**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS**
**COUNTY DEPARTMENT, LAW DIVISION**

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| Mary Sim,<br><br>Plaintiff,<br><br>v.<br><br>Osaka Sushi & Bento, Inc., an Illinois corporation, Dae Hee Yoo, an individual, Seung Ok Yoo, an individual, Sayaka Fukuyama, an individual, Stella Ryou, an individual, Peter Hwang, an individual, City of Des Plaines, a municipal corporation, Detective Paul Badofsky, an individual, Commander Scott Moreth, an individual, and Commander Christopher Mierzwa, an individual,<br><br>Defendants. | ) | No. 19 L 4210 |

**MEMORANDUM OPINION AND ORDER**

A plaintiff is required to adduce facts establishing each element of a cause of action. Separately, the *res judicata* doctrine bars litigating claims that could have been brought in a previous lawsuit. In this dispute, the plaintiff has both failed to allege necessary facts to state her claims and to identify facts in the record establishing her claims. The plaintiff also brought claims against various defendants that could have been litigated in a previous related lawsuit. For these reasons, both the motion to dismiss on the pleadings and the motion to dismiss are granted, both with prejudice.

Facts

In early 2009, Mary Sim met Dae Hee Yoo and Seung Ok Yoo, a married couple. On May 28, 2009, Dae incorporated Osaka

Sushi & Bento, Inc., for the purpose of running a restaurant in Des Plaines. At some point, Dae and Seung approached Sim to invest in the restaurant as an owner and work there. Sim agreed and, in October 2009, invested $30,000 in the restaurant. In December 2009, the Dotombori restaurant opened to the public.

In December 2010, Sim began working at Dotombori as a server. She also cleaned the restaurant and drove other employees to and from work. Despite Sim's ownership interest, Dae and Seung did not give Sim access to the restaurant's financial books and records. Without Sim's approval, Dae and Seung ran the restaurant financially as their cash cow by comingling personal and corporate funds, using the latter to play golf, purchase a personal vehicle, and pay off personal credit cards. They also withdrew large sums of cash, wrote checks to themselves from the corporate account, and made financial gifts to members of their church.

On February 4, 2017, Dae and Seung told Sim to bring $100,000 and leave the restaurant because she had been stealing. In fact, Dae and Seung were attempting to sell the restaurant without telling Sim, and had conspired with Sayaka Fukuyama, a server at Dotombori, to ensure that Sim would not be paid her share from the sale. To achieve this goal, on February 16, 2017, Dae filed a report with the Des Plaines police department, falsely claiming that between June 2014 and December 2016 Sim had stolen more than $250,000 from the restaurant.

Detective Paul Badofsky investigated the claim. On February 28, 2017, Badofsky interviewed Dae, who is not fluent in English. Dae had asked Peter Hwang to attend the meeting to provide Korean-English translation. Hwang was a former law enforcement official and the potential buyer of the restaurant. Also present at the meeting was an unidentified Caucasian male who was or is a law enforcement official.

Badofsky allegedly agreed to aid and abet the conspiracy by seeking to charge Sim with felony theft. On August 28, 2017,

Badofsky authored a report describing his investigation of Sim. Sim contends Badofsky intentionally omitted the fact that Hwang and another person were at the February 28, 2017 meeting. Further, Badofsky's report fabricated various statements that he attributed to Dae and that Dae later repudiated. These include statements that in December 2016, Dae had contacted Howard Yoon to revoke Sim's access to the restaurant's point-of-sale system. Second, Badofsky wrote that Dae stated Yoon placed new safeguards on the system to prevent her from altering, voiding, or changing receipts after a transaction had been completed. Third, Badofsky wrote that in December 2016 Dae had Yoon install a security camera at the restaurant. Police commanders Scott Moreth and Christopher Mierzwa later reviewed Badofsky's report.

Sim further alleges that, as part of the conspiracy, Badofsky twice contacted the Cook County State's Attorney's office seeking approval of felony theft charges against Sim. The office rejected the request because there existed a question as to Sim's ownership status. Despite that denial, Badofsky unilaterally charged Sim with one count of misdemeanor theft of less than $500.

On May 19, 2017, Sim filed suit in the Law Division, Commercial Section, 17 L 5125, against Dae, Seung, and Osaka Sushi & Bento, Inc. Sim alleged the two defendants individually and through the corporation violated state and federal wage statutes, breached their fiduciary duty, and committed fraud and civil theft. Sim sought remedies of promissory estoppel and partnership dissolution. The defendants filed a counterclaim against Sim for conversion and unjust enrichment.

On October 12, 2017, at approximately 6:00 p.m., Sim, her husband, and her attorney went to the Second Municipal District courthouse in Skokie. There, they met with Badofsky and another detective. The State's Attorney reviewed the file, spoke with Badofsky, and, at approximately 8:10 p.m., denied felony review. Sim then posted bond and was released from custody at approximately 9:25 p.m. On November 7, 2017, Sim first

appeared in court on the misdemeanor charge. On October 29, 2018, the state's attorney amended the charge to misdemeanor disorderly conduct. Sim pleaded guilty to that charge, and the court sentenced her to one-year conditional discharge.

