No. 1-09-2269



FIFTH DIVISION
January 21, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| KRISTIN BIONDICH, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County |
| | ) | |
| v. | ) | No. 07 L 5031 |
| | ) | |
| NBC SUBSIDIARY (WMAQ-TV, INC.), PETER KARL, | ) | Honorable |
| | ) | Kathy M. Flanagan, |
| Defendants-Appellees. | ) | Judge Presiding. |

JUDGE EPSTEIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgement.

**ORDER**

*HELD*: While plaintiff did not state false light or defamation claims in her fourth amended complaint, she minimally stated a claim for intrusion upon seclusion.

Plaintiff Kristin Biondich appeals the trial court's dismissal of her Fourth Amended Complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-615 (West 2008). Plaintiff claimed intrusion upon seclusion, false light, and defamation. For the reasons stated below, we reverse the trial court's dismissal of plaintiff's intrusion upon seclusion claim; affirm the dismissal of plaintiff's remaining claims; and remand the cause for proceedings consistent with this opinion.

BACKGROUND

In May 2006, defendants NBC Subsidiary (WMAQ-TV), Inc. and Peter Karl produced and televised a "cold case" news segment on the unsolved murder of plaintiff's fiancé, Henry Saberniak. Henry was murdered in September 2002, a few miles from his home. Defendants reported, *inter alia*, that on July 4, 2002, Henry, "52 [and] troubled with arthritis," announced his engagement to plaintiff, "34 [and] troubled with money." Plaintiff's mother allegedly brokered the marriage, seeking to obtain for her daughter money in exchange for bearing children. Two days after Henry announced his engagement, he named plaintiff as the residual beneficiary of his $250,000.00 savings account. On the first business day after Henry's funeral, plaintiff and her mother went to the bank to withdraw Henry's money because "she was going to lose her house."According to defendants, plaintiff was with Henry on the night of his murder, and although she told the police he was murdered when he went off alone looking for cans, a police detective claimed the police wanted to reinterview her due to some inconsistencies in her initial statement. The detective also said he believed Henry had been led to his death by "someone he was comfortable with somebody that he didn't feel threatened by," a statement followed immediately by a picture of Henry and plaintiff embracing. The report concluded that the police had identified several people of interest in Henry's murder, including plaintiff, and that the police were looking for any information from the public leading to Henry's "killer or killers."

On May 15, 2007, plaintiff, who took issue with the broadcast and defendants' attempt to interview her, filed the instant lawsuit claiming defamation and invasion of privacy. Defendants moved to dismiss plaintiff's claims pursuant to sections 2-615 and 2-619, but subsequently elected,

at the trial court's direction, to proceed on their section 2-615 motion only. The trial court granted the motion, dismissing plaintiff's original complaint for failure to state a claim for defamation or invasion of privacy claim. Plaintiff's amended complaint reasserting the same claims was dismissed, as were her second and third amended complaints. In dismissing the fourth complaint, the trial court wrote:

> "The Third Amended Complaint is the Plaintiff's fourth attempt to state a cause of action in defamation and false light invasion of privacy. On this fourth attempt, however, the Plaintiff, still fails to set forth the specific, relevant facts necessary to allege each element of the causes of action pled. The plaintiff adds a claim for defamation *per quod* co-mingled into her *per se* defamation claim, however, both her claim for defamation and for false light continue to be conclusory and fail to state a cause of action. In addition, the Court notes that the Plaintiff has re-alleged her entire count I into count II, also co-mingling causes of action. The Plaintiff has again failed to cure prior deficiencies and both counts do not state the causes of action alleged therein. As this is the Plaintiff's fourth attempt and it appears that she is not much closer to stating her claim as she was in the original complaint, the Court will allow her only one final attempt to re-plead."

The trial court found plaintiff's fifth complaint lacking, and dismissed it with prejudice. Plaintiff did not seek to replead and now appeals claiming her Fourth Amended Complaint, in which she claims intrusion upon seclusion (count I), false light (count II), defamation *per se* (count III), and defamation *per quod* (count IV), is sufficient.

