

FIRST DIVISION
March 21, 2011

No. 1-09-2984

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

DONNA NOVICKAS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 07 L 6193
)	
PROVISO TOWNSHIP HIGH SCHOOL)	
DISTRICT 209, <i>ET AL.</i> ,)	Honorable
)	Thomas P. Quinn,
Defendants-Appellees.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hall and Justice Hoffman concurred in the judgment.

ORDER

Held: The dismissal of plaintiff's complaint alleging violations of the School Code and defamation was affirmed where plaintiff failed to plead sufficient facts to state a cause of action.

Plaintiff, Donna Novickas, brought suit against her employer, Proviso Township High School District 209 (District), and various individual employees and officers (individual defendants) of the District in their official and personal capacity alleging improper reduction of her salary in violation of sections 24-11 and 24-12 of the School Code (105 ILCS 5/24-11, 24-12 (West 2006)) and defamation. Plaintiff's initial and first-amended complaints were the subject of motions to dismiss.

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This appeal is from the dismissal with prejudice of her second-amended complaint at law (complaint) pursuant to section 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2008)) and order denying her motion to reconsider. We affirm the dismissal of plaintiff's complaint with prejudice and the denial of her motion to reconsider.

I. Background

In count I, plaintiff alleged that, on and before June 1, 2006, the District employed her as director of state and federal programs. On June 1, 2006, the District removed her as director of state and federal programs and placed her in a classroom as a classroom teacher on a permanent basis. In May 2007, the District decreased her salary from \$128,370 to \$51,847. Plaintiff contended the reduction in pay without sufficient prior notice and a hearing violated sections 24-11 and 24-12 of the School Code (105 ILCS 5/24-11, 24-12 (West 2006)). Plaintiff sought damages against the District in the amount of her decreased pay for the 2007 through 2008 school year.

In counts II and III, plaintiff alleged that, in her position as director of state and federal programs, she had been solely responsible for "dealing with" the District's grants of money. Plaintiff alleged that, during a June 19, 2006, meeting of the Board of Education for the District, one of the individual defendants¹ made the following comment in order to maliciously and wrongfully injure her and bring her into public disgrace and scandal:

“[G]rants had been ‘a problem area under Libka. A multi-million dollar federal grant was misappropriated requiring District 209 to repay the money. And District 209 lost at least one

¹Plaintiff does not know which defendant made the comment, as she alleges that the comment was made by defendant Emanuel Welch, the District's president, and "in the alternative," that the comment was made by each of the other defendants.

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automatic grant by not filing the required paperwork before the deadline.’ ”

The same individual defendant repeated the comment to Carl Nyberg, who is not named in this suit. Mr. Nyberg published the comment on his internet blog. The relevant portion of the blog, as set forth in an exhibit to the complaint, states:

"Kyle Hastings is the mayor of Orland Hills and the Democratic State Central Committeeman for Illinois' Thirteenth Congressional District ***.

And Hastings draws a six-figure paycheck from District 209. Under CEO Robert Libka[,] Hastings was all but invisible. He was in some photo shoots. And when his biggest program--summer school--had problems Hastings was on vacation. See Forest Park Review (Seth Stern).

* * * [P]eople speculated Hastings wasn't pulling a full 40 hour work week at District 209 under Libka.

To his credit Stan Fields has given Hastings some specific duties, including managing grants. ~~This was a problem area under Libka. A multi-million dollar federal grant was misappropriated requiring District 209 to repay the money. And District 209 lost at least one automatic grant by not filing the required paperwork by the deadline.~~ [UPDATE: I am researching these allegations further. At this point it seems like the grant information originally posted is incorrect.]" (Overstricken and bolded text in original).

Plaintiff alleged that defendant's comment regarding the alleged misappropriation and losing of grants, and the subsequent publishing of the comment in Mr. Nyberg's blog, had defamed her and injured her reputation and good name. Plaintiff contended the defamatory remarks had prevented

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her from securing new employment and caused her to suffer "tremendous damages."

The trial court granted defendants' joint motion to dismiss pursuant to section 2-619 of the Code and dismissed the complaint with prejudice. Plaintiff filed a motion to reconsider the dismissal order that the court denied. Plaintiff filed this timely appeal.