On April 19, 2019, Sim filed this lawsuit, 19 L 4210. She filed a corrected version just six days later.

In June 2019, Judge Thomas R. Mulroy conducted a weeklong bench trial in the 17 L 5125 case. On September 6, 2019, Judge Mulroy issued an order in which he wrote: "The Court carefully studied Defendants while they testified and noticed their demeanor on direct and cross examination. The Court, based on the Defendants' demeanor on examination and based on the substance of their testimony, find them to be not believable." Judge Mulroy found Dae and Seung personally liable to Sim for more than $600,000, imposed $100,000 in punitive damages against them, and denied their counterclaims.

During the interim, on July 17, 2019, Sim filed an amended complaint in this case. On November 25, 2019, Sim filed her second-amended complaint. That motion prompted a full round of pleadings on motions filed by each of the defendants. On April 20, 2020, this court issued an extensive memorandum opinion and order. In sum, that ruling denied the defendants' motions without prejudice for Sim to file a third-amended complaint. The basis of the ruling was that the allegations in the second-amended complaint were insufficient to support her various causes of action.

On May 26, 2020, Sim filed her third-amended complaint. The most recent iteration brings eight counts but with additional facts. Count one is for malicious prosecution. The cause of action's title does not identify the defendants against whom it is directed. It may be inferred that the count is directed against all defendants based fundamentally on Badofsky's intentional and malicious conduct to: fabricate facts as to Sim's alleged theft; fabricate his description of how he interviewed Dae; and omit from

his report that Hwang and another person had attended the interview. Badofsky is claimed to have acceded to pressure asserted by Hwang and the unidentified person to seek felony charges against Sim and, after the state's attorney refused to bring those charges, to have intentionally and maliciously instituted misdemeanor charges against Sim. Badofsky is alleged to have conspired with Dae, Seung, Ryou (another server at Dotombori), Fukuyama, and Hwang to prosecute Sim without probable cause based on evidence of Sim's alleged theft that Badofsky knew had been fabricated. Sim claims the prosecution terminated in her favor in a manner indicative of innocence.

Count two is a cause of action for intentional infliction of emotional distress (IIED), again, apparently against all defendants. Badofsky, Dae, Seung, Ryou, Fukuyama, and Hwang are alleged to have acted with intent to cause harm or with reckless disregard of the probability that Badofsky's conduct would cause Sim severe emotional distress. Sim alleges she has suffered physical and psychological pain, emotional distress, humiliation, constant fear of law enforcement and imprisonment, anxiety, deep depression, insomnia, despair, and rage.

Count three is a claim of civil conspiracy against all the defendants. This cause of action is based on the conspirators' alleged agreement to prosecute Sim absent any probable cause. Sim alleges they undertook the conspiracy intentionally and with malice, willfulness, and reckless indifference to her rights.

Count four is for *respondeat superior* exclusively against Osaka Sushi & Bento, Inc. Sim alleges that Dae, Seung, Ryou and Fukuyama were either the corporation's employees or agents. The corporation, as principal, is, therefore, legally responsible for its employees' and agents' nefarious conduct.

Count five is another *respondeat superior* claim, this time against the City of Des Plaines. Sim alleges that Badofsky was the City's employee who conducted his investigation within the

scope of his employment. Under this count, the City, as principal, is legally responsible for Badofsky's nefarious conduct.

Count six is a cause of action for indemnification against the City. Sim alleges that the section 9-102 of the Local Government and Governmental Employees Tort Immunity Act (TIA) makes the City liable for any judgments against its employees. Since Badofsky was a City employee, the City is liable to Sim for any judgment.

Count seven is a claim brought pursuant to 42 U.S.C. § 1983 for a violation of Sim's due process rights under the Fourth and Fourteenth Amendments to the United States Constitution. The claim is based on Badofsky's lack of probable cause to arrest and prosecute Sim, his conspiracy with the other defendants, and his fabrication of evidence and omissions in his investigation report.

Count eight is a second § 1983 claim, this one directed against Scott Moreth and Christopher Mierzwa for failing to intervene to prevent Badofsky's fabrication and falsehoods. In the April 20, 2020 memorandum opinion and order, this court dismissed Sim's claim without prejudice and instructed Sim to allege facts providing the basis on which Moreth and Mierzwa knew of Badofsky's bad acts or how their failure to intervene deprived Sim of her constitutional rights. Sim did not add any allegations in the third-amended complaint and indicted that count eight is now, "(FOR APPEAL ONLY)."

On August 3, 2020, the City of Des Plaines, Badofsky, Moreth, and Mierzwa (collectively, Des Plaines Defendants) filed their motion on the pleadings against Sim's third-amended complaint. Nine days later, Osaka Sushi & Bento, Inc., Dae, Seung, Fukuyama, Ryou, and Hwang (collectively, Osaka Defendants) filed their motion to dismiss. Sim responded to both motions, and both sets of defendants filed replies.

