2015 IL App (2d) 140383-U
No. 2-14-0383
Order filed June 23, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PATRICIA LANG, GARY LANG, and JESSICA LANG,	)	Appeal from the Circuit Court of McHenry County.
Plaintiffs-Appellees,	)	
v.	)	
HEATHER A. SHEA,	)	No. 10-CH-87
Defendant-Appellant	)	
(Roger Wolden, Todd Wolden, Mary Wolden, Trevor Wolden, Daniel M. Smith, Daniel J. Smith, and Smith Surveillance, Inc., Defendants.)	)	Honorable Robert A. Wilbrandt, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in denying defendant-attorney Shea's section 2-619(a)(9) (735 ILCS 5/2-619 (West 2010)) motion to dismiss pursuant to section 15 of the Illinois Citizens Participation Act (735 ILCS 110/15 (West 2010)); affirmed.

¶ 2 Plaintiffs, Patricia Lang, Gary Lang, and Jessica Lang, filed suit against their neighbors, defendants Roger Wolden, Todd Wolden, Mary Wolden, and Trevor Wolden, the neighbors' attorney, Heather A. Shea, and Daniel M. Smith, Daniel J. Smith, and Smith Surveillance, Inc.

(the Smiths). The Langs alleged, in part, that the Smiths trespassed on the Lang's property and spooked one of their horses, causing injury to the horse and Patricia Lang. The two counts against Shea alleged trespass to property (count XXX) and trespass to chattels (count XXXI). Shea filed a combined motion to strike and dismiss the counts, pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 2-619.1 (West 2010)). The trial court granted the section 615 motion (735 ILCS 5/2-615 (West 2010)) for failure to state a cause of action, but it denied the section 2-619(a)(9) motion to dismiss (735 ILCS 5/2-619(a)(9) (West 2010)) under the Act (735 ILCS 100/1 *et seq*. (West 2010)). Shea appeals from the denial of the section 2-619 motion, as she is seeking attorney fees and costs under section 20 of the Citizen Participation Act (Act) (735 ILCS 100/20 (West 2010)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Gary and Patricia Lang and their daughter Jessica live at 6500 N. Pioneer Lane, Ringwood, Illinois. The Langs raise and train horses on their property. Roger and Mary Wolden and their sons Trevor and Todd live next door to plaintiffs.

¶ 5 The Lang's suit against the Woldens alleged a long-standing pattern of conduct by the Woldens that started in 2005, in which the Woldens terrorized and injured the Lang's show horses by letting their dogs run loose on or near the Lang's property and by riding all-terrain vehicles along the parties' shared borderline.

¶ 6 The Woldens hired Shea to represent them, and Shea hired the Smiths, a father/son team of investigators, to secretly surveil the Langs and their horses and to record the horses' reactions to noise and other stimuli. The Langs alleged that, on July 9, 2008, the Smiths trespassed onto their property. Counts XXX and XXXI of the complaint are directed at Shea for trespass to property and trespass to chattels, respectively. Count XXX alleged that Shea hired the Smiths,

and that she provided instructions and directions to the Smiths as to where to place the surveillance equipment. The Langs alleged, in part, that as a result of the Smith's actions, Patricia and one of the horses were injured.

¶ 7 Shea filed a combined section 2-619.1 motion to strike and dismiss counts XXX and XXXI. Under section 2-615, Shea requested dismissal because the Langs did not and could not have alleged that Shea had directed the Smiths to trespass on the Langs' property, or assuming that there was wrongful entry, that Shea had authorized it, ratified it, anticipated it, or should have anticipated it, given the nature of the retention of an independent contractor to conduct covert surveillance, and that counts XXX and XXXI thus failed to state a cause of action.

¶ 8 Shea requested dismissal under section 2-619(a)(9) based on the Act (735 ILCS 110/1 *et seq*. (West 2010)). Shea alleged that she was entitled to relief because the Act protected her from liability for any good-faith conduct alleged to have been undertaken in the defense of her clients.

¶ 9 The trial court granted Shea's section 2-615 motion to strike counts XXX and XXXI, but it denied her section 2-619(a)(9) motion to dismiss the counts and for further relief under the Act. Shea filed a petition for leave to appeal from the denial of her section 2-619(a)(9) motion to dismiss, which was denied by this court.

¶ 10 Thereafter, an agreement between the Langs and the Woldens was executed and a dismissal order was entered by the trial court. All final orders, including the order denying Shea's 2-619 motion to dismiss based on the Act, merged into the dismissal order. Shea timely appeals, seeking reversal of an order on a collateral dispute so that the matter can be remanded to the trial court to recover attorney fees and costs pursuant to the Act.