II. Analysis

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by proper extrinsic submissions that serve to defeat the claim. *Krilich v. American National Bank and Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569-70 (2002). On the other hand, a motion to dismiss under section 2-615 admits all well-pleaded facts but challenges the sufficiency of the complaint. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill.2d 463, 473 (2009). A defendant may raise an affirmative defense, such as privilege, in a section 2-619 motion. See generally *Krueger v. Lewis*, 342 Ill. App. 3d 467, 473 (2003). However, "[a]n affirmative defense may be raised in a section 2-615 motion where the defense is 'established by the facts apparent on the face of the complaint' and no other facts alleged in the complaint negate the defense." (Emphasis omitted.) *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill.2d 284, 292 (2010) quoting *3 R. Michael*, Illinois Practice § 27.2 at 492 (1989). We review an order granting a motion to dismiss under section 2-615 or 2-619 *de novo* and accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of plaintiff as the non-moving party to determine whether a cause of action can be maintained. *Pielet v. Hiffman*, No. 1-09-2440, slip op. at 9-10 (Ill. App. Jan. 20, 2011).

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Defendants moved to dismiss count I, arguing sections 24-11 and 24-12 of the School Code are inapplicable to both plaintiff's transfer from director of state and federal programs to teacher and her later reduction in pay. Defendants also argued that her defamation claims fail because defendants are protected by absolute privilege and the alleged statement and blog do not amount to defamation. In support of their motion, defendants submitted only a copy of Mr. Nyberg's blog, which was different from the one attached to the complaint, and his biographical information found on the blog. However, this material was not authenticated, and defendants did not rely on this material in arguing plaintiff had failed to sufficiently allege a violation of the School Code, or that the defamation claims were protected by privilege or not defamatory as to plaintiff. In essence, defendants' joint motion attacked the sufficiency of the allegations and raised affirmative defenses that defendants believed were apparent on the face of the complaint. Defendants raised similar arguments in successfully moving to dismiss plaintiff's first-amended complaint in a combined section 2-615 and 2-619 motion. We first note that defendants' challenges to plaintiff's complaint, particularly the arguments as to count I, would have been more appropriately raised in a section 2-615 motion, as they may be determined by an examination of the complaint only. However, we will decide the merits of this appeal. Any incorrect designation of the motion to dismiss has not caused prejudice to plaintiff and the standard of review under either section is the same. See *Wallace v. Smyth*, 203 Ill.2d 441, 447 (2002). We will consider the motion as having been brought and decided under section 2-615.

A. Count I - School Code

At issue here are the provisions of the School Code relating to teacher tenure. 105 ILCS 5/24-11, 24-12 (West 2006). The purpose of enacting the teacher tenure provisions "was to improve

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the school system by ensuring for teachers of experience and ability a continuous service and a rehiring based on merit and not on partisan politics or capricious reasoning.” *Wood v. North Wamac School District No. 186*, 386 Ill. App. 3d 874, 876 (2008). Section 24-11 provides:

"Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal ***." 105 ILCS 5/24-11 (West 2006).

Section 24-11 defines teacher as "any or all school district employees regularly required to be certified under laws relating to the certification of teachers." 105 ILCS 5/24-11 (West 2006). As to transfers and reduction in salary, section 24-11 provides:

"Contractual continued service status shall not restrict the power of the board to transfer a teacher to a position which the teacher is qualified to fill or to make such salary adjustments as it deems desirable, but unless reductions in salary are uniform or based upon some reasonable classification, any teacher whose salary is reduced shall be entitled to a notice and a hearing as hereinafter provided in the case of certain dismissals or removals." 105 ILCS 5/24-11 (West 2006).