Analysis

I. Des Plaines Defendants' Motion for Judgment on the Pleadings

The Code of Civil Procedure authorizes a motion for judgment on the pleadings. *See* 735 ILCS 5/2-615(e). Such a motion is essentially a motion for summary judgment limited to the pleadings and "those facts apparent from the fact of the pleadings, matters subject to judicial notice, and judicial admissions in the record." *Better Gov't Ass'n v. Office of the Special Prosecutor (In re Appointment of Special Prosecutor)*, 2019 IL 122949, ¶ 52; *Gillen v. State Farm Mut. Auto. Ins. Co.*, 215 Ill. 2d 381, 385 (2005). *See also Hess v. Estate of Estate of Klamm*, 2020 IL 124649, ¶ 14. All well-pleaded facts and reasonable inferences are taken as true. *See Gillen*, 215 Ill. 2d at 385. Judgment on the pleadings is proper if the pleadings disclose no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Hooker v. Illinois State Bd. of Elections*, 2016 IL 121077, ¶ 21.

Count 1 – Malicious Prosecution

Malicious prosecution claims are disfavored under Illinois law and are subject to more stringent limitations than other tort claims. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶¶ 24-25. To state a cause of action for malicious prosecution, a plaintiff must establish five elements: "(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) the presence of malice; and (5) damages resulting to the plaintiff." *Id.* at ¶ 26 (internal quotation marks omitted) (quoting *Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996) and citing other cases). The absence of any of these elements bars a plaintiff's malicious prosecution claim. *Id.*

Courts have used different language in their analyses of the commencement-or-continuance element. *See id.* at ¶ 33. In each case, however, "the relevant inquiry is whether the officer proximately caused the commencement or continuance of the criminal proceeding." *Id.* Here, Sim sufficiently pleaded the first element because it is uncontested that Badofsky initiated a criminal proceeding against her.

As to the second element – the prosecution concluded with an indication of the defendant's innocence – it is understood that a prosecutor's dismissal of a criminal charge may imply innocence, but such an inference cannot be drawn if the withdrawal is part of a plea bargain. *See Swick*, 169 Ill. 2d at 513. In *Swick*, the court explicitly stated, "[t]he abandonment of the [criminal] proceedings is not indicative of the innocence of the accused when the nolle prosequi [*sic*] is the result of an agreement or compromise with the accused . . . ." *Id.* (citing Restatement (Second) of Torts §§ 660 & 661 (1977)). Another court found far more broadly that, "a prosecution ending in a guilty plea does not end in a 'manner not indicative of innocence.'" *Bontkowski v. United States*, 28 F.3d 36, 37 (7th Cir. 1994) (quoting *Hajawii v. Venture Stores, Inc.*, 125 Ill. App. 3d 22, 24 (1st Dist. 1986)).

If the Supreme Court's finding in *Swick* is true for a *nolle prosequi* – "a procedure which reverts the matter to the same condition which existed before the commencement of the prosecution," *id.* (citing *People v. Woolsey*, 139 Ill. 2d 157, 163 (1990)) – then it must certainly be true if a defendant pleaded guilty to a reduced charge – a condition that did not exist before commencement of the prosecution. As noted above, the State refused to charge Sim with felony theft and the court ultimately accepted Sim's guilty plea to misdemeanor disorderly conduct. Any inference of Sim's innocence is belied by the fact that, as part of her guilty plea, the court sentenced her to one-year conditional discharge. Conditional discharge is a "sentence or disposition of conditional and revocable release without probationary supervision but under such conditions as my be imposed by the court." 730 ILCS 5/5-1-4. Such supervision may not exceed two

years. 730 ILCS 5/5-6-3.1(b). In this case, when the court placed Sim under supervision for one year, the court also retained the authority to revoke or modify her supervision if she violated the terms of the conditional discharge. *See* 730 ILCS 5/5-6-2(a) & (c); 5/5-6-3. That is why this court's April 20, 2020 memorandum opinion and order acknowledged that, even under her circumstances, Sim, "was not able to completely walk away without some penalty." *Danyus v. Derosa*, 2020 U.S. Dist. LEXIS 40973, at *38.

At the same time, this court's April ruling explicitly gave Sim the opportunity to amend her complaint and allege additional facts establishing the prosecution had concluded indicative of her innocence. While Sim took advantage of the opportunity to re-plead, none of her new allegations provide additional information from which this court could conclude her guilty plea terminated in a showing of innocence. Sim alleges the prosecutors could not meet their burden of proving her guilt (TAC ¶¶ 142-46), yet those allegations go to the felony and misdemeanor theft charges, not the misdemeanor disorderly conduct charge to which she pleaded guilty. Sim's failure to plead the required second element to a malicious prosecution claim means there is no need for this court to address the cause of action's remaining elements. The defendants' motion to dismiss count one with prejudice must be granted.

