

"Appendix A"

BLD-290

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 20-1575

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ANDY BUXTON,  
Appellant

v.

IVA C. DOUGHERTY; KATIE WYMARD; RICHARD MILLER;  
CHRISTOPHER ANTONUCCI; ROBERT MARSILI; AMBER NOEL;  
SCOTT SHANK; RIVERS CASINO; ATTORNEY GENERALS OFFICE;  
ANDREW TOTH; DAN SAMMARTINO

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. No. 2:15-cv-01653  
District Judge: Honorable Joy Flowers Conti

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Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or  
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6  
on August 27, 2020

Before: AMBRO, GREENAWAY, JR., and BIBAS, Circuit Judges

(Opinion filed: September 14, 2020)

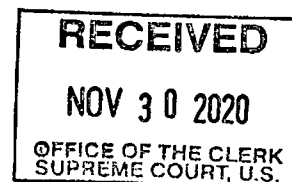
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OPINION\*

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.



Rivers Casino complied and produced copies of electronic customer activity reports, transaction reports, and W-9s related to Buxton. Rivers Casino received a second subpoena that sought the same information but for a different time period; Rivers Casino again complied. A final subpoena was issued directing Rivers Casino to produce surveillance footage of Buxton for a certain time period. Rivers Casino provided all surveillance footage that was requested. Rivers Casino stated that it does not have any reason to believe that the information it provided in response to the subpoenas is inaccurate in any respect.

The District Court granted summary judgment in favor of Rivers Casino. It held that Buxton failed to prove that Rivers Casino was a state actor, which precluded liability under § 1983. The District Court also held that, even if Rivers Casino were a state actor, Buxton failed to present evidence that it conspired with another actor to deprive him of his constitutional rights. The District Court finally determined that Buxton failed to present evidence of a conspiracy under Pennsylvania state law. Buxton appealed.

We have jurisdiction under 28 U.S.C. § 1291 and exercise de novo review over the District Court's order granting summary judgment. See S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 256 (3d Cir. 2013). Summary judgment is proper when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Kaucher v. Cty. of Bucks, 455 F.3d 418, 422–23 (3d Cir. 2006). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the nonmoving party to “come forward with specific

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relies primarily on speculation and legal conclusions. It also fails to genuinely dispute the facts as reported in Rivers Casino's statement of undisputed material facts.

facts” showing that there is a genuine issue for trial. See Santini v. Fuentes, 795 F.3d 410, 416 (3d Cir. 2015) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)) (internal quotation marks omitted). We may affirm on any basis supported by the record. See Fairview Twp. v. EPA, 773 F.2d 517, 525 n.15 (3d Cir. 1985).

To prevail on his claim under § 1983, Buxton must show not only that Rivers Casino violated his constitutional rights, but also that it acted under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). Buxton bears the burden of proving that Rivers Casino acted under the color of state law. Robert S. v. Stetson Sch., Inc., 256 F.3d 159, 164 (3d Cir. 2001). The record reveals that Rivers Casino merely responded to a grand jury subpoena by providing the documents that the prosecutor requested. Though Buxton stated in an affidavit that Rivers Casino was conspiring with the state prosecutors, he provided no evidence to support such a claim and did not meet his burden of proving that Rivers Casino acted under the color of state law.

In any event, there is no evidence in the record (other than Buxton’s conclusory assertions) that any constitutional violation occurred. Buxton claims that Rivers Casino conspired with the Attorney General’s Office in a scheme to cover up mismanagement at the casino, but he has provided very weak supporting evidence of any such conspiracy.<sup>3</sup> He also alleged that Rivers Casino provided “inaccurate, fabricated, and incomplete” evidence in response to the grand jury subpoenas. However, Buxton provided no reason to doubt

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<sup>3</sup> For the same reason, Buxton’s state law conspiracy claim fails. Apart from his own speculative affidavits, Buxton provided email exchanges between the Gaming Agent at the Pennsylvania Office of Attorney General and various personnel at Rivers Casino. However, the emails pertain only to trial scheduling matters.

that the information provided to prosecutors came directly from the casino's electronic management system.

Accordingly, we will affirm the District Court's judgment. Buxton's motion for appointment of counsel is denied.

hereby is **AFFIRMED**. Costs will be taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit  
Clerk

Dated: September 14, 2020

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDY BUXTON,  
Plaintiff,

v.