Section 24-11 by its plain terms is applicable only under limited circumstances. Plaintiff has not pleaded sufficient facts to establish she is entitled to any of the rights and protections set forth in section 24-11. This provision states that a teacher attains contractual continued service after being employed for two consecutive school terms. Defendants argue that plaintiff can not be considered a teacher as defined in this section when she held the position of director of state and federal programs. Plaintiff maintains that, while director, she was required to be certified and was certified

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as set forth in the definition of teacher in section 24-11. However, there were no allegations in the complaint as to any certifications attained by plaintiff. Plaintiff does not set forth a basis for showing that she falls within the definition of teacher during her employment with the District as alleged in the complaint. Another fundamental flaw of the complaint is the lack of factual allegations establishing plaintiff's length of continued service with the District and, thus, she has not sufficiently alleged that the tenure provisions of section 24-11 are applicable to her claims. Finally, even if plaintiff fell within the definition of teacher and attained tenure, plaintiff has not alleged a basis for finding she was entitled to notice and a hearing for her reduction in pay under section 24-11. There are no allegations that her salary reduction was not uniform or not based upon some reasonable classifications as required by the express language of the statute. Her arguments on appeal, that the District was involved in "chicanery," are based on allegations not pleaded in her complaint and cannot be considered. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 723 (2007).

Plaintiff has not presented any arguments on appeal that count I stated a claim under section 24-12. We hold that she has forfeited any arguments of error in the dismissal of count I under this statute. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006)

We affirm the dismissal of count I.

B. Counts II and III - Defamation

An overview of the law of defamation is helpful to our analysis of counts II and III. To sufficiently state an action for defamation, a plaintiff must set forth facts showing that defendant made a false statement about the plaintiff and made an unprivileged publication of that statement to a third-party that caused damages. *Green v. Rogers*, 234 Ill.2d 478, 491 (2009). Generally, a

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statement that “tends to harm a person’s reputation to the extent that it lowers that person in the eyes of the community or deters others from associating with that person” is defamatory. *Tuite v. Corbett*, 224 Ill.2d 490, 501 (2006). Statements may be considered defamatory *per se* or *per quod*. *Id.* “A statement is defamatory *per se* if its defamatory character is obvious and apparent on its face and injury to the plaintiff’s reputation may be presumed.” *Id.* In an action based on defamation *per quod*, damages to the reputation of the plaintiff are not presumed. *Id.* The five categories of defamatory *per se* statements include statements that impute the commission of a crime, or an inability to perform, or the lack of integrity in the performance of employment duties. *Id.* A defamation *per se* claim must be pled with particularity. *Green*, 234 Ill.2d at 492. Although counts II and III are not labeled, plaintiff appears to bring both a defamation *per quod* (count II) claim and a defamation *per se* (count III) claim based on the same alleged statement and publication scenario. Plaintiff’s allegations, as to the publication of a defamation statement, were made against each individual defendant in the alternative.

1. Defamation *Per Se*

Defendants argue that dismissal of plaintiff’s defamation *per se* claim was proper under the innocent construction rule because the alleged defamatory statement and blog do not refer to plaintiff. A statement that may otherwise fall into a defamation *per se* category is not actionable “if it is reasonably capable of an innocent construction.” *Green*, 234 Ill.2d at 499. The question of whether a statement is capable of an innocent construction is one of law to be decided initially by the court. *Tuite*, 224 Ill.2d at 503. The innocent construction rule requires that:

“ [A] written or oral statement is to be considered in context, with the words and the

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implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*.' ” *Id.*, quoting from *Chapski v. Copley Press*, 92 Ill.2d 344, 352 (1982).

Thus, under the innocent construction rule, a statement can not be a basis for a defamation *per se* action if, when considered in context, it may be reasonably interpreted as referring to someone other than the plaintiff. *Id.*

The statement at issue made at the board meeting and repeated to Nyberg does not mention or contain plaintiff’s name. The only reference to a name in the statement is “Libka.” The name, Libka, is not in anyway similar to plaintiff’s name so that a person hearing or reading the statement could be confused that the statement was about plaintiff. The reporting of the statement in Nyberg’s blog does not reference or mention plaintiff. Neither the statement nor the blog refers to plaintiff’s former position or office with the District. The blog attached to the complaint is a discussion centered around and about Kyle Hastings, who is said to have held various public offices including one with the District. The blog, in discussing Hastings, also refers to “CEO Robert Libka.” The blog includes the statement made at the board meeting as part of the discussion about Hastings. The blog draws a line through the statement and includes a notation that the grant information "originally posted is incorrect." The words of the statement and the blog as "used and according to the idea they were intended to convey to the reasonable reader" can be reasonably interpreted to refer to someone other than plaintiff. *Tuite*, 224 Ill.2d at 504, quoting *Bryson v. News America Publications*, 174 Ill.2d 77, 93 (1996). The use of the phrase “under Libka” in the statement can be reasonably

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interpreted to mean that the stated problems with the grants were not the responsibility of or as a result of direction by plaintiff.

