SIXTH DIVISION
October 16, 2015

No. 1-14-3813

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHELLE KACZMAREK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2013 M3 1940
	)	
CABELA'S RETAIL IL INC., an Illinois Corporation,	)	Honorable
	)	Martin S. Agran,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm summary judgment granted in favor of employer with respect to former employee's claim for invasion of privacy, where there was no factual support for employee's claim that employer, in the context of a investigation into possible harassment in the workplace, reviewed private information on employee's cell phone.

¶ 2 Plaintiff-appellant, Michelle Kaczmarek, filed the instant four-count lawsuit against her former employer, defendant-appellee, Cabela's Retail IL, Inc., an Illinois corporation, seeking to recover for damages plaintiff allegedly suffered as a result of the unauthorized review of her cell phone by another of defendant's employees. Two counts of the complaint were voluntarily dismissed with prejudice, and the circuit court granted summary judgment in favor of defendant on the remaining two counts contained in plaintiff's complaint. Plaintiff, thereafter, appealed

solely from the grant of summary judgment in favor of defendant with respect to count I of the complaint, which alleged invasion of privacy based upon an intrusion upon plaintiff's seclusion. Because the facts do not support plaintiff's contention that defendant reviewed any private information on plaintiff's cell phone, we affirm.

¶ 3 I. BACKGROUND

¶ 4 We restate here only those facts necessary to our resolution of this appeal.

¶ 5 Plaintiff filed a four-count complaint against defendant on July 3, 2013, seeking to recover for defendant's alleged invasion of plaintiff's privacy via an intrusion into her seclusion (count I), intentional infliction of emotional distress (count II), defamation *per se* (count III), and defamation *per quod* (count IV). Plaintiff's complaint generally alleged wrongdoing on the part of defendant, a retailer, while plaintiff was employed by defendant as a cashier between April 2011 and September 2012.

¶ 6 More specifically, plaintiff's complaint alleged that she was employed as a cashier by defendant at its retail store located in Hoffman Estates, Illinois. During the course of her employment, plaintiff met and befriended Tim Slaby, a senior retail operations manager.[1] Plaintiff's complaint described the relationship between plaintiff and Mr. Slaby as "strictly platonic." Nevertheless, in early July 2012, plaintiff was confronted by her immediate supervisor, Tammi Killis, "about rumors that Plaintiff and Tim were involved in a sexual relationship." Plaintiff alleged that she was "very upset at these accusations and specifically and vehemently denied any sexual relationship."

[1] Although the full identifying information for a number of defendant's employees was omitted in plaintiff's complaint, that information was subsequently disclosed throughout this litigation. For clarity, we will therefore refer to the full names of those employees while discussing the contents of plaintiff's complaint.

¶ 7 On July 15, 2012, plaintiff was summoned to a meeting with Ms. Killis and Frank Mazzocco, defendant's human resource manager, for the purpose of discussing the rumors. During that meeting, Mr. Mazzocco allegedly "told Plaintiff that she needed to give him her cell phone or she would be fired." Plaintiff reluctantly provided her cell phone, and Mr. Mazzocco "proceeded to access its various features and applications[,] including her text messages and possibly her photos." Mr. Mazzocco also allegedly "took notes (presumably of the texts) and photos with his own cell phone (presumably of the texts or photos) and/or transferred data to his cell phone." During the meeting, plaintiff was allegedly "scared, crying and fearful for her employment."

¶ 8 Thereafter, plaintiff was allegedly shunned by her coworkers, something that plaintiff attributed to "rumors of Plaintiff's alleged (and untrue) sexual relationship with Tim." A coworker subsequently informed plaintiff that Ms. Killis had indicated that plaintiff was in fact involved in a sexual relationship with Mr. Slaby. Plaintiff contended that these circumstances caused her emotional distress and anxiety. Plaintiff sought professional help, and upon a professional recommendation, plaintiff obtained a leave of absence from her employment with defendant and later resigned on September 6, 2012.

¶ 9 Count I of the complaint, alleging intrusion upon seclusion, focused exclusively upon Mr. Mazzocco's actions in reviewing plaintiff's cell phone. That count specifically asserted that Mr. Mazzocco "intentionally intruded into the private concerns of Plaintiff, by demanding to view, viewing, noting, photographing and/or transferring data of the matters contained on her cell phone." Plaintiff's complaint further asserted that the "applications and other features of Plaintiff's cell phone, including her texts and photographs, were Plaintiff's private concern[]," and that defendant's intrusion into the contents of plaintiff's cell phone was "highly offensive to

any reasonable person." Count II of the complaint asserted that Mr. Mazzocco's intrusion into plaintiff's privacy caused plaintiff to suffer emotional distress. The two defamation counts alleged that she had been defamed by the untrue statements made by Ms. Killis and others.