RIVERS CASINO,  
Defendant.

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)  
)  
) Civil Action No. 2:15-cv-1653  
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**REPORT AND RECOMMENDATION**

CYNTHIA REED EDDY, United States Magistrate Judge

**I. RECOMMENDATION**

It is respectfully recommended that the Motion for Summary Judgment filed by Defendant Rivers Casino (ECF No. 192) be granted and that judgment be entered in favor of Rivers Casino.

**II. REPORT**

**A. PROCEDURAL HISTORY**

On December 16, 2015, Plaintiff Andy Buxton, an inmate at SCI-Mercer, filed a Motion for Leave to Proceed in Forma Pauperis (ECF No. 1), which the Court granted on December 23, 2015 (ECF No. 3). Generally speaking, Plaintiff's civil rights complaint pursuant to 42 U.S.C. § 1983 alleged that his criminal charges (then pending) filed in Allegheny County Court of Common Pleas were based on fabricated evidence and perjured testimony presented at his preliminary hearing, and also that his due process rights were violated. He initially sued officials from the Pennsylvania Office of the Attorney General. On January 8, 2016, the Court, adopting the Report and Recommendation (ECF No. 4) as the Opinion of the Court, dismissed the Complaint for failure to state a claim upon which relief may be granted, pursuant to 28 U.S.C. §§ 1915(2)(B)(ii) and 1915A, ruling, *inter alia*, that Plaintiff's claims would call into question any

Rivers Casino moved to dismiss or, in the alternative, for summary judgment (ECF No. 61), and Buxton responded (ECF No. 70). On July 23, 2018, all claims against all defendants were dismissed with prejudice but for a claim for civil conspiracy against Rivers Casino. (ECF Nos. 113, 114).<sup>2</sup> The court explained that although it allowed Plaintiff to amend the remaining claim of conspiracy on the part of Rivers Casino, Plaintiff could not:

enlarge the lawsuit by filing new allegations not related to the allegations in the original complaint or by adding defendants not related to the allegations in the original complaint. Inclusion of new allegations and claims unrelated to those set forth in the original complaint will be considered a failure to comply with an Order of Court and will result in the dismissal of the claims.

(ECF No. 114). On January 9, 2019, Plaintiff filed the a complaint (ECF No. 139), entitled “Second Amended Complaint” although it is the third complaint (hereinafter, “the Operative Complaint”). In it he alleged, generally, “malicious prosecution, fabrication of evidence, abuse of process, prima facie tort, conspiracy tort, negligence, gross negligence, defamation, false light privacy, and intentional infliction of emotional distress” against “various employees of the Pennsylvania Office of the Attorney General” and “Defendants Rivers Casino” (ECF No. 139). The Attorney General’s Office, along with Defendants Dougherty, Wymard, Miller, Marsili, Toth, Antonucci, Shank, Noel, and Sammartino, filed a Motion to Strike the Operative Complaint (ECF No. 141), which was granted on January 15, 2019 (ECF No. 142), again removing said defendants from the action. Discovery as to Buxton’s claim against the sole remaining Defendant Rivers Casino ensued.

On September 17, 2019, Rivers Casino filed the pending Motion for Summary Judgment (ECF No. 192) with brief in support (ECF No. 193) and Concise Statement of Undisputed

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<sup>2</sup> Plaintiff appealed (ECF No. 116) the Memorandum Opinion and Order (ECF Nos. 113, 114) to the United States Court of Appeals for the Third Circuit. The appeal was dismissed for failure to timely prosecute insofar as he had failed to pay the requisite filing fee as directed. (ECF No. 167).

Material Facts ("CSUMF") (ECF No. 194). On December 16, 2019, Plaintiff filed a brief in response to the motion (ECF No. 202), a response to the CSUMF (ECF No. 201) and an affidavit dated December 11, 2019. (ECF No. 200) (hereinafter the "Affidavit"). On October 30, 2019, Rivers Casino filed a reply. (ECF No. 203). The matter is now ripe for consideration.