Count 2 – Intentional Infliction of Emotional Distress

To establish an IIED claim, a plaintiff must plead: (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to inflict severe emotional distress or knew there was a high probability the conduct would cause severe emotional distress; and (3) the defendant's conduct actually caused severe emotional distress. *See Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 268-69 (2003); *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988). The standard of proof is so stringent that a plaintiff must establish a defendant's conduct is outrageous and extreme to the point it goes beyond all possible bounds of decency and is

considered intolerable in a civilized community. *See Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 89-90 (1976); *Kolegas v. Heftel Broadcasting Corp.* 154 Ill. 2d 1, 20-21 (1992). *See also* Restatement (Second) of Torts § 46, comment *d* at 73 (1965). The standard of pleading an IIED claim is also no simple task. "A complaint alleging the infliction of intentional infliction of emotional distress 'must be "specific, and detailed beyond what is normally considered permissible in pleading a tort action."'" *Schroeder v. RGIS, Inc.*, 2013 IL App (1st) 122483, ¶ 27, (quoting *Welsh v. Commonwealth Edison Co.*, 306 Ill. App. 3d 148, 155 (1st Dist. 1999), quoting in turn *McCaskill v. Barr*, 92 Ill. App. 3d 157, 158 (4th Dist. 1980)).

Illinois courts have identified various factors to be considered in determining if a defendant's conduct is extreme and outrageous. *Schweihs v. Chase Home Fin., LLC*, 2016 IL 120041, ¶ 52 (citing *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 21 (1992)). Such conduct may rise to the level of IIED if the defendant abuses a position of authority over the plaintiff or has the power to affect the plaintiff's interests. *Id.* (citing *McGrath*, 126 Ill. 2d at 86-87). Another factor is the reasonableness of the defendant's belief in the legitimacy of the objective. *Id.* at ¶ 52 (citing *McGrath*, 126 Ill. 2d at 89). Still another factor is the defendant's awareness, if any, of the plaintiff's particular susceptibility to emotional distress. *Id.* (citing *Kolegas*, 154 Ill. 2d at 21; *see also McGrath*, 126 Ill. 2d at 89-90)). These factors "are to be considered in light of all of the facts and circumstances in a particular case, and the presence or absence of any of these factors is not necessarily critical to a cause of action for intentional infliction of emotional distress." *Id.* (citing *McGrath*, 126 Ill. 2d at 90).

Illinois law is plain that a defendant's "fabricated and manufactured evidence . . . for the purpose of falsely and maliciously detaining, arresting, and charging plaintiffs, knowing that such charges lacked probable cause . . . sufficiently plead[s] the first element of intentional infliction of emotional distress." *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 84. This

conclusion makes sense because it goes to the abuse of power by a peace officer. Yet the third-amended complaint and the available record do not establish Badofsky's abuse of his position sufficiently to plead the first element of IIED. Rather, the third-amended complaint merely alleges Badofsky intentionally and knowingly fabricated three statements in his police report. First, Badofsky wrote that, in December 2016, Dae contacted Howard Yoon to revoke Sim's access to the restaurant's point-of-sale system. Second, Badofsky wrote that Dae stated Yoon had placed new safeguards in the system to prevent Sim from altering, voiding, or changing receipts after a transaction had been completed. Third, Badofsky wrote that, in December 2016, Dae had Yoon install a security camera at the restaurant.

Sim alleges each statement is fabricated because Dae later testified under oath at Judge Mulroy's bench trial that Dae did not make those three statements to Banofsky. The central problem with Sim's allegations is that Dae's subsequent sworn denial at trial does not make Banofsky's report fabricated. In other words, Dae could have been lying on the stand. Credence for that conclusion is found in Judge Mulroy's September 6, 2019 order: "The court carefully studied Defendants [including Dae] while they testified and noticed their demeanor on direct and cross examination. The court, based on the Defendants' demeanor on examination and based on the substance of their testimony, finds them to be not believable." If Dae's sworn trial testimony was not believable, then the fair inference is that Dae did make the three statements to Badofsky.

This inference is further supported by a critical omission Sim failed to correct in her third-amended complaint. Sim failed to allege how Badofsky could have fabricated the three statements absent meeting Dae. Sim has not alleged Badofsky met separately with Yoon or spoke with him at any other time. Further, Sim does not allege how Badofsky came to create the three alleged fictions on his own. The supposedly fabricated statements concern very specific activities related to the restaurant's point-of-sale system and the installation of a security

camera, none of which the Osaka Defendants claim is untrue. Sim has, once again, failed to satisfy the first element of an IIED claim.

A showing of either intent or knowledge plus reckless disregard may satisfy the second element of an IIED claim. *See Turcios v. Debruler Co.*, 2014 IL App (2d) 130331, ¶ 40, *rev'd other grounds*, 2015 IL 117962. The standard by which such allegations are measured is that a complaint must allege facts, not conclusions, necessary to establish each required element of a cause of action. *See Quinn v. Board of Election Comm'rs*, 2019 IL App (1st) 190189, ¶ 42; *Beckman v. Freeman United Coal Mining*, 123 Ill. 2d 281, 287 (1988); *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1092 (2d Dist. 2010) (conclusions of law and conclusory allegations not supported by specific facts will not be admitted).

