FOURTH DIVISION
June 30, 2016

No. 1-15-0372

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

SCOTT R. DRURY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CH 16080
	)	
MARK NEERHOF, NEERHOF FOR ILLINOIS,	)	
LIBERTY PRINCIPLES PAC, DAN PROFT, and	)	
COMCAST CORPORATION,	)	
	)	
Defendants	)	
	)	Honorable
(MARK NEERHOF and NEERHOF FOR ILLINOIS,	)	Franklin Ulyses Valderrama,
Defendants-Appellants).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order denying defendants' motion to dismiss complaint as a strategic lawsuit against public participation (SLAPP) is affirmed; defendants' failed to meet their burden of proof to establish the suit is solely based on, relating to, or in response to acts in furtherance of defendants' constitutional rights.

¶ 2 This is an interlocutory appeal pursuant to Illinois Supreme Court Rule 306(a)(9) (eff. July 1, 2014) from an order denying defendants' motion to dismiss a complaint under the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2012)). In 2014 plaintiff, Scott Drury, was the incumbent candidate for Illinois state representative for the 58th legislative district. Plaintiff's opponent in that election was Mark Neerhof, and Neerhof had a campaign committee, Neerhof for Illinois (NFI) (collectively, "defendants"). The underlying litigation also involves Liberty Principles PAC, a political action committee that supports Neerhof, and the head of the PAC, Dan Proft (collectively, "the PAC"). The PAC is not a party to this appeal. Comcast Corporation was a defendant but is no longer a party to the proceedings. Plaintiff sued defendants for defamation based on a television commercial and literature mailed to residents of the district purporting to state plaintiff's position on legislation pending before the General Assembly. Defendants moved to dismiss the complaint as a SLAPP suit. The trial court denied defendants' motion. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 We will discuss only that information that is relevant to our disposition of this appeal. At this stage of proceedings that information comes from the parties' pleadings.

¶ 5 Plaintiff alleged that during the course of a campaign for political office, in which plaintiff and Neerhof were opponents[1], defendants coordinated with the PAC to publish an advertisement on cable television (the "commercial") concerning plaintiff and legislation pending in the General Assembly. Plaintiff's complaint alleged the advertisement, which concerned a school funding bill, contained five false statements about plaintiff. Those statements were:

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[1] Drury won the election during the litigation, after the filing of, but before the trial court ruled on, the motion to dismiss the complaint.

1. "Incumbent State Representative Scott Drury has put his Chicago Democrat's Party's bosses ahead of our schools."

2. "Scott Drury made the choice to serve Illinois' political ruling class at the expense of our schools."

3. "Scott Drury wants to cut funding for our local schools by as much as seventy percent."

4. "Drury's plan would cut state funding for our schools by more than $6.0 million."

5. "Drury's plan would send our tax dollars to Chicago schools."

¶ 6 Plaintiff's complaint also alleged that defendants coordinated with the PAC on the publication of a direct-mail advertisement (the "mailer") that contained four other false statements about plaintiff. The statements in the mailer were:

1. "Scott Drury supports defunding our schools so that party bosses will fund his campaign."
2. "Scott Drury has made the choice to serve Illinois' Political Ruling Class at the expense of our schools."
3. "Incumbent State Rep. Scott Drury is doing the bidding Illinois' Political Ruling Class at the Expense of our Local Schools."
4. "Scott Drury's plan would cut $6,918,523 in funding of our local schools and send our tax dollars to other school districts."

¶ 7 Plaintiff filed a complaint against defendants, the PAC, and Comcast alleging nine counts of defamation *per se* and nine counts of false light invasion of privacy. The complaint alleged a connection between defendants and the PAC. Plaintiff sought compensatory and punitive damages and injunctive relief related to future publications about plaintiff. Plaintiff also filed an emergency petition for a temporary restraining order (TRO) and injunctive relief. Plaintiff sought an emergency order enjoining defendants from any further publication of any type of

communication containing false information about plaintiff until the entry of a final order on plaintiff's complaint.