## B. LEGAL STANDARD

A court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is "genuine" if, based on the evidence in the record, a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if it might affect the outcome of the suit. *Id.* The court will view evidence in the light most favorable to the non-moving party and "all justifiable inferences are to be drawn in [that party's] favor." *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). Federal Rule of Civil Procedure 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." *Marten v. Godwin*, 499 F.3d 290, 295 (3d Cir. 2007) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

In the summary judgment context, "inferences to be drawn from the underlying facts must be viewed in the light most favorable to the opposing party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Defendants may satisfy their burden by either (1) submitting affirmative evidence that negates an essential element of Plaintiff's claim; or (2) demonstrating to the Court that the Plaintiff's evidence is insufficient to establish an essential element of Plaintiff's case. *Celotex*, 477 U.S. at 331.

② - B. LEGAL STANDARD ~~In Anderson~~ The court must view the evidence presented in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255, and draw all reasonable inferences in the light most to the non-moving party. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 774 F.2d 1350, 1363 (3d Cir. 1992). Where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true. Additionally, the court is not to decide whether the evidence unquestionably favors one side or the other, or if

make credibility determinations, but instead must decide whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. *Id.* at 282, see also *BS Apple Bonus 974-1248*

Once the moving party satisfies its burden under Rule 56, the non-moving party “must do more 1363 than simply show that there is some metaphysical doubt as to the material facts.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). This Court is mindful of Plaintiff’s *pro se* status and accordingly liberally construes the documents and briefs Plaintiff has provided. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Lockhart v. Hoenstine*, 411 F.2d 455, 458–59 (3d Cir. 1969) (when “plaintiff pleads *pro se* in a suit for the protection of civil rights, the court should endeavor to construe the plaintiff’s pleading without regard for technicalities.”); see also *Dluhos v. Strasberg*, 321 F.3d 365, 369 (3d Cir. 2003) (“[The Court will] apply the applicable law, irrespective of whether the *pro se* litigant has mentioned it by name.”). Nevertheless, non-movant *pro se* plaintiffs may not merely “rest on speculation and conjecture in opposing a motion for summary judgment.”

*Fiorentini v. William Penn Sch. Dist.*, 665 Fed. Appx. 229, 233 (3d Cir. 2016). Rather, Plaintiff must support the existence of a genuine issue of material fact through record evidence, although he may rely on affidavits. *Stringer v. The Pittsburgh Police*, 408 Fed. Appx. 578, 580 (3d Cir. 2011); see also *Giles v. Kearney*, 571 F.3d 318, 326 (3d Cir. 2009).

With this standard in mind we review the evidence of record.

### C. FACTUAL BACKGROUND

At the summary judgment stage, the facts must be construed in the light most favorable to Buxton, the nonmoving party. The court notes the following factual summary is taken largely from the CSUMF provided by Rivers Casino, which, unless otherwise addressed, are undisputed.

#### A. Undisputed Facts as Supported by Rivers Casino’s CSUMF

Rivers Casino received a subpoena from the Commonwealth Court of Pennsylvania . Statewide Investigating Grand Jury dated September 10, 2012 (“the first grand jury subpoena”). (CSUMF ¶1). The first grand jury subpoena directed Rivers Casino to appear as a witness before

That evidence should be analyzed as a whole, not in compartmentalized  
- to determine, whether it supports an inference of concerted action,  
Contract (see *Co. v. Union Carbide & Carbon*, 370 U.S. 692, 82 Ed.2d 707  
82 S.Ct 1464 (1962).

jury subpoena is a *verbatim* request for information as that which was contained in the first grand jury subpoena, except it sought information from a different timeframe (May 1, 2012 through November 8, 2012). (CSUMF ¶ 9). Again, Executive Secretary for the Grand Jury Angela L. Beaverson, explained Rivers Casino could, at its option, supply the information requested at the time of testimony or supply the information requested in advance in lieu of live testimony by directing such information to a designated Pennsylvania Deputy Attorney General. (CSUMF ¶ 10). In its written response to the second grand jury subpoena Rivers Casino responded by including:

records and reports generated from the Konami Casino Management System, which tracks customer activity for registered players; copies of currency transaction reports related to Andy Buxton; copies of W-9s related to Andy Buxton and Carl Buxton; a copy of a single W2-G related to Andy Buxton; and a video report with incident log related to Andy Buxton.

(CSUMF ¶¶ 11, 12).

