

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 21-1518

JEFFREY L. CLEMENS,

Plaintiff-Appellant,

v.

MICHAEL J. O'HARA

Defendant – Appellee.

Before

Lynch, Howard and Kayatta,
Circuit Judges.

JUDGEMENT

Entered: October 6, 2022

Pro se plaintiff-appellant Jeffrey L. Clemens appeals from the decision of the district court dismissing his complaint for malicious prosecution based on Heck v. Humphrey, 512 U.S. 477 (1994), Broussard v. Great Atlantic & Pacific Tea Co., 324 Mass. 323, 86 N.E. 2d 439 (1949), and judicial estoppel principles.

After a careful de novo review of the record and the submissions of the parties, we affirm the judgement of dismissal, substantially for the reasons set forth in the district court's thorough June 10, 2021 order of dismissal and June 22, 2021 order denying reconsideration. See Local Rule 27.0(c); see also Estate of Bennett v. Wainwright, 548 F. 3d 155, 162 (1st Cir. 2008) (standard of review).

By the Court:

Maria R. Hamilton, Clerk

cc:

Jeffrey L. Clemens
Stephen C. Pfaff

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 21-1518

JEFFREY L. CLEMENS,

Plaintiff-Appellant,

v.

MICHAEL J. O'HARA

Defendant – Appellee.

Before

**Kayatta, Lynch and Howard,
Circuit Judges.**

ORDER OF COURT

Entered: March 2, 2022

The petition for panel rehearing is denied.

By the Court:

Maria R. Hamilton, Clerk

cc:

Jeffrey L. Clemens
Stephen C. Pfaff

APPENDIX C

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

JEFFREY L. CLEMENS,

Plaintiff,

v.

MICHAEL J. O'HARA,

Defendant.

F. Dennis Saylor, Chief Judge, Presiding

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

This is the sixth action brought by plaintiff Jeffrey L. Clemens for events arising out of his arrest by the Town of Scituate Police Department on May 12, 2005. The complaint asserts a single claim of malicious prosecution against defendant Michael J. O'Hara, a Scituate police officer. Jurisdiction is based on diversity of citizenship.

I. Background

Jeffrey Clemens was arrested for disorderly conduct by officer Michael J. O'Hara on May 12, 2005. (Complaint ¶¶ 14-15). Approximately a week later, Clemens received a summons in the mail with the additional charges of criminal harassment and impersonating a private investigator. (*Id.* ¶ 36). The criminal harassment charge was dismissed by the Hingham District Court on October 16, 2008. (*Id.* ¶ 41). Clemens pleaded to sufficient facts and received a continued without a finding ("CWOF") disposition on the charge of impersonating a private investigator. (*Id.* ¶ 42). He went to trial in the Hingham District Court on the charge of disorderly conduct and was found guilty. (*Id.* ¶ 62).

Clemens appealed the guilty finding. On July 6, 2010, the Massachusetts Appeals Court overturned his conviction. (*Id.* ¶ 150). The charge of disorderly conduct was refiled by the Commonwealth of Massachusetts in Hingham District Court. (*Id.* ¶ 152). It was later dismissed by the District Court on June 16, 2015. (*Id.* ¶ 154).

II. Analysis

To establish a claim of common-law malicious prosecution, a plaintiff must show (1) the commencement or continuation of a criminal proceeding against the eventual plaintiff at the behest of the eventual defendant; (2) the termination of the proceeding in favor of the accused; (3) an absence of probable cause for the charges; and (4) actual malice. *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001).

Here, Clemens was found guilty in state court and pleaded to sufficient facts on the charge of impersonating a private investigator and received a CWOF. The fact that he was found guilty of disorderly conduct precludes his recovery under 42 U.S.C. § 1983 for malicious prosecution under *Heck v. Humphrey*, 512 U.S. 477 (1994).

The fact that the disorderly conduct conviction was overturned on appeal does not mandate a different result. In *Broussard v. Great Atlantic & Pacific Tea Co.*, 324 Mass. 323 (1949), the Supreme Judicial Court held that in an action of tort for malicious prosecution, “a conviction of the accused by a tribunal to which the complaint was made, although reversed on appeal, conclusively establishes the existence of probable cause unless the conviction ‘was obtained solely by false testimony of the defendant [charged with malicious prosecution] or is impeached on the grounds of fraud, conspiracy or subordination in its procurement.’” 324 Mass. At 324 (quoting *Dunn v. E.E. Gray Co.*, 254 Mass. 202, 202-04 (1926) (brackets in original)) See *Ramos v. Gallo*, 596 F. Supp. 833 (D. Mass. 1984).

Furthermore, and in any event, as to the charge concerning impersonating a private investigator, Clemens admitted in open court to facts sufficient to establish a crime. The doctrine of judicial estoppel prevents a litigant from pressing a claim that is directly inconsistent with a position taken by that litigant, and adopted by the court, in a prior legal proceeding. *Salcedo v. Town of Dudley*, 629 F. Supp. 2d 86, 102 (D. Mass. 2009).

III. Conclusion

For the foregoing reasons, the motion of defendant for judgment on the pleadings is GRANTED. The matter is hereby DISMISSED with prejudice.

So ordered.

Dated: June 10, 2021

/s/ F. Dennis Saylor, IV
F. Dennis Saylor, IV
Chief Judge, United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

JEFFREY L. CLEMENS,

Plaintiff,

v.

MICHAEL J. O'HARA,

Defendant.

F. Dennis Saylor, Chief Judge, Presiding

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR RECONSIDERATION

Plaintiff Jeffrey Clemens moved on June 21, 2021, for reconsideration of this Court's Order dated June 10, 2021, granting defendant Michael O'Hara's motion for judgment on the pleadings. A motion for reconsideration will be granted only upon a showing of (1) a "manifest error of law," (2) new evidence, or (3) a misunderstanding or other error "not of reasoning but apprehension." *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F. 3d 76, 81-82 (1st Cir. 2008). Clemens has not made such a showing. Instead, he repeats the arguments made in his initial opposition to O'Hara's motion – namely, that because his 2008 conviction was procured solely by the "false testimony" of O'Hara, his

complaint adequately alleged the favorable termination prong of a malicious prosecution claim. (Pl. Mot. At 3). While *Broussard v. Great Atlantic & Pac. Tea Co.*, 324 Mass. 323, 326 (1949) does hold that a conviction obtained solely by false testimony of the defendant does not prevent a plaintiff from bringing a malicious prosecution claim, Clemens's complaint does not contain sufficient allegations to survive a motion on the pleadings. The complaint contains no information providing a plausible basis that the testimony given by O'Hara at the 2008 trial was false. It merely asserts, in conclusory terms, that O'Hara's testimony at [the] trial was almost entirely a fabrication." (Compl. ¶ 59). The complaint therefore does not plead sufficient "factual content" for the malicious prosecution claim to be plausible on its face. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, that "bare assertion"amount[s] to nothing more than a formulaic recitation of the elements of a...tort, and [is] insufficient to push...plaintiff['s] claim beyond the pleadings stage." *Maldonado v. Fontanes*, 568 F. F.3d 263, 274 (1st Cir. 2009)(quoting *Iqbal*, 556 U.S. at 681). The complaint's well-pleaded facts therefore do not "possess enough heft to show that plaintiff is entitled to relief." *Ruiz Rivera*, 521 F.3d at 84. Accordingly, the motion for reconsideration is DENIED.

So ordered.

Dated: June 22, 2021 /s/ F. Dennis Saylor IV
F. Dennis Saylor IV
Chief Judge, U.S. District
Court