UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 25th day of May, two thousand eighteen.

Present: ROSEMARY S. POOLER,
RAYMOND J. LOHIER, JR.,
Circuit Judges.
RICHARD J. SULLIVAN, [1]
District Judge.

ROY S. TUCCILLO,

Plaintiff-Appellant,

v. 17-2300-cv

COUNTY OF NASSAU, NASSAU COUNTY POLICE DEPARTMENT, DETECTIVE JOHN R. CAPECE, in his individual and official capacity, DETECTIVE DONALD BITTNER, in his individual and official capacity, POLICE OFFICER WILLARD S. GOMES, in his individual and official capacity, POLICE OFFICERS JOHN DOE 1-10, in their official and individual capacities, NASSAU COUNTY OFFICE OF THE DISTRICT ATTORNEY,

Defendants-Appellees,

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[1] Judge Richard J. Sullivan, United States District Court for the Southern District of New York, sitting by designation.

RICHARD TOBIN,

Defendant.[2]

Appearing for Appellant: Richard Michael Langone, Garden City, N.Y.

Appearing for Appellees: Christi M. Kunzig, Deputy County Attorney (Robert F. Van der Waag, Appeals Bureau Chief, Deputy County Attorney, *on the brief*), *for* Jared A. Kasschau, Nassau County Attorney, Mineola, N.Y.

Appeal from the United States District Court for the Eastern District of New York (Wexler, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Plaintiff-Appellant Roy Tuccillo appeals from a June 29, 2017 judgment entered by the United States District Court for the Eastern District of New York (Wexler, *J.*), dismissing his civil rights suit regarding his arrest following a road rage incident. The district court ruled from the bench at the close of evidence following three days of trial testimony. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

We review de novo a district court's decision to grant judgment as a matter of law at the close of trial, without submitting the case to the jury. *See Cash v. Cty. of Erie*, 654 F.3d 324, 332 (2d Cir. 2011). Such a judgment is only appropriate if, "viewed in the light most favorable to the nonmoving party, the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." *Leopold v. Baccarat, Inc.*, 174 F.3d 261, 267 (2d Cir. 1999); *see also* Fed. R. Civ. P. 50(a).

As relevant here, Tuccillo brought Section 1983 and state law claims of false arrest, malicious prosecution, and abuse of process. His federal and state law claims have substantially the same elements, and thus we consider them together. *See Jenkins v. City of New York*, 478 F.3d 76, 84–85 (2d Cir. 2007) (false arrest); *Dufort v. City of New York*, 874 F.3d 338, 350 (2d Cir. 2017) (malicious prosecution); *Cook v. Sheldon*, 41 F.3d 73, 80 (2d Cir. 1994) (abuse of process). Further, each might be defeated by a finding of probable cause. "The existence of probable cause to arrest constitutes justification and is a complete defense to an action for false arrest." *Jenkins*, 478 F.3d at 84. Similarly, absence of probable cause for prosecution is an element of a malicious prosecution claim, and thus probable cause provides a complete defense to that claim as well. *See Dufort*, 874 F.3d at 351. However, we are careful to note that "[t]he existence ... of probable cause in a malicious prosecution suit is ... determined ... as of the time prosecution is commenced." *Rothstein v. Carriere*, 373 F.3d 275, 292 (2d Cir. 2004). Further, "[t]he probable cause standard in the malicious prosecution context is slightly higher than the standard for false arrest cases." *Stansbury v. Wertman*, 721 F.3d 84, 95 (2d Cir. 2013). In

[2] The Clerk is respectfully directed to amend the caption as above.

Mangino v. Inc. Vill. of Patchogue, we observed that "[t]here has been considerable confusion within our Circuit regarding whether probable cause is a complete defense to a claim of abuse of process under New York law," but declined to resolve the question. 808 F.3d 951, 958 (2d Cir. 2015). New York state courts have subsequently held that probable cause will defeat an abuse of process claim under at least some circumstances. *See Shields v. City of New York*, 35 N.Y.S.3d 330, 331 (1st Dep't 2016).

On appeal, Tuccillo appears to acknowledge that the officers had probable cause sufficient to defeat each of his claims, but argues that probable cause would have dissipated had the officers made further inquiry. However, as we have explained in similar contexts, "it is well-established that a law enforcement official has probable cause to arrest if he received his information from some person, normally the putative victim or eyewitness," and "an officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause." *Panetta v. Crowley*, 460 F.3d 388, 395-96 (2d Cir. 2006) (citations and alteration omitted). Further, Tuccillo points to *Mitchell v. City of New York*, 841 F.3d 72, 78 (2d Cir. 2016), in support of his dissipation theory, but his acceptance of the existence of probable cause renders that case distinguishable, since we there held that the record was insufficient as a matter of law to show probable cause in the first instance.

Tuccillo also notes in closing that the district court engaged in improper credibility assessments. "Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal," *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998), and Tuccillo neglected to develop this argument in any detail. Assuming that it was sufficiently raised, we agree that the district court incorrectly weighed the credibility of witnesses. However, "an appellate court may affirm the judgment of the district court on any ground appearing in the record," *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997), and the existence of probable cause here is sufficient ground to affirm the judgment of the district court.

We have considered the remainder of Tuccillo's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk