its survey of the logging operation that it would be unable to prove that the bank had heavily logged forty or more acres, in violation of the law. The following day, mid-way through direct examination of the State' s first witness, the court permitted the bank' s counsel to conduct a voir dire examination of the witness concerning a computer-generated map of the cut area. The examination revealed several discrepancies between the scale of the map with respect to the inspected areas. The hearing concluded with the court directing ANR to arrange for the computer file of the base map of the cut area to be retrieved and printed, for a one-inch scale line to be physically drawn on the new printout, and for the inspection lines to be replotted on the new computer-generated base map. A new hearing date was set, but before the continued hearing was held, the State moved to dismiss the proceeding voluntarily under V.R.C.P. 41(a)(2). In response, the bank requested reimbursement for its costs, expenses, and attorney' s fees. In January 2001, the environmental court dismissed the enforcement action, but denied the bank' s request for attorney' s fees. The bank appealed, and this Court affirmed the decision. See Agency of Nat. Res. v. Lyndonville Sav. Bank & Trust Co., 811 A.2d 1232 (2002).

Thereafter, in March 2001, plaintiff filed the instant action, alleging counts of malicious prosecution and civil conspiracy against the State, and asserting that individual state officials had violated his civil rights under color of state

law, in violation of 42 U.S.C. §1983. Plaintiff sought (1) unspecified declaratory relief; (2) compensatory damages, including lost growth potential and lost profits from the stigma created by defendants; (3) punitive damages; (4) litigation expenses and attorney' s fees; and (5) prejudgment interest. The superior court dismissed each of the three counts, ruling that (1) because plaintiff was not a named defendant in the underlying administrative enforcement action, he lacked standing and could not state a claim sounding in malicious prosecution; (2) both the malicious prosecution and civil conspiracy claims were barred by the doctrine of sovereign immunity because there is no private analog for an environmental enforcement action; and (3) plaintiff' s request for damages against individual state employees under §1983 failed to state a claim upon which relief could be granted because the conduct complained of concerned either actions not directed at plaintiff or accusations resulting in alleged damages too vague and speculative to be cognizable. On appeal, plaintiff argues that the court erred in dismissing each of the three counts in his complaint.

We address the three counts in turn, beginning with the malicious prosecution claim. Because actions for malicious prosecution tend to discourage people from seeking redress in court for legitimate complaints, they " are not favored in the law." Anello v. Vinci, 142 Vt. 583, 587 (1983). " To recover for malicious prosecution the claimant must establish that the person against whom the claim is asserted instituted the proceeding against him (1) without probable cause, (2) with malice, and that (3) the proceeding terminated in claimant' s favor." Id. at 586-87 (emphasis added); see Siliski v. Allstate Ins. Co., 811 A.2d 148, 151 (2002) (same). Here, as the superior court ruled, plaintiff has no standing and has failed to state a viable claim for malicious prosecution because the State' s enforcement action was initiated against the bank, not him; plaintiff was not a party to the prior action. See Jackson v. Kessner, 618 N.Y.S.2d 635, 637 (App. Div. 1994) (" It is axiomatic that only a party to the proceeding complained is entitled to maintain an action for malicious prosecution."); cf. Rosen v. American Bank of Rolla, 627 A.2d 190, 193 (Pa. Super Ct. 1993) (plaintiff cannot maintain action for wrongful use of civil proceeding because he was not party to prior action).

Plaintiff argues that he had standing to bring the malicious prosecution claim as subrogee by way of his indemnification agreement with the bank. He asserts that he is the real party in interest because he was harmed by the State' s enforcement action. Plaintiff fails to cite a single malicious prosecution case in support of these arguments, however, and we have found none. To the contrary, other courts have consistently rejected the notion that persons adversely affected by a prior legal proceeding, irrespective of whether they were a party to that proceeding, may bring a malicious prosecution action. See Lessard v. Jersey Shore State Bank, 702 F. Supp. 96, 98 (M.D. Pa. 1988) (concluding that person who was not named party in prior action, but who claimed her interests were affected by that action, did not have standing to bring action for wrongful use of civil proceeding); Duncan' s Trustee v. Citizens' Nat' l Bank, 45 S.W. 774, 774 (Ky. Ct. App. 1898) (rejecting argument that persons not party to, but adversely affected by, prior proceeding could bring malicious prosecution action); Jackson v. Kessner, 618 N.Y.S.2d at 637 (same); Mintz v. Bur, 6 Pa. D. & C.3d 779, 786 (1977) (holding that mere adversity of interest is not sufficient to bring abuse of process claim).

The cases cited by plaintiff have nothing to do with malicious prosecution and thus do not demonstrate that he has an equitable right to bring a malicious prosecution claim as the bank' s indemnitor and subrogee. Rather, they stand for the unremarkable and well-settled proposition that subrogation allows a party who has paid a debt, but who is only secondarily liable, to benefit from any remedies that the creditor may hold against the principal debtor. See Norfolk & Dedham Fire Ins. Co. v. Aetna Cas. & Sur. Co., 132 Vt. 341, 343 (1974) (" Subrogation arises when one man is compelled to pay a debt for which another is primarily liable and which, in good conscience, should have been discharged by the latter."); Clifford v. W. Hartford Creamery Co., 103 Vt. 229, 238 (1931) (same). Nothing in these cases suggests that we should compromise the requirement that only the parties to underlying proceedings may bring disfavored malicious prosecution actions.