¶ 8 Defendants filed a response to plaintiff's emergency petition in which defendants stated that defendants had nothing to do with publishing the statements about which plaintiff complained. Defendants also informed the court of their intention to seek dismissal of the complaint under the Act. The trial court denied plaintiff's petition for an emergency TRO or injunctive relief.

¶ 9 Defendants filed a motion to dismiss plaintiff's complaint pursuant to the Act. The PAC also filed a motion to dismiss on other grounds, but that motion is not a subject of this appeal. Defendants' motion to dismiss alleged they were not involved with publishing the statement that plaintiff contends defamed him or placed him in a false light. Defendants supported their motion to dismiss with an affidavit by Neerhof. Neerhof averred:

> "I had no involvement in placing or otherwise publishing the cable television commercials and statements of which [plaintiff] complains in his complaint. I have also made inquiry of my staff, and hereby state that I am informed and believe that no one working for Neerhof for Illinois had any involvement in placing or otherwise publishing the cable television commercials and statements of which [plaintiff] complains in his complaint. I have not, in fact, communicated with Dan Proft or anyone affiliated with Liberty Principles PAC for over a year."

¶ 10 Defendants filed additional affidavits by Neerhof and Proft without leave of court. Plaintiff filed a response to defendants' motion to dismiss in which plaintiff asserted that certain evidence was sufficient to support an inference that defendants participated in the publication of the statements at issue. Plaintiff also argued that defendants failed to satisfy their burden to show that defendants acted in furtherance of their constitutional rights and that plaintiff's claims

were solely based on, related to, or in response to defendants' acts in furtherance of their constitutional rights. Specifically, plaintiff argued that by denying involvement in the publication of the statements (in other words denying they acted at all), defendants created a question of fact as to whether defendants acted in furtherance of their constitutional rights. In reply, defendants contended that the act in furtherance of their constitutional rights which triggers protection under the Act was Neerhof's candidacy for public office rather than the publication of the allegedly false statements itself.

¶ 11 The trial court granted plaintiff's motion to strike a portion of Neerhof's affidavit stating he did not believe anyone working for NFI had any involvement in the publications at issue on hearsay grounds. The court also granted plaintiff's motion to strike the additional affidavits. The court denied plaintiff's motion to file a supplemental affidavit in opposition to defendants' motion to dismiss. The court announced its ruling on defendants' motion to dismiss and followed its oral ruling with a written memorandum and order.

¶ 12 The trial court found that the 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. The court found that it must engage in a three-step analysis to determine whether the lawsuit should be dismissed under the Act. The first step of the analysis is to determine whether defendants' acts were in furtherance of their right to petition, speak, associate, or otherwise participate in government to obtain favorable government action.

¶ 13 The trial court, when conducting its three-step analysis, looked to the acts of defendants which were raised in the complaint to conduct the first step of its evaluation. In this case, the acts complained of in the complaint were defendants' alleged publication of the defamatory

statements. The trial court found that in this case, Neerhof stated in his affidavit that he had no involvement in placing or otherwise publishing the cable television commercials and statements of which plaintiff complains in his complaint. The court reasoned that while defendants argue that the alleged wrongs that plaintiff complains of are based on government participation and implicate defendants' participation in government, defendants, in Neerhof's affidavit, deny doing any of the acts in the complaint. The court held that therefore, defendants cannot be found to be acting in furtherance of government participation when defendants, by their own admission, were not the actor of the alleged defamatory statements; or, "[p]ut another way, Drury's lawsuit cannot be in retaliation of [defendants'] acts if [defendants] did not participate in any acts."