Over two years later, Rivers Casino received a subpoena issued by the Honorable Donna Jo McDaniel dated October 2, 2014 in conjunction with a criminal case in the Court of Common Pleas of Allegheny County, Pennsylvania Criminal Division, Andy Buxton No. 12834-2013 and Carl Buxton No. 151-2014 ("surveillance footage subpoena"). The surveillance footage subpoena directed Rivers Casino to provide "all video surveillance footage pertaining to gaming activity for Andy and Carl Buxton from 2010 through 2014." (CSUMF ¶¶ 13, 14). Rivers Casino responded to the surveillance footage subpoena in writing on the same day and provided all responsive surveillance footage in its possession. (CSUMF ¶ 15).

Rivers Casino did not appear for, or testify at, any hearing or proceeding related to Andy Buxton,<sup>3</sup> and aside from providing responses to the aforementioned subpoenas, Rivers Casino

<sup>3</sup> Buxton disputes this, as will be discussed *infra*.

The task of writing the evidence and charging which side to believe would have to be decided for a jury  
for-Kent Mills, 636-5221-2584

surmises) but the *audits* and other Bureau *policies* are confidential under the Pennsylvania

Gaming Act and are proprietary information; Mr. Resch also explains the surveillance *methods* are confidential. *It would be admissible under Fed. R. Evid. 701, it is based upon direct knowledge and observation and Plaintiff's testimony also meets the more difficult burden under Federal Rules of Civ. P.*

In the end, were its contents to be offered at trial, the Buxton Affidavit would likely be *proffered*

~~in~~admissible as it contains multiple speculative statements and allegations lacking in foundation and conclusions of law. (Affidavit ¶¶ 8, 16-18). Buxton ~~may not~~ *he aware, competent, Plaintiff's testimony, facts, Judicial Notice in his opposition to the motion* rest upon speculation and conjecture in his opposition to the motion for summary judgment. Rivers Casino's Appendix to *the video and not depicted*

the Motion for Summary Judgment includes an affidavit of Dannielle Cisneros, previously

Senior Counsel for Rivers Casino, in which she states, "[t]he surveillance footage provided in

response to the subpoenas was a true and correct copy of the footage as captured by Rivers

Casino's on-site camera system" and she had "no reason to believe that the information or

documents provided in response to the subpoenas are inaccurate in any respect." (ECF No. 194-

1 at ¶¶ 17, 18). In addition, she states, "[n]either I, nor any other Rivers Casino representative,

appeared or testified at any hearing or proceeding related to Andy Buxton. (ECF No. 194-1 at

¶ 5). *Testimony by a plaintiff relevant of which he has personal knowledge is sufficient to overcome summary judgment, Contr. v. Rubenstein, No. 2:14-CV-17419, 2016 U.S. Dist. LEXIS 134737, 2016 WL 573604, 9\*7*

Next, we address Buxton's Response to the CSUMF. Buxton's Response largely mirrors

his Affidavit in terms of its speculation and conclusory nature. First, we note that Plaintiff's

Response admits to the CSUMF at paragraphs 1-3, 7-9, 13-14 (ECF No. 201). There are a total

of twenty-two paragraphs in the CSUMF. He repeats the wild speculation that the disclaimer *clear facts that are genuine supplied by the defendant's*

that the casino "makes no representation as to either the accuracy of this information or its

effectiveness as proof of losses" vis. his gambling activity ~~somehow~~ *that the information does not represent accurately* shows ~~an intention to~~ *In fact*

~~provide misleading or inaccurate information.~~ (Response at ¶¶ 6, 12). He also speculates that

documents, reports and records were inaccurate and ~~makes conclusory statements~~ that the casino

*plaintiff argues that an affidavit may satisfy the personal knowledge requirement of Federal Rule of Evidence 602*

*In fact, the jury could reasonably find that plaintiff perceived the event, the plaintiff's testimony should be admitted. Trump v. IOC-PA-US-RSM Enters, No. 2:17-cv-00625, 2018 U.S. Dist. LEXIS 136727, 2018 WL 3862091, 9\*1 (CA-14, 2018) (citing United States v. Gerardi, 507 F. App'x 210, 222 (3d Cir. 2012))*

violated his rights, as well as makes conclusory allegations that the videotaped footage does not match the evidence and the casino influenced the decision to prosecute. (¶¶ 4, 5, 10, 11, 15-22).

Such speculation is not record evidence. For these reasons, the court relies on the CSUMF as presented by Rivers Casino.