¶ 11 II. ANALYSIS

¶ 12 This case concerns the application of the Act, which is Illinois' version of an anti-SLAPP Act. 734 ILCS 110/1 *et seq*. (West 2010). The term "SLAPP" is an acronym for "Strategic Lawsuits against Public Participation." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 1. SLAPPs are lawsuits aimed at preventing citizens from exercising certain political rights or at punishing those who have done so. *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 630 (2010). "SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits" (*Walsh*, 238 Ill. 2d at 630) to "chill" a party's speech or protest activity and discourage opposition by others through delay, expense, and distraction. *Sandholm*, 2012 IL 111443, ¶ 34 (citing John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 Loy. L.A. L. Rev. 395, 396 (1993)).

¶ 13 The Act, which became effective in 2007 (Pub. Act 95-506 (eff. Aug. 28, 2007)), seeks to extinguish SLAPPs and protect citizen participation in government in three principal ways (*Wright Development Group*, 238 Ill. 2d at 632). First, it immunizes citizens from civil actions, "based on, relate[d] to, or *** in response to" any acts made "in furtherance of the [citizens'] constitutional rights to petition, speech, association, and participation in government." 735 ILCS 110/15 (West 2010); *Wright Development Group*, 238 Ill. 2d at 632. Next, the Act establishes an expedited legal process to dispose of SLAPPs in both the trial court and the appellate court. 735 ILCS 110/5, 20 (West 2010); *Wright Development Group*, 238 Ill. 2d at 632. Last, the Act mandates that a party who prevails in a motion under the Act shall be awarded "reasonable attorney's fees and costs incurred in connection with the motion." 735 ILCS 110/25 (West 2010); *Wright Development Group*, 238 Ill. 2d at 632.

¶ 14 Section 15 of the Act describes the type of motion to which the Act applies.

> "This Act applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.
>
> Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15 (West 2010).
>
> A "claim" under the Act includes "any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing alleging injury." 735 ILCS 110/10 (West 2010). When a motion to dismiss is filed pursuant to the Act, "[t]he court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act." 735 ILCS 110/20(c) (West 2010).

¶ 15 Shea contends that the trial court erred in denying her section 2-619(a)(9) motion to dismiss because she believes that she is immunized from the lawsuit under the Act. Shea asserts that the anti-SLAPP legal protection extends to an attorney sued by an adversary in response to litigation-related conduct taken in furtherance of obtaining a favorable outcome for the client. Shea maintains that the record shows beyond any dispute that the Langs filed the trespass counts against her solely in an attempt to create adversity in the attorney-client relationship between herself and her clients, and to prevent her participation in activity protected by the Act.

¶ 16 A motion to dismiss a claim brought under the Act based on immunity is appropriately raised in a section 2-619(a)(9) motion. *Sandholm v. Kuecker*, 2012 IL 111443 ¶ 54. A motion to dismiss admits the legal sufficiency of the plaintiff's complaint, but it asserts an affirmative matter that avoids or defeats the plaintiff's claim. *Evanston Insurance Company v. Riseborough*, 2014 IL 114271 ¶ 13. Because the trial court based its denial of Shea's motion on its interpretation and application of the Act, a question of law exists and a *de novo* standard of review applies. *Samoylovich v. Montesdeoca*, 2014 IL App (1st) 121545 ¶ 18.

¶ 17 The seminal case of *Sandholm* sets forth the framework for analyzing a section 2-619 motion to dismiss under the Act. In *Sandholm*, a former high school basketball coach brought an action against numerous defendants, alleging multiple counts of defamation *per se*, false light invasion of privacy, civil conspiracy to intentionally interfere with prospective business advantage, and slander *per se* based on statements the defendants made as part of their campaign to have the plaintiff removed from his position due to their disagreement with his coaching style.

¶ 18 The plaintiff argued that the Act is intended to apply only to actions based *solely* on the defendants' petitioning activities and does not immunize defamation or other intentional torts. In other words, the plaintiff argued, if the plaintiff's intent in bringing suit is to recover damages for alleged defamation and not to stifle or chill the defendants' rights of petition, speech, association, or participation in government, it is not a SLAPP and does not fall under the purview of the Act. The supreme court agreed with the plaintiff. *Sandholm*, 2012 IL 111443, ¶ 42.

¶ 19 In deciding whether a lawsuit should be dismissed pursuant to the Act, the supreme court held that a court must first determine whether the suit is the type of suit the Act was intended to address. *Id*. ¶ 43. In light of the clear legislative intent expressed in the statute to subject only meritless, retaliatory SLAPP suits to dismissal, the court construed the phrase " 'based on, relates

to, or is in response to' " in section 15 to mean "*solely* based on, relating to, or in response to " 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.' " *Id.* ¶ 45 (quoting 735 ILCS 110/15 (West 2010)). Stated in another way, the court held that, "where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on defendants' rights of petition, speech, association, or participation in government. In that case, the suit would not be subject to dismissal under the Act. It is clear from the express language of the Act that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute." *Id.*

¶ 20 Turning to the merits of the motion, the court noted that the defendants had the initial burden of proving that the plaintiff's lawsuit was solely "based on, relate[d] to, or in response to" their acts in furtherance of their rights of petition, speech, or association, or to participate in government. Only if the defendants had met their burden would the plaintiff have to provide clear and convincing evidence that the defendants' acts were not immunized from liability under the Act. *Id.* ¶ 56.