Regarding plaintiff' s civil conspiracy claim against the State, we need not consider whether the superior court properly dismissed the claim based on sovereign immunity, in as much as we conclude that plaintiff failed to state a claim upon which relief could be granted. See Curran v. Marcille, 152 Vt. 247, 249 (1989) (trial court' s ruling may be sustained upon any legal ground even though court based its decision on another ground). Assuming that there continues to be an independent cause of action for the tort of civil conspiracy, but see Chambers v. Stern, 64 S.W.3d 737, 743 (Ark. 2002) (civil conspiracy is not actionable in and of itself, but merely allows recovery for damages caused by acts committed pursuant to conspiracy); Burns Jackson Miller Summit & Spitzer v. Lindner, 452 N.Y.S.2d 80, 93-94 (App. Div. 1982) (allegation of civil conspiracy is not independent tort but can be used to connect non-actors with co-conspirators); Henry v. Deen, 310 S.E.2d 326, 334 (N.C. 1984) (civil conspiracy does no more than associate defendants together and allow

greater flexibility in applying evidentiary rules); Hart v. Moore, 952 S.W.2d 90, 98 (Tex. Ct. App. 1997) (civil conspiracy provides basis for imposing damages, but is not cause of action complete within itself), plaintiff has failed to allege facts that satisfy all of the elements of the tort as set forth in Boutwell v. Marr, 71 Vt. 1 (1899) " the only case that plaintiff relies upon. In Boutwell, this Court stated that the grounds of recovery in a civil suit alleging conspiracy differ from criminal conspiracy in that a " civil action cannot be sustained unless something causing damage to the plaintiff has been done in furtherance of the agreement," and " the thing done be something unlawful in itself." Id. at 6. The Court emphasized that even if there is an illegal purpose, " there can be no recovery unless illegal means were employed." Id. at 6-7.

Here, plaintiff has failed to allege facts that satisfy the " illegal means" element. Plaintiff alleges that state officials (1) acted at least recklessly by making public statements indicating that they were investigating the possibility that plaintiff' s logging operation for the bank violated the heavy cutting law, even though they did not have clear standards for making such a determination; and (2) engaged in extortion by offering to lift the threat of a significant fine if the bank acknowledged that plaintiff' s operation violated the law. The Agency of Natural Resources is statutorily authorized to investigate suspected violations and to negotiate settlements. See 10 V.S.A. §8005-8007 (establishing perimeters for investigating, providing notice of, and negotiating settlement for suspected violations). Moreover, the fine imposed was well within the statutory maximum. See 10 V.S.A. §8010 (establishing maximum penalty of not more than $25,000 per violation and up to $10,000 per day for continuing violations). Because plaintiff failed to allege an illegal means used in furtherance of the claimed conspiracy, the court properly dismissed his civil conspiracy claim against the State.

Finally, we conclude that the superior court did not err in determining that plaintiff failed to state a claim upon which relief could be granted with respect to his §1983 count directed at individual state officials. In his complaint, defendant alleges that specified state officials (1) failed to develop rules establishing clearly ascertainable standards for determining whether the heavy cutting law had been violated; (2) arbitrarily and capriciously accused plaintiff, without reference to any clearly established standards, of violating the heavy cutting law; (3) falsely or recklessly concocted evidence of a heavy cut violation by plaintiff; (4) made stigmatizing or defamatory accusations about plaintiff to the news media; and (5) took the above actions to discredit him professionally and politically in retaliation for his opposition to the heavy cutting law and to chill the activities of others similarly inclined. We agree with the State that these allegations amount to nothing more than a defamation claim dressed up to invoke constitutional rights.

" [A] plaintiff cannot sustain a §1983 action on a claim of defamation without an accompanying deprivation of a cognizable liberty or property interest." Levinsky v. Diamond, 151 Vt. 178, 196 (1989); see Siegert v. Gilley, 500 U.S. 226, 233 (1991); Paul v. Davis, 424 U.S. 693, 709 (1976). Here, plaintiff alleges retaliatory conduct on the part of state officials, but fails to allege any cognizable deprivation of constitutional rights. See Silverfine v. Town of Bakersfield, 155 Vt. 554, 557 (1991) (damages based on speculative abstract value of violated constitutional right are not compensable in §1983 actions). Defendant' s vague claim of chilled First Amendment rights depends primarily and inextricably on the administrative enforcement investigation and proceeding against the bank and the potential effect of those actions on others who might otherwise challenge the law. Similarly, the claims of concocted evidence are tied to the enforcement action against the bank. Further, the claimed due process and equal protection violations are connected to ANR' s alleged failure to promulgate rules, which is not moored to violation of any federal right. See Coliseum Enter., Inc. v. Campbell, 795 A.2d 1212, 1214 (Vt. 2002) (mem.) (" [P]laintiffs may not use a violation of state law to bootstrap a violation of the federal constitution."); Calvert County Planning Comm' n v. Howlin, 772 A.2d 1209, 1221 (Md. 2001) (failure of commission to promulgate regulations did not, by itself, violate due process, which is concerned with fundamental fairness in proceeding, not with whether agency failed to comply with statutory requirement). Finally, plaintiff' s claim of potential lost business is too speculative to sustain his §1983 action. See Levinsky, 151 Vt. at 196-97 (plaintiff' s claim that defendants' defamatory remarks interfered with his prospective business operations was " too speculative to be cognizable under § 1983"). In short, we find no alleged deprivation of rights that are cognizable under plaintiff' s §1983 claim.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned