

No. 1-11-2707

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LORETTA CAPEHEART,)	Appeal from the Circuit
)	Court of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 11 L 2460
)	
SHARON K. HAHS, LAWRENCE P. FRANK, in)	
their official capacities as Northeastern Illinois)	
University administrators,)	
)	
Defendants,)	
)	
and)	
)	
MELVIN C. TERRELL, individually,)	Honorable
)	Randy A. Kogan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

ORDER

¶ 1 *Held:* Interlocutory appeal was properly filed pursuant to Supreme Court Rule 307(a)(1), and the circuit court abused its discretion in ordering that the litigation be stayed pending resolution of the appeal from a decision in a federal action between the parties.

¶ 2 Defendant, Melvin C. Terrell, brings this interlocutory appeal, pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010), challenging the circuit court's decision to stay litigation brought by the plaintiff, Loretta Capeheart, pending resolution of an appeal in a federal action between the same parties and raising the same claims. For the reasons that follow, we reverse the decision of the circuit court.

¶ 3 The complaint, motions, and supporting documents disclose the following facts pertinent to the issues in this appeal. Capeheart is a tenured associate professor in the Department of Justice Studies at Northeastern Illinois University (NEIU) and has been employed by the university since 2002. Defendant Sharon K. Hahs is the president of NEIU, and defendant Lawrence P. Frank is NEIU's provost.¹ Terrell was employed as the vice president of student affairs at NEIU until his retirement from that position on December 31, 2008.

¶ 4 Capeheart's claims against Terrell are premised on conduct that allegedly occurred during a March 12, 2007, meeting of NEIU's Faculty Council for Student Affairs (Faculty Council), which advises the university's vice president for student affairs and is comprised of several elected faculty members. In March 2007, Capeheart was a member of the Faculty Council, and both Capeheart and Terrell participated in the meeting as part of their professional responsibilities to the university. Capeheart claimed that Terrell defamed her during the meeting by stating that a student had accused her of "stalking." She also claimed that Terrell's defamatory statement was made in retaliation for statements she made during the March 2007 Faculty Council meeting. At that meeting, Capeheart

¹ Hahs and Frank ultimately agreed to stay the proceedings on the single claim against them, and they are not parties to this appeal.

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asked several question of Terrell, who had supervisory responsibility over the campus police, and she criticized the use of campus police to arrest two students who were members of the NEIU Socialists Club, which she advises, while the students were engaged in a peaceful protest against the presence of CIA recruitment personnel on campus.

¶ 5 In March 2008, Capeheart brought suit against Hahs, Frank, and Terrell in the United States District Court for the Northern District of Illinois. Her complaint, as finally amended, consisted of four counts. Count I was directed against Hahs and Frank and asserted a federal claim for violation of her constitutional right to free speech pursuant to the first amendment to the United States Constitution (U.S. Const., amend. I). Counts II and III were directed against Terrell and asserted state claims for defamation *per se* and defamation *per quod*, respectively. Count IV was directed against all three defendants and asserted a state claim for retaliation against the exercise of free speech, as guaranteed under Article 1, section 4, of the Constitution of the State of Illinois (Ill. Const. 1970, art. I, §4). Capeheart sought injunctive relief from Hahs and Frank, who were sued in their official capacities as president and provost of NEIU, respectively. She sought monetary damages from Terrell, who was sued in his individual capacity.

¶ 6 After the denial of his motion to dismiss in March 2010, Terrell answered the three state claims against him and asserted 13 affirmative defenses, including that he was immune from suit based on the provisions of the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2008)). In June 2010, Terrell filed a motion for summary judgment, asserting, *inter alia*, that, based on the provisions in the Act, he was immune from any claims premised on statements made by him during the Faculty Council meeting in March 2007.

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¶ 7 On February 14, 2011, the district court entered summary judgment in favor of Hahs and Frank on Capeheart's federal claim for infringement of her first amendment right to free speech. The court declined to exercise supplemental jurisdiction over the state claims, which were dismissed without prejudice to refile in state court. On February 24, 2011, Capeheart filed a notice of appeal in the United States Court of Appeals for the Seventh Circuit, challenging the district court's entry of summary judgment against her on the federal claim and the decision not to exercise supplemental jurisdiction over the state claims.