Sim's third-amended complaint does not allege that Badofsky intended to inflict severe emotional distress. Additionally, the third-amended complaint is devoid of any factual allegations that Badofsky knew or should have known Sim was susceptible to any psychological or physical health problems brought on by stress, or she was particularly susceptible to stress. Such an omission is understandable since Sim acknowledges Badofsky never interviewed her. Absent any personal contact between Sim and Badofsky, however, he could not have had any insight as to Sim's emotional state or particular susceptibilities. Further, Sim merely parrots boilerplate language that Badofsky acted "with intent to cause or [was] in reckless disregard of the probability that [his] conduct would cause, severe emotional distress. . . ." TAC, ¶ 151. Such a bald allegation is wholly insufficient for fact pleading an IIED claim. Sim has, therefore, failed to plead sufficiently the second element of an IIED claim.

As to the third element of an IIED claim, it is ultimately irrelevant whether Sim suffered severe emotional distress. Even if she did and she pleaded it sufficiently, the claim cannot stand

without the other two necessary elements. Count two must, therefore, be dismissed with prejudice.

Count 3 – Civil Conspiracy

The foundation of a civil conspiracy "is not the agreement itself, but the tortious acts performed in furtherance of the agreement." *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 63 (1994) (citing William Prosser, Torts § 46, at 293 (4th ed. 1971); and *Lasher v. Littell*, 202 Ill. 551, 554 (1903)). "It is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable." *Id.* (citing William Prosser, Torts § 46, at 243 (4th ed. 1971)). Thus, a conspiracy to commit a wrongful act is, by itself, not a tort, even if it is a crime. *Id.* (citing William Prosser, Torts § 46, at 293 (4th ed. 1971)). To establish a civil conspiracy, a plaintiff must plead: "(1) a combination of two or more persons, (2) for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means, (3) in the furtherance of which one of the conspirators committed an overt tortious or unlawful act." *Fritz v. Johnston*, 209 Ill. 2d 302, 317 (2004) (citing *Adcock*, 164 Ill. 2d at 62-63).

Sim alleges Badofsky, Dae, Seung, Ryou, Fukuyama, and Hwang conspired to prosecute Sim for theft. According to Sim, Badofsky was the lynch pin who enabled and held together the conspiracy. Sim focuses on two tortious acts to satisfy the third element of her conspiracy claim: (1) Badofsky's allegedly fabricated facts contained in his report; and (2) the lack of probable cause to arrest Sim.

As to the allegedly fabricated report, this court need not repeat its analysis from count two above. Suffice it to say no irony is lost that Sim claims Dae was a truth teller during Judge Mulroy's bench trial, yet her complaint is based in substantial part on Dae's confabulation of her alleged thievery. As noted

above, there is nothing in the third-amended complaint or the record establishing Badofsky's fabrication of his report's contents.

Sim's second claimed tortious act is the lack of probable cause to arrest her. "With respect to probable cause as an element of malicious prosecution involving criminal proceedings," Illinois courts have defined probable cause as "a state of facts that would lead a person of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested committed the offense charged." *Ross v. Mauro Chevrolet*, 369 Ill. App. 3d 794, 801 (1st Dist. 2006) (quoting *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 72 (1st Dist. 2003)). To establish a malicious prosecution cause of action, the existence of probable cause depends on "the totality of the circumstances at the time of the arrest." *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶ 112. The facts of the case or the guilt or innocence of the accused are not at issue; rather, "it is the state of mind of the one commencing the prosecution." *Johnson*, 341 Ill. App. 3d at 72 (citing cases). Only a mistake or error constituting gross negligence will affect the question of probable cause if the complainant honestly believes the accused is probably guilty of the offense. *See id.* (citing *Turner v. Chicago,* 91 Ill. App. 3d 931, 935 (1st Dist. 1980).

Sim argues Banofsky's lack of probable cause to initiate criminal proceedings is based on his failure to interview various persons, including Sim, before filing his report. Such a position argues to an inapplicable, higher standard as made plain in *Kim v. City of Chicago*, a case in which the court rejected a similar argument. 368 Ill. App. 3d 648 (1st Dist. 2006). The State's Attorney charged Kim with first-degree murder and aggravated criminal sexual assault for beating his pregnant girlfriend and killing the fetus. *Id.* at 652. A grand jury indicted Kim based on his partial confession and the victim's statement. *Id.* at 652-53. Three years later, a court ordered Kim's release after the victim recanted her statement as something "she and her dad cooked up." *Id.* at 653. Kim then filed a malicious prosecution claim contending the police had failed to contact key individuals during the investigation. *Id.*

The court considered all of the facts and circumstances and concluded the defendants "had ample probable cause at the time of arrest to believe [Kim] had committed a crime." *Id.* at 660. Importantly, the Cook County medical examiner had performed a fetal autopsy and determined blunt abdominal trauma had been the cause of death. *Id.* at 656. The court concluded, based on the information known to the detectives at the time of the arrest, "the detectives held an objectively reasonable belief that [Kim] had committed murder." *Id.*

Another insightful case is *Burrell v. Village of Sauk Village*, 2017 IL App (1st) 163392. Burrell confessed to injuring his one-month-old niece unintentionally, but she subsequently died, and he later recanted his statement. *Id.* at ¶¶ 4-5. Burrell and other witnesses confirmed he was the only adult present when the niece died. *Id.* at ¶ 7. That fact was critical because the coroner ruled the niece's death a homicide by blunt force trauma that only an adult could have inflicted. *Id.* at ¶¶ 7-8. The detectives who investigated the incident were never alerted that the niece's older sister had told Burrell's mother she had tripped while carrying her baby sister and dropped the one-month-old on the floor. *Id.* at ¶ 6. The older sister then placed the baby in a bassinette that immediately collapsed on top of her. *Id.* Although the Assistant State's Attorneys involved were aware of the older sister's statements, "both believed probable cause existed to prosecute plaintiff based on the circumstances and medical examiner's determination." *Id.* at ¶ 19. The court concluded based on all the available evidence that "it was not unreasonable for defendants to have arrested and prosecuted plaintiff for first degree murder." *Id.*

As with the detectives in *Kim* and *Burrell*, Banofsky failed to interview all possible witnesses, including, in this case, Sim. And as with *Kim* and *Burrell*, Banofsky's omission does not establish a lack of probable cause. Sim's third-amended complaint admits that Dae told Banofsky a consistent story of Sim's alleged wrongdoing. The complaint further alleges the corroboration of

those same events by other witnesses. Thus, it bears repeating that: "[i]t is the state of mind of the one commencing the prosecution, and not the actual facts of the case or the guilt or innocence of the accused, that is at issue." *See Grundhoefer v. Sorin*, 2014 IL App (1st) 131276, ¶ 13 (quoting *Johnson*, 341 Ill. App. 3d at 72). Banofsky's failure to turn over every stone and interview each and every possible witness does not invalidate a finding of probable cause. Even if Banofsky should have interviewed Sim before filing his report, that omission, at most, constitutes sloppiness, but not a lack of probable cause. Count three must, therefore be dismissed with prejudice.

Count 5 – *Respondeat Superior*

The *respondeat superior* doctrine provides that an employer may be vicariously liable for the torts of an employee acting within the scope of employment. *Vancura v. Katris*, 238 Ill. 2d 352, 375 (2010). The employee's liability is imputed to the employer, and the plaintiff need not establish the employer's malfeasance. *Id.* An employer's liability extends to negligent, willful, malicious, and even criminal acts of its employees within the scope of employment. *Adames v. Sheahan*, 233 Ill. 2d 276, 298 (2009); *Mitchell v. Norman James Construction Co.*, 291 Ill. App. 3d 927, 932 (1997).

Sim raises a *respondeat superior* claim against the City as the employer responsible for all alleged torts committed by Badofsky, its employee. As indicated above and below, Sim has failed and cannot establish the necessary requirements to bring her underlying substantive claims. As a result, Count 5 must also be dismissed with prejudice.

Count 6 – Indemnification

Sim alleges that her indemnification claim in count 6 is authorized by the TIA. *See* 745 ILCS 10/9-102. This is a plain misreading of the statute. TIA article IX only authorizes and directs local public entities to pay tort judgments or settlements.

*See Hubble v. Bi-State Dev. Agency of the Illinois-Missouri Metro. Dist.*, 238 Ill. 2d 262, 279 (2010). Further, the TIA provides only defenses and immunities; it is not a source of duties or liabilities. 745 ILCS 10/1-101.1(a); *Sparks v. Starks*, 367 Ill. App. 3d 834, 838 (1st Dist. 2006); *Swett v. Village of Algonquin*, 169 Ill. App. 3d 78, 92 (2d Dist. 1988). The TIA cannot, therefore, provide a private right of action against the City. Count 6 must be dismissed with prejudice.

Count 7 – Fourth and Fourteenth Amendment

Sim brings count 7 pursuant to section 1983, the federal statute providing a right of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. Her underlying constitutional claims are based on the Fourth and Fourteenth Amendments. The Fourth Amendment protects a person's right to be free from unreasonable seizures without probable cause. U.S. Const. amend. IV. The Fourteenth Amendment prohibits a state from depriving a person of life, liberty, or property without due process. U.S. Const. amend. XIV, § 1.

The Fourth Amendment establishes the standards and procedures governing pre-trial detention, *Manuel v. City of Joliet*, ___ U.S. ___, 137 S. Ct. 911, 914 (2017), which apply even after the start of legal process in a criminal case. *Id.* (citing *Albright v. Oliver*, 510 U.S. 266, 274 (1994)). As to the Fourteenth Amendment, there are two parts to its due process guarantees – procedural and substantive. Procedural due process is violated if arbitrary governmental action infringes on a protected interest without procedural safeguards. *People v. Pepitone*, 2018 IL 122034, ¶ 13. A substantive due process claim asserts the deprivation is constitutionally invalid in and of itself, irrespective of the process leading up to it. *Id.*

At this point, it is prudent to address whether the probable cause standard for malicious prosecution is the same as the probable cause standard in the criminal setting, and whether

those are equivalent to the probable cause standard under the Fourth Amendment. The court in *Johnson* explained that probable cause is defined in the criminal setting as "a state of facts that would lead a person of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the person arrested committed the offense charged." *Johnson*, 341 Ill. App. 3d at 72 (quoting *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 348 (1st Dist. 2000)). Sim has not suggested any basis to distinguish the two standards, *i.e.*, "reasonable grounds" to believe an offense has been committed is a weaker standard than an "honest and strong suspicion" that an offense has been committed. This court agrees with the conclusion in *Johnson* that, for all purposes, the standards are equal. 341 Ill. App. 3d at 80.