¶ 21 The court concluded, based on the parties' pleadings, that the plaintiff's lawsuit was "not solely based on, related to, or in response to the acts" of the defendants in furtherance of the rights of petition and speech. *Id.* ¶ 57. It found that the plaintiff's suit did not resemble a strategic lawsuit intended to "chill participation in government" or to "stifle political expression." *Id.* ¶ 57. The court observed that the true goal of the plaintiff's claims was not to interfere with and burden the defendants' free speech and petition rights but to seek damages for the personal harm to the plaintiff's reputation from the defendants' alleged defamatory and tortious acts. *Id.* ¶ 57. Accordingly, the court concluded that the defendants had not met their

burden of showing that the plaintiff's suit was based solely on their petitioning activities. *Id*. ¶ 57.

¶ 22 In *August v. Hanlon*, 2012 IL App (2d) 111252, an attorney was sued for defamation for statements he made to the press in relation to a lawsuit he filed on behalf of his clients against the plaintiff. The trial court granted the defendant's motion for summary judgment on the basis that the Act provided the defendant immunity from the claims alleged by the plaintiff. Applying the analysis in *Sandholm*, we held that the plaintiff's objective in filing the complaint was not solely to interfere with the attorney's right to petition but to seek damages for the personal harm to his reputation resulting from the defendant's allegedly false and defamatory statements. *August*, 2012 IL App (2d) 111252, ¶ 30.

¶ 23 Like in *Sandholm* and *August*, counts XXX and XXXI of plaintiffs' complaint were not solely based on, related to, or in response to the acts of Shea in furtherance of her right to represent her clients so as to participate in government. The true goal of plaintiffs' suit was not to "chill" participation in government but to seek damages for injuries to Patricia and plaintiffs' horse directly resulting from the alleged trespass. As the trial court aptly stated:

> "In this case we're dealing with a complaint against the attorney for a trespass to chattels that occurred because the surveillance company trespassed on the plaintiffs' land, spooked the horses, causing injury to the–horse and to the Plaintiff.
>
> I don't believe that all activity by an attorney in the representation of [her] client falls within the ambit of the Citizen Participation Act.
>
> Although I did strike the complaint against Miss Shea because it didn't set forth a cause of action under the limited exception for liability to an individual who employs an independent contractor, I don't believe that the evidence and the motion itself has

established that this lawsuit against Miss Shea was in retaliation for her representation of the Woldens during the course of the litigation. Rather, the lawsuit was filed because the Langs alleged injury to a horse as a result of Smiths' surveillance activities in trespassing on the plaintiff's property.

"So, I'm going to respectfully deny the motion to dismiss under the 2-619 portion of the motion."

¶ 24 Shea has failed to prove that the Langs' complaint was solely based on Shea's exercise of her constitutional right to participate in government. Thus, the burden never shifted to the Langs to provide clear and convincing evidence that Shea's acts were not immune from liability under the Act. Accordingly, we find that the trial court did not err in denying Shea's section 2-619 motion to dismiss.

¶ 25 While it is questionable whether the tort of trespass can be an act in furtherance of a right to participate in government (see *Denton v. Browns Mill Development Company*, 561 S.E.2d 431, 434 (2002) (holding that the right of free speech does not include the right to trespass onto another's land)), we need not resolve the issue since we have determined that Shea has not met her initial burden to show that the lawsuit was solely aimed at interfering with her right to participate in government.

¶ 26 Shea contends that, unlike the defamation damages in *Sandholm*, the Langs' request for damages is predicated on the false assumption that they had a legal and factual basis for their trespass counts. A motion to dismiss pursuant to section 2-619(a)(9) admits the legal sufficiency of the plaintiff's complaint but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Sandholm*, 2012 IL 111443, ¶ 54. In reviewing the trial court's order, we consider the pleadings and the affidavits in the light most favorable to the Langs, as the

non-moving party. See *Lucas v. Prisoner Review Board*, 2013 IL App (2d) 110698, ¶ 14. The complaint in this case outlined the allegations of trespass, Shea's involvement in the trespass, and the damages sustained by the trespass. The trial court ultimately granted the section 2-615 motion, holding that counts XXX and XXXI did not state a cause of action against Shea. This was a separate motion with a separate analysis. If Shea believed that the counts against her were frivolous, she could have sought sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 4, 2013).

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the trial court denying the section 2-619(a)(9) motion to dismiss.

¶ 29 Affirmed.