¶ 10 After defendant answered the complaint and the parties engaged in discovery, defendant filed a motion for summary judgment on August 25, 2014. That motion was supported by—*inter alia*—the transcript of plaintiff's deposition testimony and an affidavit completed by Mr. Mazzocco.

¶ 11 In her deposition, plaintiff, who was 20-years old at the time she worked for defendant, reiterated that there was nothing inappropriate with respect to her relationship with Mr. Slaby, who was considerably older than plaintiff. The two got to know each other while taking smoke breaks at work, and they would exchange texts regarding various non-work-related topics such as movies, music, and internet links. Mr. Slaby did invite plaintiff to "go drinking with him" via text, but this never happened. After Mr. Slaby made this invitation, plaintiff told her co-worker, Krystle Magsino, about her texts with Mr. Slaby and showed her some of those texts.

¶ 12 In May and June 2012, plaintiff became aware that rumors were spreading at work that she and Mr. Slaby were having an inappropriate sexual relationship. Plaintiff did nothing to correct these rumors prior to July 14, 2012, when she was confronted by Ms. Killis who asked plaintiff if she had been texting Mr. Slaby. Plaintiff admitted that in response to this question, she first lied to Ms. Killis and specifically denied that she had Mr. Slaby's phone number or that she had exchanged texts with him. The next day, only after discussing the matter with Ms. Magsino and Mr. Slaby, plaintiff admitted to Ms. Killis that she had not been truthful and had texted Mr. Slaby. Plaintiff then showed Ms. Killis some of her recent texts with Mr. Slaby "to

prove that there was nothing going on in hopes that she saw it was just friendly conversations, that both of our jobs would be okay and she would be able to stop the rumors from going on."

¶ 13 With respect to the meeting with Ms. Killis and Mr. Mazzocco, which occurred on July 16, 2012, plaintiff admitted that she provided her cell phone for Mr. Mazzocco to review, albeit only after he indicated that he needed to determine that nature of her relationship with Mr. Slaby and that she might be fired if she refused. While Mr. Mazzocco reviewed her phone for between 5 and 10 minutes, plaintiff could not tell what information he reviewed. Plaintiff did observe Mr. Mazzocco take pictures of her phone with his own cell phone.

¶ 14 In her deposition, Plaintiff acknowledged that she continued to work until July 30, 2012, when she was formally disciplined for lying to Ms. Killis. Plaintiff was upset by this decision, and left work in the middle of her shift. Plaintiff never returned to work for defendant, first obtaining a leave of absence and then resigning her position on September 6, 2012. Plaintiff also acknowledged that she had not preserved the texts between Mr. Slaby and herself, explaining that they had been erased in connection with a subsequent "hardware issue" she had with her phone.

¶ 15 In his affidavit, Mr. Mazzocco averred that he only reviewed plaintiff's cell phone in the course of his investigation into the possibility that there was an inappropriate relationship between Mr. Slaby and plaintiff. In conducting that review, Mr. Mazzocco only "reviewed and counted up the number of recent text messages between Tim Slaby and Michelle Kaczmarek that were on [plaintiff's] cell phone" and that he "did not review any personal text messages or any other items in Ms. Kaczmarek's cell phone." Mr. Mazzocco averred that true and accurate copies of the few recent texts he copied from plaintiff's cell phone were attached to the motion for summary judgment. In the affidavit, Mr. Mazzocco further indicated that Mr. Slaby's

employment was terminated on or about July 23, 2012, following the completion of the investigation into this matter.

¶ 16 In response to defendant's motion for summary judgment, plaintiff voluntarily dismissed, with prejudice, the two defamation counts in her complaint. She then filed a response to the motion for summary judgment with respect to the two remaining counts, with that response supported by plaintiff's own affidavit. In that affidavit, plaintiff again averred that she told Ms. Masingo and Ms. Killis about her texting with Mr. Slaby, and also acknowledged that: (1) during her conversation with Ms. Masingo regarding the texting, plaintiff allowed Ms. Masingo to see a "screen that I had pulled [up on] on my phone;" and (2) during her conversation with Ms. Killis regarding the texting, plaintiff "pulled up a specific text message thread *** and showed the phone screen to Tammi Killis." She also again admitted that she had no way of knowing exactly what Mr. Mazzocco had reviewed on her phone.