Sim's third-amended complaint alleges the City violated her Fourth and Fourteenth Amendment rights in two ways: (1) bringing charges against her based on fabricated evidence and a lack of probable cause; and (2) depriving her of liberty until she was able to post bond. As to the first argument, this court's analysis above concluded that Banofsky neither fabricated evidence nor lacked probable cause to bring charges. Those earlier conclusions apply here and drive the independent conclusion that the Des Plaines defendants did not violate Sim's Fourth Amendment protections from seizure absent probable cause.

As to Sim's due process argument under the Fourteenth Amendment, she fails to identify her particular path, but her allegations plainly infer a violation of procedural due process rights. In this case, the record makes plain that the Des Plaines defendants never denied Sim due process. The police report indicates that Sim arrived at the Des Plaines police department on October 12, 2017 at approximately 6:00 p.m. During the next 3½ hours, she met with detectives, refused to waive her Miranda rights, and the State's Attorney reviewed her file for potential felony review. After the State's Attorney denied felony review,

Sim posted bond and the court released her from custody at approximately 9:30 p.m.

Apart from these facts contained in the police report, Sim's third-amended complaint fails to provide any additional allegations identifying alleged constitutional deprivations. For example, there is nothing in the third-amended complaint (or the police report) suggesting the police detained Sim beyond her initial arrest or imposed on her any other pre-trial detention. Those are precisely the facts for which the court in *Mitchell v. City of Elgin* searched. 912 F.3d 1012, 1015-16 (7th Cir. 2019). "We have misgivings about construing a simple obligation to appear in court – a uniform condition of any pretrial release – as a 'seizure' for Fourth Amendment purposes. Converting every traffic ticket into a nascent Fourth Amendment claim strikes us as an aggressive reading of the constitutional text." *Id.* at 1017. The court recognized a pre-trial release might be construed as a seizure for Fourth Amendment purposes, "if the conditions of that release impose significant restrictions on liberty." *Id.* at 1016. Mitchell failed, however, to provide the court with the necessary information, thus a question of fact remained for future resolution. *Id.* at 1017; *see also Harrington v. City of Nashua*, 610 F.3d 24, 32-33 (1st Cir. 2010) ("run-of-the-mill" conditions of pre-trial release, including required attendance in court proceedings, do not constitute Fourth Amendment seizure absent other restrictions) citing *Nieves v. McSweeney*, 241 F.3d 46, 55 (1st Cir. 2001)).

Here, in contrast, this court explicitly gave Sim the opportunity to provide additional facts in the third-amended complaint to clarify how her constitutional rights had been violated. This court went so far as to suggest the type of additional facts that might establish her constitutional claim. Despite that opportunity and direction, Sim's third-amended complaint does not provide any additional information shedding light on a possible constitutional claim. Further, the police report does not indicate the court imposed any conditions on Sim's release after she posted bond. Quite simply, Sim presented to the Skokie courthouse and was unconditionally released on bond 3½

hours later. Objectively, such a typical situation and remarkably quick release cannot rise to the level of a constitutional violation. Count seven must, therefore, be dismissed with prejudice.

Count 8 – Fourth and Fourteenth Amendment

This court's April 20, 2020 memorandum opinion and order dismissed count eight without prejudice so Sim could provide additional facts establishing Moreth's and Mierzwa's violations of her constitutional rights. Sim's third-amended complaint does not, however, include any new allegations on this issue; rather, Sim keeps the title and merely indicates the cause of action is, "(FOR APPEAL ONLY)." Absent any argument supporting the cause of action, Sim appears to have forfeited any appellate argument. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 306, (2000) (appellant who fails to raise issue in circuit court forfeits issue on appeal).

II. Osaka Defendants' Motion to Dismiss

The motion to dismiss filed by the Osaka Defendants is based on the *res judicata* doctrine. The Code of Civil Procedure explicitly authorizes such a motion based on a cause of action "barred by a prior judgment." *See* 735 ILCS 5/2-619(a)(4); *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 20. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). *Res judicata* bars what was actually decided in the first action as well as those matters that could have been decided. *Id.* at 334-35. The underlying policies of the doctrine are to promote judicial economy and protect defendants from the burden of re-litigating essentially the same claim. *Richter*, 2016 IL 119518, ¶ 21 (citing *Hiroshi Hayashi v. Illinois Dep't of Fin. & Prof'l Reg.*, 2014 IL 116023, ¶ 45). For *res judicata* to apply, there must be: (1) a final judgment on the merits rendered by a court of competent jurisdiction, (2) an identity of cause of action, and (3)

an identity of parties or their privies. *Id.* Whether *res judicata* applies is a question of law. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 43.