## ANALYSIS

We should note as an initial matter that although the trial court directed defendants to choose between a section 2-615 or 2-619 motion to dismiss, section 2-619.1 of the **Code of Civil Procedure** expressly allows litigants to combine motions under both sections, provided the combined motion is in parts, with each part specifying on what section it is based (either 2-615 or 2-619), limited only to that section, and "clearly show[ing] the points or grounds relied on." 735 ILCS 5/2-619.1 (West 2008). In any event, as plaintiff's claims were dismissed pursuant to section 2-615 only, we will limit our review accordingly, under the standard of de novo review. ***Marshall v. Burger King Corp***., 222 Ill. 2d 422, 429 (2006).

A section 2-615 motion to dismiss requires the court to determine "whether the complaint sufficiently states a cause of action." *Jespersen v. 3M*, 288 Ill. App. 3d 889, 892 (1997). The court should "not consider the merits of the claim. [Rather] [a]ll well-pleaded facts and reasonable inferences that could be drawn from those facts are accepted as true [citation], but not conclusions of law or conclusions of fact unsupported by allegations of specific facts [citation]." *Id*. The court should "construe the allegations in the complaint in the light most favorable to the plaintiff." Marshall, 222 Ill. 2d at 429. "Unless it appears to a certainty that the plaintiff is entitled to no relief on the provable stated facts, the complaint must be sustained." *Greene v. Gust*, 26 Ill. App. 2d 2, 6 (1960). Stated another way, where "sufficient facts are contained in the pleadings which, if established, could entitle the plaintiff to relief," dismissal is inappropriate. Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 488 (1994).

### A. Plaintiff Stated an Intrusion Upon Seclusion Claim

"[A] cause of action for invasion of privacy may be stated for the unreasonable intrusion upon the

seclusion of another." Melvin v. Burling, 141 Ill. App. 3d 786, 789 (1986).

> "In order to state such a cause of action, the facts which must be alleged are (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion must be offensive or objectionable to a reasonable man; (3) the matter upon which the intrusion occurs must be private; and (4) the intrusion causes anguish and suffering." *Id.*

This tort requires an intrusion that "is not only offensive, but *highly* offensive to a reasonable person." (Emphasis in original.) *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1030-31 (2002).

> "The examples provided as forming the basis for the tort of intrusion into the seclusion of another include the following acts: invading someone's home; an illegal search of someone's shopping bag in a store; eavesdropping by wiretapping; peering into the windows of a private home; and persistent and unwanted telephone calls." *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 416-17 (1989);

Restatement (Second) of Torts § 652B cmt. b (1977) ("The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home."). Plaintiff has alleged here that in May 2006:

> "8. Peter Karl or his workers knocked on the door to the Biondich residence.
>
> 9. Patricia Biondich answered the door and opened the door.
>
> 10. Peter Karl entered the door and barged into the apartment.
>
> 11. Peter Karl started asking Patricia Biondich questions and conducted an

interview of Patricia Biondich.

12. At this time, Plaintiff was in her bed in her bedroom.

13. Sometime later, Plaintiff awoke from her bed to use the bathroom and exited her bedroom.

14. Plaintiff entered the hallway and prior to entering the bathroom noticed that people were in the front area of the apartment.

15. Plaintiff approached the front area to find out what was happening and took a seat at the dining table because she was sleepy.

16. Peter Karl then stepped toward Plaintiff and stuck a microphone in front of her face.

17. Plaintiff told Peter Karl that she did not want to be interviewed.

18. Peter Karl stuck a microphone toward her and she stated, 'I don't wanna go on.'

19. Plaintiff then got up to walk away from Karl.

20. Peter Karl did not stop filming or recording after she stated she did not want to go on.

21. Rather, Peter Karl, a man of much larger stature than the female Plaintiff, got up and then followed her with the microphone in the home and continued filming.

22. Peter Karl persisted in his attempt to film her in her home after she sat up and walked away from him.

23. Peter Karl remained in the house for sometime and continued to ask questions after he was told that she did not [w]ant to answer his questions.