¶ 17 On November 10, 2014, the circuit court granted defendant's motion for summary judgment as to the two remaining counts of plaintiff's complaint. With respect to the intrusion upon seclusion count, the circuit court concluded that: (1) plaintiff had no factual basis to conclude that Mr. Mazzocco reviewed anything other than the texts between plaintiff and Mr. Slaby; and (2) "[p]laintiff cannot demonstrate that the intrusion is not only offensive, but highly offensive to a reasonable person." Plaintiff timely appealed.

¶ 18 II. ANALYSIS

¶ 19 As noted above, plaintiff has only appealed from the summary judgment granted in favor of defendant with respect to count I, which alleged an invasion of privacy based upon an intrusion upon plaintiff's seclusion.

¶ 20 Summary judgment is appropriate only where the pleadings, depositions, admissions and affidavits show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2–1005(c) (West 2014). Although a drastic means of disposing of litigation, summary judgment is nevertheless an appropriate measure to expeditiously dispose of a suit when the moving party's right to the judgment is clear and free from doubt. *Gaston v. City of Danville*, 393 Ill. App. 3d 591, 601 (2009).

¶ 21 The court's ruling on a motion for summary judgment must examine the evidentiary matter in a light most favorable to the nonmoving party (*Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001)), and construe the evidence strictly against the movant and liberally in favor of the nonmovant (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)). Nevertheless, facts " 'contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.' " *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 14 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986)). When reviewing an order granting summary judgment, "we conduct a *de novo* review of the evidence in the record." *Espinoza*, 165 Ill. 2d at 113.

¶ 22 As this court has summarized:

> "Illinois courts have long recognized a right of privacy. [Citation.] There are four ways to state a cause of action for invasion of privacy: (1) intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) publicity placing another in a false light. [Citation.] The 'intrusion' tort has an interesting history in Illinois. To the extent the tort has been recognized, Illinois courts have followed the Restatement (Second) of

> Torts: 'One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.' [Citation.] The elements of the cause of action typically are stated as: (1) the defendant committed an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion would be highly offensive or objectionable to a reasonable person; (3) the matter intruded on was private; and (4) the intrusion caused the plaintiff anguish and suffering. [Citation.] The elements of the tort are cumulative. [Citation.]" *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 71 (2004).[2]

As we also recognized in *Busse* that "[t]he third element of the tort appears to be the predicate for the other three. *** Without private facts, the other three elements of the tort need not be reached." *Id*. at 72.

¶ 23 "Thus, it is not sufficient if the behavior complained of only intrudes into *personal*, rather than *private*, matters." (Emphasis added.) *Vega v. Chicago Park Dist*., 958 F. Supp. 2d 943, 959 (N.D. Ill. 2013). In this context, private matters have been described as being those "which are facially embarrassing and highly offensive if disclosed." *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 367 (2010). "Examples of private facts include 'family problems, romantic interests, sex lives, health problems, future work plans and criticism of [an employer].' [Quoting *Busse.*] Other examples of prying into private matters are opening a person's mail, searching a person's safe or wallet, and reviewing a person's banking information. [Citing *Lawlor*.]" *Vega*, 958 F. Supp. 2d at 959.

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[2] Our supreme court affirmatively recognized the tort of intrusion upon seclusion in *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 35.

¶ 24 Here, the invasion of privacy count of plaintiff's complaint focused exclusively upon Mr. Mazzocco's actions in reviewing plaintiff's cell phone, with the complaint specifically asserting that Cabela's, through the actions of Mr. Mazzocco, "intentionally intruded into the private concerns of Plaintiff, by demanding to view, viewing, noting, photographing and/or transferring data of the matters contained on her cell phone." Plaintiff's complaint further asserted that the "applications and other features of Plaintiff's cell phone, including her texts and photographs, were Plaintiff's private concern[]," and that defendant's intrusion into the contents of plaintiff's cell phone was highly offensive. On appeal, plaintiff continues to focus on Mr. Mazzocco's review of the contents of her cell phone in support of her invasion of privacy claim, noting that she had no idea exactly what Mr. Mazzocco reviewed and contending that he "had access to numerous contents of private information on Plaintiff's cell phone."