¶ 14 The trial court held that defendants failed to satisfy their burden to show that their acts were in furtherance of their right to participate in government and therefore failed to satisfy the first prong of the analysis under the Act. The court found that it did not need to consider the remaining two prongs of the analysis and denied defendants' motion to dismiss. The court went on to address defendants' alternative grounds for dismissal: that the complaint was insufficient at law because the statements are neither defamatory nor defamatory *per se*, or because the complaint does not contain factual allegations supporting a claim that defendants acted maliciously. The court found that some of the statements complained of "do not fall under any of the categories of statements that are defamatory *per se* as they do not impute an inability to perform or want of integrity in the discharge of duties of office or employment and do not prejudice, or impute a lack of ability in [plaintiff's] profession." The court dismissed the counts corresponding to those statements with prejudice. As to the remaining counts, the court found that the complaint does not sufficiently allege malice in accordance with the heightened pleading standard applicable to claims of defamation *per se*. The court dismissed the remaining counts with leave to file an amended complaint.

¶ 15 Defendants announced their intention to seek appeal of the trial court's ruling, and plaintiff successfully moved the trial court to extend the time to file an amended complaint until after any such appeal was resolved. Defendants filed a petition for leave to appeal to this court pursuant to Illinois Supreme Court Rule 306(a)(9) (eff. July 1, 2014). This court denied defendants' petition. Defendants then filed a petition for leave to appeal in our supreme court. Our supreme court denied defendants' petition, but it entered a supervisory order directing this court to grant defendants' petition and consider the appeal on its merits, which we turn to now.

¶ 16 ANALYSIS

¶ 17 A "strategic lawsuit against public participation," or SLAPP, is meant to chill speech or protest activity, and discourage opposition, through delay, expense, and distraction. *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 12. A SLAPP is a meritless lawsuit where the party filing the suit does not intend to win, but the suit is used solely to retaliate against a defendant for attempting to participate in government by exercising some first amendment right such as the right to free speech or the right to petition. *Id.* "While the case is being litigated *** defendants are forced to expend funds on litigation costs and attorney fees and may be discouraged from continuing their protest activities." *Id.* (citing *Sandholm v. Kuecker,* 2012 IL 111443, ¶ 34). "In 2007, the legislature enacted the Citizen Participation Act in order to combat the rise of *** SLAPPs." *Ryan*, 2012 IL App (1st) 120005, ¶ 12. The 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." 735 ILCS 110/15 (West 2012).

> "In light of the clear legislative intent expressed in the statute to subject only meritless, retaliatory SLAPP suits to dismissal, we construe 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.' 735 ILCS 110/15 (West 2008). Stated another way, 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." *Sandholm*, 2012 IL 111443, ¶ 45.

"[T]he Act seeks not only to protect individuals from meritless, retaliatory SLAPPs but also to allow plaintiffs who have legitimately been wronged to receive compensation." *Ryan*, 2012 IL App (1st) 120005, ¶ 15. "The Act seeks to extinguish SLAPPs and protect citizen participation by: (1) immunizing citizens from civil actions based on acts made in furtherance of a citizen's free speech rights or right to petition government ([citation]); (2) establishing an expedited legal process to dispose of SLAPPs both before the trial court and appellate court ([citation]); and (3) mandating a prevailing movant be awarded reasonable attorney fees and costs incurred in connection with the motion ([citation])." *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 632 (2010). "However, merely because defendants' activities were the kind that the Act is designed to protect does not necessarily mean that plaintiff's lawsuit is a SLAPP and is therefore subject to dismissal under the Act." *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶ 16.

¶ 18 A motion for dismissal based on the Act is made in a motion under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)). *Sandholm*, 2012 IL

111443 ¶ 54. "A motion to dismiss under section 2-619(a) admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim." *Sandholm*, 2012 IL 111443, ¶ 55.