24. Peter Karl left after Patricia Biondich indicated that she would call the police if he did not leave.

25. Defendant used the images of Plaintiff in her home without her consent to broadcast those images on television and the Internet.

26. Defendant's act of filming a woman in her home without her consent while she had just awaken is highly offense to a reasonable person.

27. It was highly offensive for Peter Karl to continue to pursue an interview of Plaintiff in her home when she stated, "she did not want to go on."

28. It was highly offensive to broadcast images of Plaintiff taken of her in her home without her consent.

29. It was highly offensive for Peter Karl to attempt to interview Plaintiff in her home without a prior request or without her consent.

30. Plaintiff suffered loss of normal life and mental anguish as a proximate result of Defendant's intrusive and offensive conduct.

31. Plaintiff has lost her normal life as a result of Defendant's conduct and intrusion because she feels less secure in her home.

32. Plaintiff suffered mental anguish as a result of Defendant's conduct and intrusion in the form of loss of sleep and continued headaches." Fourth Am. Compl. ¶¶ 8-32.

These allegations state a claim for intrusion upon seclusion. It is not unreasonable to expect privacy, that is, to expect to be left alone, in one's home. That plaintiff's mother, Patricia Biondich, may have initially allowed defendants into their home (something that is uncertain on the face of the complaint) does not mean defendants were free to record *plaintiff* over her objection. There are sufficient facts provided in plaintiff's complaint from which a juror *could* reasonably conclude, which is all that is required to prevail against a section 2-615 motion to dismiss, that defendants' unauthorized recording of plaintiff in her home, over her voiced protests, was highly offensive.

As for defendants' continued attempts to interview plaintiff, we cannot say at this stage whether or not that conduct was offensive, as we do not know the full extent of plaintiff's and defendants' behavior. Plaintiff has alleged that she told Peter Karl that she did not want to be interviewed, that he "persisted in his attempt to film her in her home after she sat up and walked away from him"; that he "remained in the house for sometime and continued to ask questions after he was told that she did not [w]ant to answer his questions"; and that he only left after plaintiff's mother threatened to call the police. Id. at ¶¶ 22-24. What we do not know, however, is the full extent and duration of defendants' persistence, as well as plaintiff's demeanor during the attempts to interview her. Until those facts are known, it is impossible to say with certainty whether defendants' conduct was or was not offensive.

> "In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. [Citation.] We also construe the allegations in the complaint in the light most favorable to the plaintiff. [Citation.] Given these standards, a cause of action should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be

proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009).

That is not the case here. Plaintiff has pled just enough facts from which a reasonable juror could conclude that defendants' conduct was highly offensive. She has also pled anguish and suffering. That is sufficient to state a claim for intrusion upon seclusion. We reverse the trial court's dismissal of count I.

B. Plaintiff Did Not State a False Light Claim

"To state a case for the 'false light' variety of invasion of privacy, the plaintiff must allege that: (1) the defendant's actions placed the plaintiff in a false light before the public; (2) the false light would be highly offensive to a reasonable person; and (3) the defendant acted with actual malice, that is, with knowledge that the statements were false or with reckless disregard for whether the statements were true or false." *Duncan v. Peterson*, 359 Ill. App. 3d 1034, 1047 (2005).

We need not determine whether plaintiff sufficiently pled all three elements here, for she clearly failed to plead actual malice, alleging only:

"35. Defendants published information about Biondich that was false and placed her in a false light that is highly offensive to a reasonable person, and is published in reckless disregard of whether the information was false or would place the person in a false light.

* * *

44. Defendants acted with malice in that Defendant knowingly portrayed Plaintiff in a false light and had knowledge of the light that Plaintiff would

be placed in the video and article." Fourth Am. Compl. ¶¶ 35, 44.

These conclusory allegations, which lack any supporting facts, are insufficient. We affirm the trial court's dismissal of count II.

C. Plaintiff Did Not State a Claim for Defamation Per Se

"To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. [Citation.] A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him. [Citation.] A statement is defamatory *per se* if its harm is obvious and apparent on its face. [Citation.] In Illinois, there are five categories of statements that are considered defamatory *per se:* (1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication." *Green v. Rogers*, 234 Ill .2d 478, 491-92 (2009).