¶ 8 On March 4, 2011, Capeheart filed the instant action in the Circuit Court of Cook County. In her complaint, Capeheart reasserted the state claims originally alleged in the federal litigation. All three defendants filed motions to dismiss. Terrell's motion, filed on April 25, 2011, asserted that he was immune from suit under the Act because the defamation and retaliation claims were filed in response to his exercise of his constitutional rights to free speech and participation in government. Capeheart then filed an "Emergency Motion to Stay" the circuit court proceedings pending disposition of the federal appeal. The circuit court ordered briefing on the defendants' motions to dismiss and on Capeheart's motion to stay.

¶ 9 Hahs and Frank subsequently agreed to stay the proceedings on the retaliation claims against them, pending the outcome of the federal appeal. On July 21, 2011, counsel for Terrell and Capeheart appeared and presented argument in favor of their respective motions, but Capeheart's attorney did not present any evidence in support of the motion for a stay. The court deferred its ruling on both motions and continued the hearing in order to review Capeheart's brief in the federal appeal. On August 18, 2011, the circuit court granted Capeheart's motion to stay, without

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explanation, and placed the cause on the "appeal calendar." In addition, the court ordered that Terrell's motion to dismiss was "entered and continued [until] after lifting of stay." The court also denied Terrell's request for a finding that the issue was immediately appealable under Supreme Court Rule 304(a) (eff. Feb. 26, 2010) and refused to certify the question for immediate appeal under Supreme Court Rule 308 (eff. Feb. 26, 2010). This appeal followed.

¶ 10 We initially address Capeheart's argument that this appeal should be dismissed for lack of jurisdiction. Article VI, section 6, of the 1970 Illinois Constitution provides that final judgments may be appealed as a matter of right from the circuit court to the appellate court. Ill. Const. 1970, art. VI, § 6. That constitutional provision also vests the supreme court with the authority to provide for interlocutory appeals, by rule, as it sees fit. Ill. Const. 1970, art. VI, § 6. Except as specifically provided by those rules, the appellate court is without jurisdiction to review judgments, orders or decrees which are not final. *Almgren v. Rush-Presbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210, 642 N.E.2d 1264 (1994). Pursuant to its constitutional authority to provide for appeals from other than final judgments, the supreme court has adopted Rule 307(a)(1), which provides that "[a]n appeal may be taken to the Appellate Court from an interlocutory order of the court: (1) granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010).

¶ 11 In asserting that the appeal should be dismissed, Capeheart contends that the circuit court's interlocutory order does not constitute an injunction and, therefore, is not subject to review under Supreme Court Rule 307(a)(1). We disagree.

¶ 12 When determining whether an order "constitutes an appealable injunctive order under Rule

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307(a)(1) we look to the substance of the action, not its form." *In re A Minor*, 127 Ill. 2d 247, 260, 537 N.E.2d 292, 297 (1989). An injunction has been defined as a " 'judicial process operating in personam and requiring [a] person to whom it is directed to do or refrain from doing a particular thing' " (*In re A Minor*, 127 Ill. 2d at 261 (quoting Black's Law Dictionary 705 (5th ed. 1983)) or as " 'a judicial process, by which a party is required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ, the most common sort of which operate as a restraint upon the party in the exercise of his real or supposed rights' " (*In re A Minor*, 127 Ill. 2d at 261 (quoting *Wangelin v. Goe*, 50 Ill. 459, 463 (1869)). However, orders that are properly characterized as "ministerial" or "administrative" cannot be the subject of an interlocutory appeal because they regulate only the procedural details of the litigation before the court. *In re A Minor*, 127 Ill. 2d at 262. Administrative or ministerial orders "do not affect the relationship of the parties in their everyday activity apart from the litigation, and are therefore distinguishable from traditional forms of injunctive relief." *In re A Minor*, 127 Ill.2d at 262.

¶ 13 In arguing that the stay order is not appealable under Rule 307(a)(1), Capeheart asserts that the stay order was merely administrative and fell within the realm of the circuit court's authority to control the docket of cases pending before it. To support this assertion, she relies primarily on *Burns v. Celotex Corp.*, 225 Ill. App. 3d 200, 202-03, 587 N.E.2d 1092 (1992), and *In re Asbestos Cases*, 224 Ill. App. 3d 292, 297, 586 N.E.2d 521 (1991), both of which held that orders placing litigation on the "deferred docket registry," which had the effect of precluding the defendants from proceeding with motions and discovery in asbestos-related actions, were not subject to review because such orders were ministerial in that they merely regulated the procedural details of the litigation and were

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within the traditional exercise of a court's authority to control its docket. *Burns*, 225 Ill. App. 3d at 202-03; *In re Asbestos Cases*, 224 Ill. App. 3d at 297. We note, however, that both of these actions were placed on the "deferred docket registry" in order to allow the passage of time to determine whether the plaintiffs developed any damages from exposure to asbestos. See *Burns*, 225 Ill. App. 3d at 201; *In re Asbestos Cases*, 224 Ill. App. 3d at 293. Therefore, these cases were decided under a procedural posture that was peculiar to asbestos litigation and radically different from that presented here. Consequently, *Burns* and *In re Asbestos Cases* do not govern the jurisdictional question in the case at bar.

¶ 14 Capeheart also cites *Pekin Insurance Co. v. Bensen*, 306 Ill. App. 3d 367, 714 N.E.2d 559 (1999), and argues that appellate jurisdiction is lacking because Terrell has challenged only a portion of the stay order issued by the circuit court. In *Pekin Insurance Co.*, the trial court granted a stay of arbitration under an insurance policy, but imposed interest on any subsequent arbitration award, as a condition of granting the stay. *Pekin Insurance Co.*, 306 Ill. App. 3d at 370. The plaintiff appealed the interest portion of the order. *Pekin Insurance Co.*, 306 Ill. App. 3d at 370, 375. In finding that Rule 307(a)(1) did not grant jurisdiction to review that portion of the order, this court noted that the plaintiff had not challenged the grant of the stay itself, but only the conditional imposition of interest. *Pekin Insurance Co.*, 306 Ill. App. 3d at 378.

¶ 15 In claiming that Terrell has appealed only a portion of the stay order, Capeheart points to the fact that Hahs and Frank agreed to stay the proceedings on the retaliation claims alleged in Count III, and she asserts that the stay with respect to that count "is unchallenged." This assertion is refuted by the record. Terrell's motion sought dismissal of the entire action against him, including the

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retaliation claim in count III. In the circuit court and on appeal, Terrell has argued that the stay was improper with respect to all claims. The fact that Hahs and Frank acquiesced in the stay does not operate to deprive Terrell of the right to challenge the circuit court's decision, and her reliance on *Pekin Insurance Co.* is entirely misplaced.

¶ 16 This court has repeatedly held that an order ruling on the request for a stay of the trial court's proceedings is considered the equivalent of the grant or denial of an injunction and, therefore, subject to review under Rule 307(a)(1). See *Aventine Renewable Energy, Inc. v. JP Morgan Securities, Inc.*, 406 Ill. App. 3d 757, 759-60, 940 N.E.2d 257 (2010); *Rogers v. Tyson Foods, Inc.*, 385 Ill. App. 3d 287, 288, 895 N.E.2d 97 (2008); *Allianz Insurance Co. v. Guidant Corp.*, 355 Ill. App. 3d 721, 729-30, 839 N.E.2d 113 (2005); *Disciplined Investment Advisors, Inc. v. Schweih's*, 272 Ill. App. 3d 681, 691, 650 N.E.2d 578 (1995); *Chicago City Bank & Trust Co. v. Drake Intern., Inc.*, 211 Ill. App. 3d 850, 854-55, 570 N.E.2d 765 (1991). Though the supreme court has not expressed an opinion as to the merits of these decisions, it has cited one such appellate decision with approval and has specifically recognized that they reflect a policy of broadly construing the meaning of the term "injunction." See *Bohn Aluminum & Brass Co. v. Barker*, 55 Ill. 2d 177, 180-81, 303 N.E.2d 1 (1973) (citing *Valente v. Maida*, 24 Ill. App. 2d 144, 149, 164 N.E.2d 538 (1960)); *In re A Minor*, 127 Ill. 2d at 260-61 (citing *Valente*, 24 Ill. App. 2d at 149, and *Wiseman v. Law Research, Inc.*, 133 Ill. App. 2d 790, 791, 270 N.E.2d 77 (1971)).