> "When a motion to dismiss is filed pursuant to the Act, 'a hearing and decision on the motion must occur within 90 days after notice of the motion is given to the respondent.' 735 ILCS 110/20(a) (West 2008). Discovery is suspended pending a decision on the motion. 735 ILCS 110/20(b) (West 2008). However, 'discovery may be taken, upon leave of court for good cause shown, on the issue of whether the movants [*sic*] acts are not immunized from, or are not in furtherance of acts immunized from, liability by this Act.' *Id.* 'The 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 2008)." *Sandholm*, 2012 IL 111443, ¶ 39.

On review of a trial court's judgment on a section 2-619 motion to dismiss, we may affirm on any basis in the record. See generally *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 17.

¶ 19 The Act creates immunity from claims to which it applies. Under the Act, actions "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 2012). Our supreme court's construction of the Act excludes motions "brought against meritorious claims with a substantial basis other than or in addition to the petitioning

activities implicated." *Sandholm*, 2012 IL 111443 ¶ 47 (citing *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 691 N.E.2d 935 (1998)).

> "Three requirements must be met for a lawsuit to be subject to dismissal under the Act:
>
> '(1) the defendants' acts were in furtherance of their right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the plaintiffs' claims are solely based on, related to, or in response to the defendants' "acts in furtherance"; and (3) the plaintiffs fail to produce clear and convincing evidence that the defendants' acts were not genuinely aimed at solely procuring favorable government action.' [Citations.]" *Goral v. Kulys*, 2014 IL App (1st) 133236, ¶ 34 (quoting *Hammons v. Society of Permanent Cosmetic Professionals*, 2012 IL App (1st) 102644, ¶ 18 (citing *Sandholm*, 2012 IL 111443, ¶¶ 53-57)).

¶ 20 Defendants argue the trial court erroneously determined that the Act "does not apply to protect defendants who deny an essential element of the plaintiff's claim" and that the court erroneously limited its analysis to the petitioning activities raised by plaintiff's complaint. Defendants assert that in this case it is not the publication of the assertedly defamatory statements (which defendants denied participating in) that defendants claim is protected by the Act, but Neerhof's candidacy for State Representative. Defendants argue that the protected activity at issue is Neerhof's campaign because plaintiff sued for allegedly defamatory comments made during the course of that campaign. Defendants go on to claim that because plaintiff's complaint was "based on and in response to" Neerhof's candidacy, defendants are entitled to the protection of the Act. Defendants assert that the effect of the trial court's ruling is that "the only

relevant government participation by a defendant is that framed by the plaintiff's complaint." (Emphases omitted.)

¶ 21 The first question presented here is what is meant by "defendants' acts" when determining whether a suit is subject to dismissal under the Act. Defendants' argument suggests that for purposes of the first inquiry into the applicability of the Act, whether "the defendants' acts were in furtherance of their right to petition, speak, associate, or otherwise participate in government to obtain favorable government action," the term "defendants' acts" cannot mean simply whatever acts are alleged in the complaint but rather should mean whatever acts prompted the plaintiff to file the lawsuit. In this case, the "defendants' acts" are Neerhof's campaign for office rather than any specific statements, according to defendants. Plaintiff contends the "defendants' acts" in question are the publications of the defamatory statements and that those "acts" are the only ones which prompted this lawsuit. Plaintiff argues the trial court properly concluded that because defendants denied ever committing the only relevant "acts" defendants cannot prove that the "defendants' acts" at issue were done in furtherance of their rights to seek to obtain favorable government action.

¶ 22 The question presented by the argument in this case is similar to one raised in *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113 (2010), which predates *Sandholm*. The plaintiff in that case filed suit against an employee for fraud and breach of fiduciary duty, after the employee filed a wage claim against the plaintiff, her former employer. *Id.* at 114-15. In *Hytel*, the plaintiff argued that because the acts forming the basis of the complaint (fraud and breach of fiduciary duty) were not protected activities, the Act did not apply. *Id.* at 122. The defendant-movant argued that the language regarding the "acts of the moving party" must be interpreted to refer to the movant's protected actions, rather than the alleged acts which form the basis of the complaint. *Id.* at 124. The *Hytel* court explained the basis for uncertainty this way:

> "Because the Act allows a litigant to seek dismissal of not only those claims arising directly out of his or her protected action (a defamation claim premised on the movant's protected speech, for instance), but also those claims allegedly brought 'in response to' (*i.e.*, in retaliation for) the protected action, it appears to apply to claims that are, on their face, unrelated to the protected action.
>
> However, the Act also permits nonmovants to raise the defense that 'the acts of the moving party' were not immunized from liability by the Act. This language is contained in section 20 of the Act, which immediately follows section 15 and sets out the procedures to be utilized when a movant claims that a lawsuit is subject to the Act and moves to dismiss it ***.
>
> The question thus becomes what that phrase—'the acts of the moving party'—means." *Id.* at 123.

¶ 23 The *Hytel* court held that the "phrase 'the acts of the moving party' is an unambiguous reference to the actions identified in [the Act] as subject to the Act's protection." *Id.* The court found the language of the Act "explicitly includes within the Act's reach suits filed 'in response to' petitioning activity as well as those 'based on' such activity, thereby encompassing facially unrelated but retaliatory claims." *Id.* at 124-25. The court agreed with the defendant-movant in *Hytel* that the Act applied because the lawsuit in that case was "clearly retaliatory." See *Id.* at 125 ("the target of such litigation may feel just as intimidated by a facially unrelated but clearly retaliatory lawsuit as by a lawsuit based more directly on the exercise of those rights"). The plaintiff in *Hytel* raised a concern about an interpretation of the Act which would look beyond the complaint to determine whether a claim was brought in response to protected petitioning

activity. See *Id.*[2] The court rejected the *Hytel* plaintiff's argument because "it ignores the court's role in determining which claims were filed 'in response to' a protected first amendment activity and are therefore subject to motions to dismiss under the Act." *Id.* The *Hytel* court held that "when a lawsuit does not arise directly out of the protected activity but instead is alleged to have been brought 'in response to' the protected activity, it becomes vital that the trial court engage in a careful examination of the allegations of the complaint and the surrounding facts to determine whether it is truly barred by the Act *as a retaliatory suit*. We believe that this requirement will prevent the application of the Act beyond its intended scope." (Emphasis added.) *Id.*

¶ 24 Although a portion of the holding in *Hytel* has since been rejected, the court has found that its analysis of certain issues is "still useful" (*Ryan,* 2012 IL App (1st) 120005, ¶¶ 22-23) and, more importantly, *Hytel* has not been reversed on its treatment of motions to dismiss under the Act "when a lawsuit does not arise directly out of the protected activity but instead is alleged to have been brought 'in response to' the protected activity" (*Hytel,* 405 Ill. App. 3d at 125). See *Stein,* 2013 IL App (1st) 113806, ¶¶ 18, 22 (considering separately whether facially related claim (libel) and facially unrelated claim (Wage Act and breach of contract) were solely based on protected conduct (statements to a government official to obtain favorable government action)). We find that *Hytel* is instructive in this case. Here, similarly to *Hytel,* the lawsuit is alleged to have been brought in response to the protected activity of running for public office,

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[2] The plaintiff in *Hytel* argued that "under this interpretation of the Act, no counterclaim or other claim filed after a movant's initial claim could ever survive a motion to dismiss under the Act. [The plaintiff] reasons that, because any lawsuit represents an exercise of the plaintiff's right to petition for redress of grievances ([citation]) and the Act contains no language restricting its scope to petitions regarding a matter of public concern, any counterclaim brought after an initial claim is filed would be considered a claim brought 'in response to' protected petitioning activity and would therefore be barred by the Act." *Hytel*, 405 Ill. App. 3d at 125.

rather than in response to the publication of the defamatory statements that form the basis of the lawsuit. Plaintiff's argument on appeal—that defendants' claim that the protected activity is the campaign rather than the defamatory statements—is "belated" and invited the trial court to rule based upon defendants' denial they published the statements, is unpersuasive. We believe the trial court's analysis improperly limited consideration of defendants' protected activity to the defamation allegations made in the complaint and should have considered defendants' activities in seeking public office. However, on appeal we review the judgment of the circuit court and not the reasons for the judgment, and, therefore, this court may affirm the trial court's judgment on any basis supported by the record. *Satherlie,* 2015 IL App (1st) 142152, ¶ 17. This court may consider all of the surrounding facts to determine whether defendants have shown evidence that the lawsuit was brought in response to protected conduct. We find that the court can make that determination based on the protected conduct alleged in the motion to dismiss, even if that is not the conduct alleged in the complaint. See *Hytel,* 405 Ill. App. 3d at 126 ("Determining the Act's application to possibly retaliatory claims must be done on a case-by-case basis."). This interpretation is necessary to give meaning to the words "in response to any act or acts of the moving party in furtherance of the moving party's rights *** to *** participate in government" (735 ILCS 110/15 (West 2012)) in the statute. *Brucker v. Mercola,* 227 Ill. 2d 502, 514 (2007) ("Each word, clause and sentence of the statute, if possible, must be given reasonable meaning and not rendered superfluous."). Plaintiff "frames his claims around the election," therefore we accept defendants' argument that the candidacy for public office is the protected activity.

¶ 25 Having determined that the relevant activity is Neerhof's candidacy, a protected activity (satisfying the first requirement for a lawsuit to be subject to dismissal under the Act), we must consider whether the suit filed by plaintiff is the type of suit the Act was intended to address. The Act provides immunity against lawsuits filed solely in response to defendants' protected

activities for the purpose of inhibiting defendants' rights to participate in government. To determine whether a lawsuit was filed solely in response to protected activities, we consider whether the claim is meritless and retaliatory:

> "In order to carry their burden under the second prong [(whether plaintiff's claims are solely in response to the defendants' protected acts)], defendants 'must affirmatively demonstrate that the [plaintiff's] claim is a SLAPP within the meaning of the Act, that is, that the claim is meritless and was filed in retaliation against the [defendants'] protected activities in order to deter the [defendants] from further engaging in those activities.' [Citations.]" *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 18.

¶ 26 Turning to the question of whether plaintiff's claim is meritless, defendants argue plaintiff's claim is without merit because plaintiff's allegations fail to overcome Neerhof's affidavit "attesting that neither Neerhof nor his campaign were involved in the publication of the political ads at issue." Defendants further argue the trial court erroneously struck Proft's affidavit, and that plaintiff's allegations "on information and belief" are insufficient to satisfy the pleading requirements for a defamation claim. Turning first to defendants' complaints about plaintiff's allegations "on information and belief," a party may plead a claim of defamation *per se* on information and belief, but when so pled "the factual basis informing the plaintiff's belief must also be pled." *Green v. Rogers*, 234 Ill. 2d 478, 495 (2009). We initially note that *Green* involved a motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012). *Id.* at 491. Defendants' argument that plaintiff failed to plead defamation with sufficient particularity would properly be raised in a section 2-615 motion to dismiss. See 735 ILCS 5/2-615 (West 2012) ("motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and

certain in a specified particular"). "The term 'meritless' is often used loosely to describe any unsuccessful legal claim or theory, but in the context of a SLAPP it is a term of art and means something more." *Garrido*, 2013 IL App (1st) 120466, ¶ 20. "To the extent that *Hytel* defined a 'meritless' lawsuit as one that fails to state a legal claim under section 2-615, we rejected that approach in *Hammons* because the supreme court made clear in *Sandholm* that a motion to dismiss based on immunity under the Act should be considered under section 2-619 rather than section 2-615. [Citation.] A motion under section 2-619 concedes the legal sufficiency of a claim ([citation]), so whether a complaint has properly stated a claim under section 2-615 is irrelevant to the issue of merit in this context." *Ryan*, 2012 IL App (1st) 120005, ¶ 22.