Plaintiff claims here that defendants' broadcast imputes she is a prostitute and a murderer. We disagree.

In considering a section 2-615 motion to dismiss a defamation *per se* claim, the court must accept as true the facts alleged in the complaint, including the defendant's

> publication of a statement. ***The court is not, however, required to accept the plaintiff's interpretation of the disputed statement as defamatory per se.*** The meaning of the disputed statement is not a fact that can be alleged and accepted as true. Thus, the preliminary construction of the statement 'is properly a question of law to be resolved by the court in the first instance.' *Chapski,* 92 Ill.2d at 352, 65 Ill. Dec. 884, 442 N.E.2d 195. In construing the statement under the innocent construction rule, the court must 'give the allegedly defamatory words their natural and obvious meaning' and interpret them 'as they appeared to have been used and according to the idea they were intended to convey to the reasonable [viewer].' " (Emphasis added.) *Tuite v. Corbitt*, 224 Ill. 2d 490, 510 (2006).

We have reviewed defendants' broadcast and do not agree that it imputes plaintiff is either a prostitute or a murderer. A brokered marriage is not prostitution, and while the broadcast clearly imputes plaintiff is a *suspect* in her fiance's murder, it does not expressly accuse her of the crime. The broadcast can reasonably be construed as merely inviting the viewer to conclude that plaintiff *may* have been involved. Suspicion of murder is not an accusation of murder. See *Trembois v. Standard Ry. Equipment Manufacturing Co.*, 337 Ill. App. 35, 43-44 (1949) (allegedly false statements "that plaintiff was 'mixed up in a rape charge,' that 'the police arrested him for jumping bond on the rape charge,' that 'he was arrested for supposedly jumping a bond in connection with rape,' that 'he was arrested for rape,' and 'was picked up by the police,' " found not to be defamatory because they "do not impute the commission of the crime of rape or state that he is a rapist. Arrest is no evidence of guilt. A charge that he was arrested on a rape charge does not say that he is guilty

of rape."). Plaintiff's defamation *per se* claim fails. We affirm the trial court's dismissal of count III.

D. Plaintiff Did Not State a Claim for Defamation Per Quod

> "To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. [Citation.] A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him." *Green*, 234 Ill. 2d at 491.

"For defamatory *per quod* statements, extrinsic facts are required to explain their defamatory meaning." *Quinn v. Jewel Food Stores*, 276 Ill. App. 3d 861, 869 (1995). "Loosely translated, *per quod* means 'with explanation.' [Citation.] In order to prevail, a plaintiff must plead the defamatory meaning of ***otherwise ambiguous words*** and special damages." (Emphasis added). *Heerey v. Berke*, 188 Ill. App. 3d 527, 532 (1989).

> "The innocent construction rule does not apply because the whole point of a per quod defamation action is to establish the defamatory character of a statement otherwise innocent on its face. [Citation.] Where the extrinsic facts are insufficient to reasonably support the defamatory meaning plaintiff urges, dismissal of the complaint is in order." Quinn, 276 Ill. App. 3d at 869.

The gist of plaintiff's claim here is that defendants falsely portrayed her as a prostitute, a woman with financial troubles willing to participate in a shotgun brokered marriage and murder. Plaintiff does not, however, allege any extrinsic facts supporting the defamatory meaning she ascribes to the statements about her alleged

brokered marriage or financial troubles. While she claims a co-worker began spreading rumors that she was a murderer, plaintiff does not tie that allegation to defendants' broadcast. Plaintiff's factual allegations do not demonstrate that defendants' broadcast was actually defamatory. We affirm the trial court's dismissal of count IV.

## CONCLUSION

Plaintiff stated a claim only for intrusion upon seclusion. We reverse the trial court's dismissal of count I of plaintiff's Fourth Amended Complaint and affirm the dismissal of plaintiff's remaining counts. This cause is remanded for proceedings consistent with this opinion.

Affirmed in part and reversed in part; cause remanded.