Plaintiff argues that the statement at issue accuses her of committing a felony, but presents no basis for reasonably construing the statement and the blog as referring to her. In her complaint, plaintiff does allege she was the “only person dealing with” and “responsible” for the District’s grants at the relevant time. These allegations are conclusory in nature. Plaintiff does not specify the extent of her dealings or responsibilities as to grants, or the extent that third- persons would be aware of her role with the District. There are no allegations showing the names or persons Libka and Hastings are associated with plaintiff. The supreme court in *Bryson* recognized "the general proposition" that, where an alleged defamatory statement does not refer to the plaintiff, "it should appear on the face of the complaint that persons other than the plaintiff and defendant must have reasonably understood" that the statement was about the plaintiff. *Bryson*, 174 Ill.2d at 96. As discussed, the statement and the blog do not refer to plaintiff and are directed at others. Plaintiff’s complaint does not contain facts to show how third-persons would be led to reasonably conclude that the statement made at the Board meeting and contained in the blog was about her.

Under the innocent construction rule, we hold that the trial court properly dismissed plaintiff’s defamation *per se* claim.

2. Defamation *Per Quod*

We now consider whether the dismissal of plaintiff’s defamation *per quod* claim was proper. The innocent construction rule does not apply to defamation *per quod* actions. See *Tuite*, 224 Ill.2d at 511. However, a plaintiff bringing a defamation *per quod* claim must plead sufficient and specific

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facts showing the defamatory nature of the language and special damages. *Anderson v. Vanden Dorpel*, 172 Ill.2d 399, 416 (1996). “An action for defamation *per quod* is established where words not defamatory on their face are rendered so by extrinsic facts or innuendo, which must be alleged ***.” *Schaffer v. Zekman*, 196 Ill. App. 3d 727, 733 (1990). Special damages must be pleaded with particularity. *Id.* The *Schaffer* court made clear:

"General allegations, such as damage to an individual's health or reputation, economic loss, and emotional distress, are insufficient to support an action *per quod* [citation], for example; plaintiff was exposed to 'public hatred, contempt and ridicule and tended to deprive *** [plaintiff] of public confidence and injured it in its business reputation' [citation]; plaintiff 'suffered ill health, emotional distress and damage to his reputation and medical practice' [citation]; damage to plaintiff's 'good name, reputation and business,' exposure to public hatred, obloquy, and constant harassment by the police department, and subjection 'to derision, insults and indecent proposals, which cause her to become ill' [citation]." *Schaffer*, 196 Ill. App. 3d at 733.

The complaint did not sufficiently allege that the statement by one of the individual defendants at the board meeting and repeated to Nyberg was defamatory in nature as to plaintiff. See our discussion above. Plaintiff's allegations as to damages in the complaint are that she “was and has been greatly injured in her good name, credit and reputation and brought into public disgrace and scandal [and] prevented from securing new employment and has suffered and will continue to suffer tremendous damages.” Plaintiff has not adequately set forth special damages with the required particularity. Although defendants did not raise any deficiency in the pleading of special damages,

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we may affirm the trial court on any basis supported by the record. *People ex rel. Madigan v. Excavating and Lowboy Services, Inc.*, 388 Ill. App. 3d 554, 564 (2009). The defamation *per quod* claim was properly dismissed.

We affirm the dismissal of counts II and III.

In light of our holding, we need not address defendants' arguments as to absolute privilege.

C. Dismissal with Prejudice and Denial of Motion to Reconsider

Plaintiff's brief before this court does not present an argument showing error in the dismissal of her complaint with prejudice or the denial of her motion to reconsider. Plaintiff has forfeited review of these issues. Ill. S.Ct. R. 341(h)(7) (eff. Sept. 1, 2006). We affirm the dismissal of plaintiff's complaint with prejudice and the denial of her motion to reconsider.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.