VERMONT SUPERIOR COURT
Orleans Unit
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CIVIL DIVISION
Case No. 225-8-19 Oscv

Cornelius vs. City of Newport

ENTRY REGARDING MOTION

Title: Motion to Reconsider or Alternatively for Permission for Interlocutory Appeal
(Motion: 6)
Filer: Michael J. Leddy
Filed Date: January 25, 2022

The motion is DENIED.

Defendant City seeks reconsideration of the Decision of January 3, 2022 denying its summary judgment motion, or alternatively seeks permission for interlocutory appeal.

The court denied the City's motion due to lack of facts on the third of the required three elements of the Plaintiff's cause of action. Plaintiff claims violation of civil rights under Article 11 of the Vermont Constitution, as established in *Zullo v. State,* 2019 Vt 1.[1] The third required element is that the law enforcement officers either knew or should have known that they were violating clearly established law or the officers acted in bad faith. The court ruled that the facts offered by the City did not sufficiently relate to the required element.

The City claims that the court erred in failing to require the Plaintiff to set forth facts in support of the element—to "put its cards on the table." There is no such requirement, however, and the Plaintiff's failure to respond with facts on an element does not necessarily entitle the moving party to summary judgment if there are insufficient facts from the moving party to support judgment in its favor as a matter of law. V.R.C.P. Rule 56 (e) and Reporter's Notes, 2012 Amendment. The moving party must show that on the basis of undisputed facts, it is entitled to judgment as a matter of law.

The Reporter's Notes cite *Miller v. Merchants Bank*, 138 Vt. 235, 238 (1980), in which the Court stated that:

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[1] The three required elements are:
(a) The officer violated Article 11
(b) There is no meaningful alternative remedy in the context of that particular case
(c) The officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith.

Zullo v. State, 2019 VT 1 at ¶55.

> the failure to respond does not require an automatic summary judgment; rather, two requirements must be met: (1) the supporting materials must be both formally and substantively sufficient to show the absence of a fact question, and (2) summary judgment must be appropriate in the sense that the moving party is entitled to judgment as a matter of law." *Miller v. Merchants Bank*, 138 Vt. 235, 238, 415 A.2d 196, 198 (1980) (citing *Alpstetten Ass'n v. Kelly*, 137 Vt. 508, 514-15, 408 A.2d 644, 647-48 (1979).

In *In re Trustees of Marjorie T. Palmer Tr.*, 2018 VT 134, ¶ 43, the Court stated:

> ¶ 43. Nor do we agree with the trustees' suggestion that they were automatically entitled to summary judgment because Palmer did not oppose their cross-motion or submit his own statement of disputed facts. "[T]he failure to respond does not require an automatic summary judgment." *Miller v. Merchants Bank*, 138 Vt. 235, 238, 415 A.2d 196, 198 (1980). The moving party is still required to show that no material facts are genuinely disputed and that it is entitled to judgment as a matter of law. *Id.* Here, the civil division generally accepted the facts as stated by the trustees but determined that they were not entitled to summary judgment on the three issues before the court.

In other words, the moving party is not entitled to judgment unless the court's analysis of undisputed facts shows that it is entitled to judgment as a matter of application of the law to the facts that are undisputed. This requires undisputed facts on all necessary elements. In this case, the court ruled that the "facts" the City offered on the third element did not actually properly address the third element. Thus, the City had not shown undisputed facts material to the third required element. Because there were no undisputed facts on that element, the City was not entitled to judgment.

This is not a case in which the City, a moving party that does not bear the burden of proof, can show, after adequate discovery, that plaintiff with the burden of proof *cannot* provide evidence in support of its claim—in other words, that there is an absence of facts supporting the plaintiff's claim. "Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case." *State v. Great Ne. Prods., Inc.*, 2008 VT 13, ¶ 8 (citing *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 18 (1995). That is not the case here.

The City did not claim that Plaintiff could not produce any facts on the third element, nor could it. The City's own Exhibit K attached to its Statement of Undisputed Facts, is the April 6, 2017 Entry Order of the Supreme Court in which Justice Skoglund wrote, "Most critically, 13 V.S.A. §1503 specifically exempts family members, including brothers, from the charge of aiding an escaped prisoner." The record itself establishes evidence of established law that a brother cannot be charged with aiding an escaped prisoner. This contradicts the proposition of an absence of

evidence that the officer knew or should have known that he was violating clearly established law or acted in bad faith.[2]

Thus, having reconsidered its decision at the City's request, the court declines to change the ruling on this aspect of the summary judgment motion.