As to the first requirement, a judgment or order is final if it terminates the litigation and secures the parties' rights, leaving only the judgment's enforcement. *Richter*, 2016 IL 119518, ¶ 24. The second *res judicata* requirement is an identity of the cause of action. Under the transactional test used by Illinois courts, separate claims are considered the same cause of action if they "arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). The third requirement – an identity of parties or their privies – does not require the parties to be identical to be considered the same. *A&R Janitorial v. Pepper Constr. Co.*, 2018 IL 123220, ¶ 19.

In this case, each of the three *res judicata* requirements is met. First, it is uncontested that Judge Mulroy's September 9, 2019 order was a final order. That ruling disposed of the factual and legal issues before the court, established the parties' rights, and left only the judgment to be enforced. Second, there was a singular cause of action based on the same set of operative facts. Each of Sim's claims against the Osaka Defendants arose from their alleged concerted attempt to pin on Sim a theft of money from Dotombori. The Osaka Defendants correctly point out that Sim actually relies on Judge Mulroy's ruling as a springboard to her other claims, including the conspiracy cause of action at the heart of this litigation.

The third element raises a privity issue. It is uncontested that Dotombori, Dae, and Seung are the same parties named in the cases before Judge Mulroy and this court. In this suit are, however, for the first time, Fukuyama and Ryou, two servers at Dotombori. Illinois law is plain that, "to be bound by a prior judgment in an action where it was not a party, the party in the subsequent lawsuit must have been in privity with one of the parties in the prior lawsuit." *See Agolf, LLC v. Village of*

*Arlington Heights*, 409 Ill. App. 3d 211, 220 (1st Dist. 2011) (citing *Holzer v. Motorola Lighting, Inc.*, 295 Ill. App. 3d 963, 972 (1st Dist. 1998)). Privity does not require each party in each lawsuit be the same because this element focuses, instead, on the parties' interests. *Id.* (citing *Purmal v. Robert N. Wadlington & Assocs.*, 354 Ill. App. 3d 715, 722-23 (1st Dist. 2004)). As one court thoroughly explained:

> Privity expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." (Internal quotation marks omitted.) *City of Chicago v. St. John's United Church of Christ*, 404 Ill. App. 3d 505, 513 (2010) (quoting *Purmal*, 354 Ill. App. 3d at 722-23, quoting Restatement of Judgments §83, cmt. a (1942)). Simply put, privity exists between a party to the prior suit and a nonparty when the party to the prior suit "adequately represent[ed] the same legal interests" of the nonparty. (Internal quotation marks omitted.) *People ex rel. Burris v. Progressive Land Developers, Inc.*, 151 Ill. 2d 285, 296 (1992). And, more specific to the instant cause, privity clearly exists between parties who share a mutual or successive relationship in property rights that were the subject of an earlier action. *See Board of Ed. of Sunset Ridge School Dist. No. 29 v. Village of Northbrook*, 295 Ill. App. 3d 909, 919 (1998); *see also St. John*'s, 404 Ill. App. 3d at 513. Ultimately, a nonparty to a prior suit may be bound pursuant to privity if its interests "are so closely aligned to those of a party" in that prior suit that the party was, essentially, a virtual representative of the nonparty. *Purmal*, 354 Ill. App. 3d at 723; accord *St. John*'s, 404 Ill. App. 3d at 513; *see also City of Rockford v. Unit Six of the Policemen's Benevolent & Protective Ass'n*, 362 Ill. App. 3d 556, 563 (2005).

*Agolf*, 409 Ill. App. 3d at 220 (parallel citations omitted).

The record here makes plain that Fukuyama and Ryou were in privity with the other defendants in the prior lawsuit. The testimony in the 17 L 5125 case established Fukuyama and Ryou as servers at Dotombori. They allegedly saw Sim steal money from the tip jar and were aware of the allegedly unusual activities involving the cash register. They suspected Sim was stealing and reported what they saw to Seung and Dae. In addition, the third-amended complaint explicitly alleges that Fukuyama and Ryou, along with the other defendants, fabricated evidence against Sim. TAC, ¶ 2. Fukuyama and Ryou are also alleged to have conspired with Dae and Seung, and later with Badofsky, to have Sim criminally charged with theft. TAC, ¶ 56. The third-amended complaint goes so far as to allege that Judge Mulroy's findings support the "inexorable inference" that Ryou and Fukuyama conspired with Dae and Seung to fabricate evidence against Sim. TAC, ¶ 101.

The record also makes it plain that Fukuyama and Ryou's interests aligned with those of Dae and Seung. The latter two stood to benefit if Sim had been ordered to pay restitution to the restaurant based on her embezzled funds. Similarly, Fukuyama and Ryou stood to benefit since Sim's alleged sticky fingers in the tip jar meant that they, too, would have received a share of Sim's restitution to the restaurant. In sum, the privity requirement of the *res judicata* doctrine is satisfied.

Since the record supports a finding that each of the three *res judicata* requirements has been met, the Osaka Defendants' motion to dismiss must be granted.

Conclusion

Based on the foregoing, it is ordered that:

1. The City of Des Plaines' motion for judgment on the pleadings is granted with prejudice; and

2. The Osaka Defendants' motion to dismiss is granted with prejudice.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075