¶ 17 In this case, the circuit court's order prevented Terrell from obtaining a decision on the motion to dismiss the claims against him and, thereby, impacted the adjudication of the underlying factual and legal issues. As such, it did more than merely regulate the procedural aspects of the

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litigation and effectively operated as a restraint upon Terrell's exercise of his rights. See *Allianz Insurance Co.*, 355 Ill. App. 3d at 731. In accordance with the long-standing precedent cited above, we find that the circuit court's order is injunctive in nature and cannot be fairly characterized as "ministerial" or "administrative." Consequently, we conclude that we have jurisdiction over this appeal pursuant to Supreme Court Rule 307(a)(1).

¶ 18 Turning to the merits of this appeal, we next consider whether the circuit court erred in granting Capeheart's motion to stay the proceedings pending resolution of her federal appeal. Section 2-619(a)(3), which is a procedural device designed to avoid duplicative litigation, allows a defendant to move for a dismissal or a stay when there is "another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2008); *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 852-53, 932 N.E.2d 520 (2010). The decision to grant or deny a motion to stay will not be overturned on appeal absent an abuse of discretion. *Estate of Bass v. Katten*, 375 Ill. App. 3d 62, 67, 871 N.E.2d 914 (2007). A circuit court abuses its discretion when it has "acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted. [Citations.]" (Internal quotation marks omitted.) *Aventine Renewable Energy, Inc.*, 406 Ill. App. 3d at 760. An abuse of discretion will be found when a circuit court ignores statutory language governing the relevant issue. See generally *Cooper v. Cooper*, 102 Ill. App. 3d 872, 875, 430 N.E.2d 379 (1981) (holding that it is an abuse of discretion to consider only the father's income and to ignore the statutory language when determining the issue of child support).

¶ 19 Generally, in determining whether dismissal or issuance of a stay is proper under section 2-

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619(a)(3), a court should consider the following factors: (1) comity; (2) the prevention of multiplicity, vexation, and harassment; (3) the likelihood of obtaining complete relief in a foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum. *Whittmanhart*, 402 Ill. App. 3d at 853; *Combined Insurance Co. v. Certain Underwriters at Lloyd's London*, 356 Ill. App. 3d 749, 754, 826 N.E.2d 1089 (2005). We find, however, that these factors are not determinative here because the terms of the Act take precedence.

¶ 20 The Act aims to protect defendants from “Strategic Lawsuits Against Public Participation” (SLAPPs), which seek to prevent citizens from exercising their constitutional rights, such as the right to petition the government, or to punish those citizens who have done so. See 735 ILCS 110/5 (West 2008); *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 630, 939 N.E.2d 389 (2010); *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013, 1020, 936 N.E.2d 1198 (2010). In furtherance of this purpose, the Act provides that it is the public policy of Illinois that “the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence.” 735 ILCS 110/5 (West 2008). In addition, the Act articulates four explicit goals that are in the public interest: (1) to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; (2) to protect and encourage public participation in government to the maximum extent permitted by law; (3) to establish an efficient process for identification and adjudication of SLAPPs; and (4) to provide for attorney's fees and costs to prevailing movants. 735 ILCS 110/5 (West 2008).

¶ 21 The Act seeks to extinguish SLAPPs and protect citizen participation by immunizing citizens

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from civil actions based on acts made in furtherance of a citizen's free speech rights or right to petition government. 735 ILCS 110/15 (West 2008); *Wright Development Group, LLC*, 238 Ill. 2d at 632. In addition, the Act establishes an expedited legal process to dispose of SLAPPs before both the trial court and appellate court. 735 ILCS 110/20 (West 2008); *Wright Development Group, LLC*, 238 Ill. 2d at 632. This expedited procedure requires the circuit court to conduct a hearing and issue a decision within 90 days after notice of a motion to dispose of a claim on the ground that the conduct underlying the claim was in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government. 735 ILCS 110/20(a) (West 2008).

¶ 22 In this case, Terrell's motion to dismiss under the Act was filed on April 25, 2011, and Capeheart received notice of the motion, by messenger, on that date. In accordance with section 20(a) of the Act, the circuit court was obligated to conduct a hearing and rule on Terrell's motion before July 25, 2011.² On July 21, 2011, the court held a hearing, at which counsel for Terrell presented argument in favor of the motion to dismiss. Capeheart's attorney also appeared and presented argument, but did not present any evidence in support of her motion to stay. Following the arguments of counsel, the circuit court continued the hearing in order to review the briefs filed by Capeheart in the federal appeal. The court granted Capeheart's motion to stay on August 18, 2011, which was 115 days after Capeheart received notice of Terrell's motion to dismiss under the Act. Thus, the record affirmatively demonstrates that the circuit court ignored the statutory mandate

² The 90-day time period expired on July 24, 2011. However, because that date fell on a Sunday, the time limitation for the circuit court's decision on Terrell's motion expired on the following day. See 5 ILCS 70/1.11 (West 2008).