The City also claims that the court erred in overlooking its argument for municipal immunity. The court acknowledges that this argument was not addressed in the ruling. However, the result does not change. The City, as a municipality, is a subdivision of the State, having been created by it. Vermont Constitution Chapter II, §69. The Charter for the City of Newport is set forth in Title 24 Appendix, Part II, Chapter 7. In *Zullo,* the Supreme Court recognized a cause of action for violation of civil rights under Article 11 of the Vermont Constitution against the State. If the State itself can have such liability, it is logical that a municipal subdivision of it would be subject to such liability as well.

Moreover, the court adopts the arguments set forth by Plaintiff in its Opposition to the present motion and hereby concludes that the City has not shown that it is entitled to municipal immunity. The one case cited by the City in its Reply memorandum, *Sobel v City of Rutland,* 2012 VT 84, involves an entirely different kind of claim unrelated to a claim of violation of civil rights under Article 11 of the Vermont Constitution, and does not support the City's argument. The City has not presented rulings or arguments sufficiently supporting its legal argument or showing that there are differences of opinion on this issue.

The City also makes an argument that it was not the City but the criminal court that caused Plaintiff to spend time in jail, and therefore there is no proximate causation. This element of the claim was not addressed in the City's original motion for summary judgment, and is therefore not a proper topic for reconsideration. Moreover, proximate causation, which is an issue for the factfinder, appears to be a complicated question in this case. There is no basis for the court to determine that there are undisputed facts on the issue of causation or for a ruling as a matter of law.

In sum, the court declines to alter the ruling denying the City's motion for summary judgment.

The City requests, in the alternative, permission to take an interlocutory appeal. Required grounds for an interlocutory appeal are set forth in Vermont Rules of Appellate Procedure Rule 5 (b)(1):

(A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and
(B) an immediate appeal may materially advance the termination of the litigation.

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[2] This is not a ruling of fact or law on this issue, but only indicates that the City did not show there was an absence of any evidence on the element.

The primary basis for the summary judgment ruling was that the City had not shown grounds for summary judgment because it had not shown any material undisputed facts with respect to the third required element of the Plaintiff's cause of action, nor has it shown that the Plaintiff has been unable to produce facts in response to discovery requests. There is no possible difference of opinion concerning the required elements of the cause of action, which were established by *Zullo.* The City does not dispute this.

The City seeks interlocutory appeal on four questions as set forth on page 9 of its motion.[3] As to the first, which is whether *Zullo* is precedent for this case, the issue is not ripe for decision because no facts, undisputed or not, on the required third element were before the court. The court did not decide the summary judgment motion on the basis of a ruling on this issue. Rather, the basis of the ruling was insufficient facts for a summary judgment ruling.

The second is not exactly clear, but appears to seek a ruling on municipal immunity. The City's argument on this issue is brief and conclusory; the City has not shown that there is substantial ground for difference of opinion.

The third and fourth issues were resolved by the court on the basis that the City did not show it was entitled to judgment as a matter of law because it did not show sufficient undisputed facts on element three of the cause of action. There is no basis for a difference of opinion on the requirements of V.R.C.P. Rule 56 for establishing grounds for judgment as a matter of law. Rule 56 (e), Reporter's Notes, 2012 Amendment, *Miller,* and *Trustees of Marjorie T. Palmer Trust* are all consistent that a moving party is not automatically entitled to judgment just because the opposing party does not respond with facts. Rather, it is the court's role to evaluate whether the undisputed facts in the record support summary judgment to the moving party or not. In this case, the court ruled, and herein confirms its ruling, that the City did not submit relevant undisputed facts material to the third required element, and due to an absence of material undisputed facts on the issue, the City is not entitled to judgment as a matter of law.

Because the controlling ruling of law is based on application of the summary judgment rule about which there is no substantial ground for difference of opinion, grounds for interlocutory appeal have not been shown.

The requirements for interlocutory appeal are also not met on the issue of municipal immunity because the City has not shown substantial grounds for difference of opinion.

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[3] 1. "Whether *Zullo* can be extended to the facts of this case, where Plaintiff was arrested and charged with a crime, and he filed criminal process motions with the criminal court, which were denied.
2. Whether the City is immune from a direct private right of action under Article 11 under a theory of vicarious liability.
3. Whether Plaintiff failed to meet his burden on any or all of the essential elements of an Article 11 claim.
4. Whether the City is entitled to judgment as a matter of law if any of the three essential elements of Plaintiff's Article 11 claim are not met."
Defendant's Motion. . .for Permission to Take an Interlocutory Appeal, filed January 25, 2022, page 9.

The court has reconsidered and for the reasons set forth above declines to change the ruling, although the ruling is supplemented by the decision above on municipal immunity. The alternative request for interlocutory appeal is denied for the reasons stated.

Electronically signed pursuant to V.R.E.F. 9(d) on May 4, 2022 at 4:12 PM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge