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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

OSCAR CERVANTES, JR.,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	No. 14 L 1977
)	
CITY OF CHICAGO, JOSEPH OSKVAREK,)	
TAQUERIA LOS COMALES, TAQUERIA LOS)	The Honorable
COMALES #1, INC. d/b/a TAQUERIA LOS)	Kathy Flanagan,
COMALES #1,)	Judge Presiding.
)	
Defendants-Appellees.)	

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Where the plaintiff failed to argue in his opening brief error in the trial court's conclusion that he could not maintain a claim for malicious prosecution against the City based on *respondeat superior* where the defendant officer did not commence or continue the criminal proceedings against the plaintiff, the plaintiff waived the contention, and the judgment was affirmed.

¶ 2 The plaintiff, Oscar Cervantes, Jr., appeals from the trial court’s grant of summary judgment in favor of defendant City of Chicago (“City”) on his claim for malicious prosecution. For the reasons that follow, we affirm.

¶ 3 **BACKGROUND**

¶ 4 The following facts are not in dispute by the parties on appeal. The plaintiff’s claim arises out of an incident that took place on February 28, 2012. On that date, defendant Joseph Oskvarek, an officer with the Chicago Police Department, was off-duty, working security at defendant Taqueria Los Comales (“Los Comales”). That evening, the plaintiff and three of his friends drove to Los Comales so that one of his friends could use the restroom. While his three friends went inside, the plaintiff remained in his vehicle in a rear parking lot.

¶ 5 Inside Los Comales, the plaintiff’s three friends exchanged words with Oskvarek, prompting Oskvarek to follow them out when they left. Oskvarek followed them to the rear parking lot where the plaintiff’s vehicle was parked. Once there, Oskvarek was confronted by the plaintiff, who got out of his vehicle. While the plaintiff was out of his vehicle, one of his friends, Raymundo Rodriguez, got into the driver’s seat and drove the vehicle toward Oskvarek, striking him.

¶ 6 The plaintiff was charged with two counts of attempt murder in connection with this incident. Following a trial, the plaintiff was acquitted of both charges.

¶ 7 The plaintiff subsequently instituted a civil action against the City, Oskvarek, and Los Comales. In his “Second Amended Complaint at Law” (“Complaint”), the plaintiff brought, among others, claims for malicious prosecution against all of the defendants. With respect to the malicious prosecution claim against the City, the plaintiff entitled the count “Count VIII City of

Chicago—Malicious Prosecution—Respondeat Superior.” In it, the plaintiff alleged in relevant part as follows:

“3. At all relevant times, Defendant City of Chicago employed police officers, including Defendant Oskvarek.

4. On or about February 28, 2012, and at all relevant times, Defendant Oskvarek was employed by the Chicago Police Department and was an authorized agent and representative of the Chicago Police Department acting within the scope of his employment with the City of Chicago, and the City of Chicago is responsible under the doctrine of *respondeat superior* for his actions.

8. On or about February 28, 2012, Defendants caused Plaintiff Cervantes to be imprisoned, detained, arrested and charged with attempted murder of a police officer.

9. Defendants commenced and continued the malicious prosecution of Plaintiff Cervantes based upon false information provided to prosecutors by Defendants.”

¶ 8 Los Comales filed a motion for summary judgment on the plaintiff’s claim for malicious prosecution against it, and the City joined that motion. In the motion, Los Comales (and the City, by adoption) argued that the plaintiff’s claim for malicious prosecution must fail as a matter of law because (1) Oskvarek, as the alleged agent of Los Comales/the City, did not commence or continue the prosecution against the plaintiff, and (2) there existed probable cause for the prosecution of the plaintiff. After full briefing by Los Comales and the plaintiff, the trial court granted summary judgment in favor of Los Comales, concluding that neither Los Comales nor Oskvarek initiated or continued the criminal proceedings against the plaintiff and that there existed probable cause for the plaintiff’s prosecution. With respect to the City, the trial court

also granted summary judgment, finding that because the claim against the City was based on the theory of *respondeat superior* for the acts of Oskvarek, because the trial court had already held that Oskvarek did not initiate or continue the criminal proceedings against the plaintiff, and because there existed probable cause, the claim for malicious prosecution against the City must also fail. For the same reasons, the trial court held that the claim for malicious prosecution against Oskvarek lacked merit. The trial court entered a Supreme Court Rule 304(a) (eff. Mar. 8, 2016) finding with respect to its decision pertaining to the City only.

¶ 9 After an unsuccessful motion to reconsider, the plaintiff filed this appeal.

¶ 10 ANALYSIS

¶ 11 Summary judgment is appropriate where “the pleadings, depositions, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” 735 ILCS 5/2-1005(c) (West 2014). All pleadings and supporting evidence must be viewed in the light most favorable to the non-movant. *Fabiano v. City of Palos Hills*, 336 Ill. App. 3d 635, 640 (2002). It is not appropriate, however, where the facts are in dispute or where the facts are not in dispute but reasonable persons could draw differing inferences from the undisputed facts. Our review of the trial court’s grant of summary judgment is *de novo*. *Id.* at 640-41.

¶ 12 To maintain a cause of action for malicious prosecution, the plaintiff must establish the following: “(1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) malice; and (5) damages.” *Id.* at 641.

¶ 13 Here, the trial court held that the defendants were entitled to judgment as a matter of law on the first and third elements of the plaintiff’s malicious prosecution claims. In his opening

brief on appeal, however, the plaintiff challenges only the trial court's determination on the probable cause element. He makes no argument whatsoever regarding the trial court's conclusion that the plaintiff's claim against the City failed because he could not demonstrate that the City, through Oskvarek's actions, commenced or continued the criminal proceedings against him. Accordingly, the plaintiff has waived any contention that the trial court erred in this respect. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (stating with respect to the appellant's opening brief, "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."); see also *In re Estate of York*, 2015 IL App (1st) 132830, ¶ 40 (appellant's failure to argue regarding count II resulted in waiver of the issue); *In re R.S.*, 382 Ill. App. 3d 453, 464 (2008) (appellant's failure to argue error in the trial court's determination that she was unable to parent her children resulted in waiver of the issue).

¶ 14 In his reply brief, the plaintiff argues, for the first time on appeal, that the trial court erred in concluding that the City did not commence or continue the criminal proceedings against him, because even if Oskvarek did not sign the criminal complaints against the plaintiff, some other police officer of the City did. He also argues that we should overlook his failure to raise this issue in his opening brief, because the issue was briefed in the trial court and because the City addressed the issue in their response brief on appeal. This argument does not, however, eliminate the prejudice to the City in being deprived the opportunity to respond directly to the plaintiff's arguments on how the trial court erred in its finding.

¶ 15 Even if we were inclined to overlook waiver in this situation, the plaintiff's contention of error on this issue lacks merit. The plaintiff does not make any argument against the trial court's conclusion that Oskvarek did not sign the criminal complaints against the plaintiff, nor does he argue on appeal that Oskvarek continued the criminal proceedings against him in any way.

Rather, the plaintiff simply argues that his malicious prosecution claim against the City was not based solely on the actions of Oskvarek, but on the actions of *all* of the officers in the Chicago Police Department. Thus, according to the plaintiff, because *some* officer of the Chicago Police Department signed the criminal complaints against him, the City is vicariously liable.

¶ 16 In support of his position that his claim is based on the actions of the entire Chicago Police Department, the plaintiff relies on his allegation in paragraph 3 of his claim that “[a]t all relevant times, Defendant City of Chicago employed police officers, including Defendant Oskvarek.” The plain language of this allegation simply states that the City employs police officers; it says nothing whatsoever about the officers being agents of the City or the City being vicariously liable for those officers’ actions. This is in stark contrast to the plaintiff’s allegation in the very next paragraph, which specifically states that on the date of the incident, Osvarek “was employed by the Chicago Police Department and was an authorized agent and representative of the Chicago Police Department acting within the scope of his employment with the City of Chicago, and the City of Chicago is responsible under the doctrine of *respondeat superior* for his actions.”

¶ 17 The plaintiff also relies on his allegation that “Defendants commenced and continued the malicious prosecution of Plaintiff Cervantes based upon false information provided to prosecutors by Defendants,” but does not explain how this supports the notion that he sought to hold the City liable for the actions of officers other than Oskvarek. The defendants, as defined by the plaintiff’s Complaint, consisted of the City, Oskvarek, and Los Comales. The only officer for whom the plaintiff alleged the City was responsible was Oskvarek. Thus, we see no basis to conclude that this allegation encompassed anyone other than who it referenced—the defendants.

¶ 18 Moreover, although the Complaint contains numerous allegations that specifically reference the actions of Oskvarek, there are no allegations that pertain to the actions of other officers, whether identified by name, star number, or general reference. Based on this and the plain language of the Complaint, it is abundantly apparent from these allegations that the plaintiff's claim against the City for malicious prosecution was based solely on Oskvarek's actions. Given that the plaintiff does not dispute on appeal the trial court's conclusion that there was no evidence that Oskvarek commenced or continued the criminal proceedings against the plaintiff, we find no error in the trial court's determination that the City was entitled to summary judgment on this element of the plaintiff's claim.

¶ 19 We finally note that the plaintiff suggests that summary judgment for the City was based only on the trial court's finding of probable cause. This is clearly not the case, as the trial court explicitly stated, "However, as the malicious prosecution claim against the City in count VIII is based on *respondeat superior* for the acts of its agent Officer Oskvarek, and as the Court has ruled that Oskvarek did not commence or continue criminal proceedings against the Plaintiff and had probable cause as a matter of law, the *respondeat superior* malicious prosecution claim in count VIII against the City cannot stand."

¶ 20 Because the plaintiff waived any contention of error in the trial court's finding that the plaintiff could not demonstrate that the City, through Oskvarek, commenced and continued the criminal proceedings against the plaintiff, and because the plaintiff's contention lacks merit even if he had not waived it, the trial court's conclusion in this respect must be affirmed. In turn, because the plaintiff cannot make out this element of his claim of malicious prosecution, his entire claim must fail as a matter of law, and we need not address whether he could sustain the probable cause element of his claim.

¶ 21

CONCLUSION

¶ 22

For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 23

Affirmed.