¶ 25 As an initial matter, we reject plaintiff's apparent assertion that there is a genuine issue of material fact with respect to the scope of the information Mr. Mazzocco reviewed on plaintiff's cell phone. Mr. Mazzocco's affidavit, filed in support of defendant's motion for summary judgment, included his specific, detailed averments that he only "reviewed and counted up the number of recent text messages between Tim Slaby and Michelle Kaczmarek that were on [plaintiff's] cell phone" and that he "did not review any personal text messages or any other items in Ms. Kaczmarek's cell phone." In contrast, in both her deposition testimony and in her affidavit filed in opposition to the motion for summary judgment, plaintiff admitted that she had no way of knowing exactly what Mr. Mazzocco reviewed on her phone.

¶ 26 As we noted above, the facts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted, and such facts must be taken as true for purposes of the motion. *Anderson*, 2011 IL App (1st) 110748, ¶ 14.

For purposes of our review, therefore, we take as true Mr. Mazzocco's averment that he *only* "reviewed and counted up the number of recent text messages between Tim Slaby and Michelle Kaczmarek that were on [plaintiff's] cell phone." Indeed, any contention that Mr. Mazzocco reviewed any other information on plaintiff's cell phone amounts to nothing more than speculation and conjecture, and it is well-recognized that " '[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment.' " *O'Gorman v. F.H. Paschen, S.N. Nielsen, Inc*., 2015 IL App (1st) 133472, ¶ 82 (quoting *Sorce v. Naperville Jeep Eagle, Inc*., 309 Ill. App. 3d 313, 328 (1999)).

¶ 27 We also reject plaintiff's contention that the text messages actually reviewed by Mr. Mazzocco were *private*. In her deposition, plaintiff herself admitted that—prior to her meeting with Mr. Mazzocco—she both told Ms. Masingo and Ms. Killis about her texting with Mr. Slaby and showed her recent texts with Mr. Slaby to both Ms. Masingo and Ms. Killis. In the affidavit she filed in opposition to defendant's motion for summary judgment, plaintiff again averred that she told Ms. Masingo and Ms. Killis about her texting with Mr. Slaby, and also acknowledged showing Ms. Masingo a "screen that I had pulled [up on] on my phone" and showing Ms. Killis "a specific text message thread." We fail to see how plaintiff's recent text messages to Mr. Slaby can be viewed as a private matter at the time they were reviewed by Mr. Mazzocco, when plaintiff had already shared them with at least two other people. As the federal court has noted in rejecting a claim of intrusion upon seclusion based upon Illinois law, " '[p]ersons cannot reasonably maintain an expectation of privacy in that which they display openly.' " *Acosta v. Scott Labor LLC*, 377 F. Supp. 2d 647, 650 (N.D. Ill. 2005) (quoting *Vega-Rodriguez v. Puerto Rico Telephone Co.*, 110 F. 3d 174, 181 (1st Cir. 1997)).

¶ 28 We also note that in her complaint, plaintiff specifically alleged that her relationship with Ms. Slaby was "strictly platonic" and specifically "denied any sexual relationship" with him. In her deposition testimony, plaintiff again specifically contended that there was no inappropriate, sexual relationship between her and Mr. Slaby and that any rumors to the contrary were untrue. Plaintiff further contended that that she therefore showed the texts between her and Mr. Slaby to Ms. Killis "to prove that there was nothing going on."

¶ 29 Again, in the context of the tort of invasion of privacy by an intrusion on seclusion, *private* matters are those "which are facially embarrassing and highly offensive if disclosed." *Cooney*, 407 Ill. App. 3d at 367. By plaintiff's own admission, her texts with Mr. Slaby were just the opposite, and she actually shared them with Ms. Killis in an effort to quell contrary rumors that were themselves embarrassing and highly offensive in nature. We also note that the content of only a few recent texts are included in the record, with the remaining texts left unpreserved prior to the time they were deleted due to a "hardware issue" with plaintiff's cell phone. There is nothing facially embarrassing or highly offensive about the texts in the record.

¶ 30 For all the above reasons, we conclude that there is simply no factual support for any contention that Mr. Mazzocco reviewed any private matters when he reviewed plaintiff's cell phone. Plaintiff has therefore failed to establish the third element of the tort of intrusion upon seclusion, and we need not further analyze the other elements of her claim. *Busse*, 351 Ill. App. 3d at 72 ("Because the analysis begins with the predicate, private facts, it also ends there if no private facts are involved."). The circuit court's grant of summary judgment in favor of defendant on count I of plaintiff's complaint is therefore affirmed.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 33 Affirmed.