Next, we address whether there is a genuine dispute of material fact such that a reasonable jury could return a verdict in favor of Buxton.

#### D. DISCUSSION

The sole remaining claim against Rivers Casino is that it conspired with others to falsify records and/or inadequately maintain evidence in relation to Buxton's criminal prosecution or criminal proceedings in the Court Common Pleas of Allegheny County. Rivers Casino argues that judgment should be entered in its favor because the uncontroverted record evidence

establishes that it merely responded in good faith to valid subpoenas by providing the grand jury and state court with requested documents, and had no further involvement in Buxton's criminal matters thereafter.

##### 1. § 1983 State Action

The Supreme Court has set forth the two essential elements of a § 1983 action: "(1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

9

Leshkov. Sums

423 F.3d 337, 338 (3d Cir. 2005)

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(EF.204)

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Obviously, Rivers Casino is not a state actor. Under the case precedent, however, a private party can be held liable for violation of an individual's § 1983 rights; importantly, the individual alleging such a violation is not relieved of the obligation to establish that the private party acted under color of state law. "[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action [of the private party] so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974). Under the facts of this case, the determination of whether there has been state action would be based on whether "the private party has acted with the help of or in concert with state officials." *McKeesport Hospital v. Accreditation Council for Graduate Medical Ed.*, 24 F.3d 519, 524 (3d Cir.1994). Thus, in *Adickes*, the Court held that a conspiracy between a private party and a state official to engage in unlawful discrimination constituted action "'under color' of law for purposes of the statute." *Id.* at 152, 90 S.Ct. at 1606. Similarly, in *Lugar* a private party's prejudgment attachment of another party's property, pursuant to a state statute, constituted state action under § 1983. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941-42, 102 S.Ct. 2744, 2756 (1982).

Buxton has asserted that employees of Rivers Casino sat in court during his trial, which Rivers Casino disputes. Buxton also cites to a series of emails from October 2014, June 2015 and April 2016 between Robert Marsili, the Gaming Agent at the Pennsylvania Office of Attorney General, and various personnel at the casino, informing Rivers Casino of trial scheduling matters. The record lacks a showing of a sufficiently close nexus between the state actors and Rivers Casino such that it could be said to have acted with the help or in concert with state officials. Having failed to make a showing sufficient to establish the existence of the

Opinion and order of court  
(Weickert, J.) 7

Radical Notice in when  
98 A.3d 1271  
(a poker dealer who took 2000 dollars in  
poker chips)

Rivers violates plaintiff's constitutional rights while engaging in a state actor relationship.

Braden v. University of Pittsburgh  
552 F.2d 948  
(3d Cir. 1977)

Schroeder v. Temple University  
576 F.2d 1561  
Pa. 1977

Reiter v. R. H. P. Inc.  
2016 U.S. Dist. Ct.  
LEXIS 166446  
2016  
W2 7034704  
+ 2  
E.D. Pa. 2016

where named person subpoenaed to appear in the court

element of state action, there is no genuine dispute of material fact on this element of state action.

In addition, "[i]n order to demonstrate the existence of a conspiracy under section 1983, 'a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right under color of law.'" *Royster v. Beard*, 308 F. App'x 576, 579 (3d

Cir.2009). There is no record evidence to support a genuine dispute of material fact as to an agreement on the part of the casino and a co-conspirator to deprive Buxton of his constitutional rights.

*- Plaintiff's Complaint is sworn and is properly before the court and should have been considered in connection with the defendant's Motion for Summary Judgment*

This complete failure of proof on an essential elements of plaintiff's § 1983 claim entitles

Rivers Casino to summary judgment as a matter of law. *Celotex*, 477 U.S. at 322-23, and

therefore, it is respectfully recommended that summary judgment be granted in favor of Rivers

Casino on this claim. *- Plaintiff Affidavit make clear it is based on his personal knowledge and is not hearsay*

*The court may consider hearsay if the summary judgment rule of the hearsay could be reduced to a form admissible affidavit*

## 2. Claim for Conspiracy under Pennsylvania law

*see D'Onofrio v. Motion Picture Pub'n, Inc., 888 F.3d 197, 208, 1 Ariz. v. Stearns Hotel & Resorts Worldwide, Inc., 294 F. App'x 189*

Both Rivers Casino (ECF No. 193 at 7) and Buxton (ECF No. 202 at 3) have included 161,

arguments relating to a claim for conspiracy under Pennsylvania state law,<sup>4</sup> which arguably

remained viable after the Court's ruling on the Motion to Dismiss. (ECF No 114).