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to rule on Terrell's motion within 90 days. The failure to abide by the expedited procedure specified in the Act constitutes an abuse of discretion. See *Cooper*, 102 Ill. App. 3d at ___875.

¶ 23 In reaching this conclusion, we note that the circuit court offered no compelling reason for deferring ruling on the motion until after the federal appeal was resolved. Though the court expressed its desire to review Capeheart's brief in the federal appeal, there was no obstacle to preclude a decision on Terrell's motion because no substantive judgment had been entered on the state claims in that litigation.

¶ 24 We are also unpersuaded by Capeheart's argument that this conclusion is not undermined by the fact that previous cases did not impose "consequences" for the failure to rule within 90 days. See *Wright Development Group, LLC*, 238 Ill. 2d at 626-27 (reflecting that the circuit court ruled 98 days after the motion was filed); *Sandholm v. Kuecker*, 405 Ill. App. 3d 835, 843, 942 N.E.2d 544 (2010) (reflecting that the circuit court ruled 160 days after the motion was filed). There is no indication that the propriety of extending the deadline for a decision under the Act was raised in those cases, and neither case involved a request for an indefinite stay until the resolution of an appeal in related litigation. Significantly, the supreme court has specifically recognized that the expedited procedure for disposing of motions to dismiss is one of the primary goals of the Act. *Wright Development Group, LLC*, 238 Ill. 2d at 632-33. Thus, we conclude that the circuit court abused its discretion in granting the stay and refusing to rule on Terrell's motion to dismiss under the Act.

¶ 25 Moreover, even if the terms of the Act did not compel this result, we do not believe that the issuance of the stay can be justified under the facts of this case. As Terrell correctly argues, section 2-619(a)(3) is a statutory provision by which a "defendant" or "any other party against whom a claim

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is asserted" may seek dismissal or other appropriate relief, such as a stay. See 735 ILCS 5/2-619(a), (b) (West 2008). In this case, Capeheart is the plaintiff, and there are no counterclaims pending against her. As the plaintiff, she made the deliberate decision to bring this action in the circuit court of Cook County while the ruling of the federal district court was being appealed. Thus, it was her choice to pursue the state-law claims simultaneously in both state and federal court. As a named defendant, Terrell was entitled to proceed on his motion to dismiss the claims against him based on the provisions of the Act. Capeheart has not pointed to any statutory language or other authority indicating that section 2-619(a)(3) provides an avenue by which a plaintiff could request a stay of the litigation that she initiated.

¶ 26 In addition, the mere fact that the state and federal actions involved the "same cause" and "same parties" did not require the circuit court to automatically grant a stay under section 2-619(a)(3). See *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447, 493 N.E.2d 1045 (1986). Rather, the decision to grant or deny defendant's section 2-619(a)(3) motion is discretionary with the trial court. *Kellerman*, 112 Ill. 2d at 447. The party requesting the stay must prove by clear and convincing evidence that a stay of the proceedings outweighs the potential harm to the party against whom it is operative. *Certain Underwriters at Lloyd's, London v. Boeing Co.*, 385 Ill. App. 3d 23, 36, 895 N.E.2d 940 (2008). Consequently, the party seeking the stay must "make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. [Citations.]" (Internal quotation marks omitted.) *Certain Underwriters at Lloyd's, London*, 385 Ill. App. 3d at 36. Here, although Capeheart's attorney argued in favor of the motion to stay, no evidence was presented to

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support a finding that she would suffer hardship or inequity in being required to go forward with the litigation. Also, as noted above, the circuit court expressed no finding with regard to hardship or inequity and granted the motion for a stay without explanation.

¶ 27 For the foregoing reasons, circuit court's order staying the proceedings is reversed, and the cause is remanded for further proceedings consistent with the terms of the Act.

¶ 28 Reversed and remanded.