A predicate to any civil conspiracy claim is the presence of an underlying tort. *See*

*McGreedy v. Stroup*, 413 F.3d 359, 371 (3d Cir.2005) (citing *Boyanowski v. Capital Area*

*Intermediate Unit*, 215 F.3d 396, 405 (3d Cir.2000)). The plaintiff argues that Rivers Casino

*Infering an agreement from circumstantial evidence is acceptable and, in many cases, may be the only way to establish a claim of Conspiracy, Morgan, 633 A.2d at 998*

<sup>4</sup>"[A] district court[ ] may decline to exercise supplemental jurisdiction over a claim ... if ... the district court has dismissed all claims over which it has original jurisdiction ...." 28 U.S.C. § 1367. "The decision to retain or decline jurisdiction over state-law claims is discretionary" and "should be based on considerations of judicial economy, convenience[,] and fairness to the litigants." *Kach v. Hose*, 589 F.3d 626, 650 (3d Cir. 2009) (citations omitted). Here, because Plaintiff's federal and state law claims relate to the allegedly unlawful conspiracy to deny him of his rights, and furthermore given that this case was filed in 2015, has been on appeal and remanded, and has proceeded through discovery, it is appropriate to exercise supplemental jurisdiction over Plaintiff's remaining state-law claim as a matter of judicial economy and fairness.

*The best evidence rule states that the original writing, recording or photograph of issue must be produced in evidence.*

conspiracy.” *Commerce Bank/Pennsylvania v. First Union Nat. Bank*, 911 A.2d 133, 143 (quoting *Thompson Coal Co.*, 412 A.2d at 472). “Malice requires ... that the sole purpose of the conspiracy was to injure the plaintiff,” and that this intent was without justification. *Doltz v. Harris & Assoc.*, 280 F.Supp.2d 377, 389 (E.D. Pa. 2003) (emphasis added). Because malice can only be found when the sole purpose of the conspiracy is to injure the plaintiff, a showing that a person acted for professional reasons, and not solely to injure the plaintiff, negates a finding of malice. See *Bro-Tech Corp. v. Thermax, Inc.*, 651 F.Supp.2d 378, 419 (E.D. Pa. 2009); *Thompson Coal Co.*, 412 A.2d at 472 (noting that the intent to injure must be absent justification, which cannot exist when an act is merely done “with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights”) (quoting *Rosenblum v. Rosenblum*, 320 Pa. 103, 181 A. 583, 585 (1935)).

Thus, to survive summary judgment, a plaintiff bringing a civil conspiracy claim must produce evidence to establish that the defendant acted in concert to commit an unlawful act or do a lawful act by unlawful means, and he acted with malice. *Commerce Bank*, 911 A.2d 133, 143 (citing *Skipworth by Williams v. Lead Indus. Ass'n*, 547 Pa. 224, 690 A.2d 169, 174 (1997)). The elements of civil conspiracy may be proven circumstantially, so long as the evidence is “full, clear and satisfactory.” *Rumbaugh v. Beck*, 411 Pa. Super. 220, 601 A.2d 319, 327 (1991) (internal citations omitted).

Setting aside the self-serving allegations in the Affidavit, and after a careful review of the record, and viewing it in the light most favorable to the non-movant, no reasonable factfinder could conclude that Buxton has supported his claim of a civil conspiracy. Rivers Casino responded to valid subpoenas and provided the grand jury and state court with requested documents, and had no further involvement in Buxton's cases. *There is no record evidence that*

*In review of state court*

*but must concede that no one made any further effort with this and did not*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDY BUXTON,

Plaintiff,

v.

RIVERS CASINO,

Defendant.

Civil Action No. 2:15-cv-1653

**MEMORANDUM OPINION**

**Introduction**

This case was referred to a United States magistrate judge for pretrial proceedings in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rules of Court 72.C and 72.D. On January 15, 2020, the magistrate judge entered a Report and Recommendation (“R&R”) (ECF No. 205), recommending that the motion for summary judgment filed by Rivers Casino, (ECF No. 192) be granted. Plaintiff Andy Buxton (“Buxton”) filed timely objections to the R&R (ECF No. 206). Rivers Casino filed a response in opposition to the objections (ECF No. 207). Buxton filed a motion for leave to file a supplement, which the court construed as a reply brief. The matter is ripe for disposition.

**Factual and Procedural Background**

Rivers Casino is the sole remaining defendant in this case. In the operative Third Amended Complaint (ECF No. 139), Buxton asserts that Rivers Casino engaged in a civil conspiracy with other defendants to deny his rights as protected by the First, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. Buxton’s theory is that Rivers Casino provided falsified documents to agents of the Commonwealth Attorney General’s Office that

*Stand alone Fabricated evidence*

were thereafter used in criminal proceedings against him.

Rivers Casino explained in its concise statement of material facts (“CSMF”) (ECF No. 194) that it supplied documents and video surveillance footage about Buxton’s gambling activities in response to two subpoenas from a Pennsylvania grand jury, and one subpoena from the Allegheny County Court of Common Pleas.<sup>1</sup> Rivers Casino asserts it provided true and correct copies of the items requested therein. (ECF No. 194 ¶¶ 18-21). Rivers Casino asserts that it does not have any reason to believe that the information it provided in response to the subpoenas was inaccurate in any respect. (ECF No. 194 ¶ 22). Aside from providing responses to the subpoenas, Rivers Casino had no involvement in any hearing or proceeding related to Buxton. (ECF No. 194 ¶ 17).

Buxton filed an affidavit and a response to the CSMF which included rambling denials of the relevant paragraphs. (ECF Nos. 200, 201). In the R&R, the magistrate judge explained that conclusory or speculative denials, not based on facts within the personal knowledge of the witness, may not be considered in opposing summary judgment. The magistrate judge observed that Buxton had been put on notice of his obligation by an order dated July 19, 2019 (ECF No. 184).~~✗~~ The magistrate judge concluded that Buxton failed to point to any record evidence that would create a genuine dispute about the accuracy of Rivers Casino’s CSMF.

On the merits, the magistrate judge concluded that Buxton’s § 1983 civil conspiracy claim failed for two reasons: (1) Rivers Casino was not a state actor, and did not act “in concert ~~✗~~ with” state officials merely by responding to a subpoena; and (2) there was no evidence of any

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<sup>1</sup> There were two grand jury subpoenas from the Commonwealth of Pennsylvania Statewide Investigative Grand Jury dated September 10, 2012, and November 8, 2012, that relate to Plaintiff’s gaming activity at the casino. The first requests information dated from September 1, 2012, through September 12, 2012; the second requests information over a larger timeframe, May 1, 2012, to November 8, 2012. The third subpoena was issued by the state trial judge on October 2, 2014, in conjunction with two state court cases in the Court of Common Pleas of Allegheny County, Pennsylvania Criminal Division: Commonwealth v. Andy Buxton, Case No. 12834-2013 and Commonwealth v. Carl Buxton, Case No. 151-2014, (hereinafter, the “State Court Subpoena”). The State Court Subpoena directed Rivers Casino to provide “all video surveillance footage pertaining to gaming activity for Andy and Carl Buxton from 2010 through 2014.” (ECF No. 194 ¶ 14).

players card numbers.<sup>2</sup> Buxton contends that the video does not depict him gambling \$275,295.

Buxton reasons that because the evidence was false and incomplete, it can be inferred that Rivers Casino acted in bad faith and malice and agreed with the state in providing that information, such

that his conspiracy claims should be decided by a jury. The court concludes that these objections lack merit.

*Defendants failed to inform the prosecutor of the conspiracy in connection with the (plus the Appendix) several events. McMillan Johnson, 88 F.3d 1554, 1567 (11th Cir. 1996) awarded 101 F.3d 1363 (11th Cir. 1998) Walker v. City of New York, 974 F.2d 293, 289 (2d Cir. 1992) Greer v. Fortson, 849 F.2d 1302, 1559 (5th Cir. 1988).*

The magistrate judge properly applied the rules governing responses to summary judgment. At the summary judgment stage, Buxton cannot merely accuse Rivers Casino of providing inaccurate, fabricated or incomplete information. Instead, he must come forward with actual admissible evidence in support of that position. The court's order of July 19, 2019, specifically instructed Buxton that "all affidavits, opposing or counter affidavits must be based upon the personal knowledge of the person executing the affidavit." (ECF No. 184). That order also instructed Buxton that he was required to comply with Local Rule 56.C in responding to the CSMF, including appropriate citations to the record setting forth the basis for denials of any fact. *Id.* Buxton was warned that Rivers Casino's proposed facts "will for the purpose of deciding the motion for summary judgment be deemed admitted unless specifically denied or otherwise controverted." *Id.* Buxton failed to properly contest any of Rivers Casino's facts by citation to other facts in the record and did not submit his own appendix (other than his personal affidavit.) Buxton may have seen Rivers Casino personnel in the courtroom on several occasions. Buxton did not, however, present any admissible evidence to create a genuine dispute about whether the documents or video surveillance footage provided by Rivers Casino had been falsified or that Rivers Casino entered into any kind of agreement other than its response to the subpoenas.\* His

<sup>2</sup> In its response to the objections, Rivers Casino explains that an individual can have multiple Player Club Cards, but all cards will have that individual's patron identification number. (ECF No. 207 at 2 n.1). In his reply, Buxton argues that he was issued numerous cards without his authorization and not all were registered under his identification number. (ECF No. 208). This dispute is not material. As the magistrate judge recognized, there is no evidence in the record from which a reasonable jury could conclude that River Casino conspired with the state to violate Buxton's civil rights.

Conclusion

For the reasons set forth above, the magistrate judge's January 15, 2020 R&R (ECF No. 205), will be adopted as the opinion of this court as supplemented herein. Plaintiff Andy Buxton's objections to the R&R (ECF No. 206) will be DENIED. The motion for summary judgment filed by Rivers Casino (ECF No. 192) will be GRANTED. This case will be marked closed.

An appropriate order and judgment will be entered.

BY THE COURT:

Dated: March 4, 2020

/s/ Joy Flowers Conti  
Joy Flowers Conti  
Senior United States District Court Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDY BUXTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:15-cv-1653
	)	
RIVERS CASINO,	)	
	)	
Defendant.	)	

**ORDER**

AND NOW, this 4<sup>th</sup> day of March, 2020, it is hereby ORDERED that for the reasons set forth in the memorandum opinion: the magistrate judge's January 15, 2020 R&R (ECF No. 205), will be adopted as the opinion of this court as supplemented therein. Plaintiff Andy Buxton's objections to the R&R (ECF No. 206) are DENIED. The motion for summary judgment filed by Rivers Casino (ECF No. 192) is GRANTED. This case shall be marked closed.

BY THE COURT:

/s/ Joy Flowers Conti  
Joy Flowers Conti  
Senior United States District Court Judge

cc: ANDY BUXTON  
MS 1885  
SCI Mercer  
801 Butler Pike  
Mercer, PA 16137  
(via U.S. First Class Mail)

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

ANDY BUXTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2:15-cv-1653
	)	
RIVERS CASINO,	)	
	)	
Defendant.	)	

**JUDGMENT**

AND NOW, this 4<sup>th</sup> day of March, 2020, JUDGMENT is hereby entered in favor of defendant Rivers Casino and against plaintiff Andy Buxton.

BY THE COURT:

/s/ Joy Flowers Conti  
Joy Flowers Conti  
Senior United States District Court Judge

cc: ANDY BUXTON  
MS 1885  
SCI Mercer  
801 Butler Pike  
Mercer, PA 16137  
(via U.S. First Class Mail)

u Appendix C 11

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 20-1575

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ANDY BUXTON,  
Appellant

v.

IVA C. DOUGHERTY; KATIE WYMARD; RICHARD MILLER;  
CHRISTOPHER ANTONUCCI; ROBERT MARSILI; AMBER NOEL; SCOTT SHANK;  
RIVERS CASINO; ATTORNEY GENERALS OFFICE;  
ANDREW TOTH; DAN SAMMARTINO

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(W.D. Pa. No. 2:15-cv-01653)

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SUR PETITION FOR REHEARING

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Present: SMITH, Chief Judge, and McKEE, AMBRO, CHAGARES, JORDAN,  
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO,  
BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas  
Circuit Judge

Dated: November 2, 2020  
Lmr/cc: All Counsel of Record