¶ 27 Regardless, defendants' argument concerning the sufficiency of plaintiff's allegations is unavailing. In *Green*, our supreme court found that the plaintiff's complaint did not allege that the defendant "in fact" made the statements alleged in the complaint. *Id.* at 496. "Rather, it alleges only that plaintiff is informed and believes that defendant made such statements, and it does so in a factual vacuum. The first amended complaint nowhere states either how plaintiff came to be so informed or what facts caused him to believe this." *Id.* Because the complaint in *Green* failed to provide any "objective basis" for the plaintiff's belief, the court found it facially deficient. *Id.* In this case, plaintiff alleged defendants in fact published the defamatory statements about plaintiff. Plaintiff did not make those allegations in a "factual vacuum." Instead, plaintiff provided a factual basis for his belief defendants were involved in the publication of the defamatory statements. Plaintiff alleged factual connections between defendants and the PAC defendants (who admitted publishing the statements) and similarities between prior publications to support his belief defendants were involved in the publications at issue. We cannot say plaintiff failed to adequately plead facts in support of his claim.

¶ 28 We have no need to address the issue of whether the trial court properly struck the additional affidavits or whether this court has jurisdiction to review that order because our ruling would be the same even considering the additional affidavits. It is defendants' burden to show that there are undisputed facts that demonstrate plaintiff's claim is meritless. *Stein*, 2013 IL App (1st) 113806, ¶ 20. Here, plaintiff argues the facts are disputed as to whether defendants published the allegedly defamatory statements.

> "When ruling on the motion, the court should construe the pleadings and supporting documents in the light most favorable to the nonmoving party. [Citation.] The court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor. [Citation.] The question on appeal is whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. [Citation.]" *Ryan*, 2012 IL App (1st) 120005, ¶ 11.

¶ 29 In ruling on defendants' motion to dismiss pursuant to section 2-619, this court may consider affidavits but "must construe all the pleadings and supporting matter in the light most favorable to the party opposing the motion for involuntary dismissal." *Advocate Health & Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d 755, 759 (2004). Construing plaintiff's complaint and defendants' affidavits in this way, we find defendants have failed to satisfy their burden to establish that there is no genuine issue of material fact as to defendants' publication of the statements at issue. "Section 2-619 allows for the dismissal of a complaint on the basis of issues of law or easily proven issues of fact ([citations]), while disputed questions of fact are reserved for trial proceedings, if necessary." *Id.* See also *Goral*, 2014 IL App (1st) 133236, ¶ 40 ("This court has held that a claim is 'meritless' under the Act if the defendant 'disproves some

essential element of the [plaintiff's] claim.' [Citation.]"). Defendants' affidavits do not establish that the defamatory statements are true or are capable of an innocent construction thus rendering the case meritless. *Cf. Goral*, 2014 IL App (1st) 133236, ¶ 52. Instead, defendants' affidavits merely refute plaintiff's allegations. " 'Affirmative matter' includes something in the nature of a defense that negates the alleged cause of action completely or refutes a crucial conclusion of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Holubek v. City of Chicago*, 146 Ill. App. 3d 815, 817 (1986). As discussed above, plaintiff's allegations of defendants' involvement in the publication are supported by specific fact contained in and inferred from the complaint. *Supra* ¶ 27. Therefore, publication of the defamatory statements presents a question of fact. The trial court found that some of the statements alleged in the complaint were defamatory *per se*. Because genuine questions of fact exist as to defendants' liability for defamatory statements, we cannot say plaintiff's claim is meritless under the Act.

¶ 30 Defendants also alleged the lawsuit was merely retaliatory. On review this court has the responsibility to "engage in a careful examination of the allegations of the complaint and the surrounding facts to determine whether it is truly barred by the Act as a retaliatory suit." *Hytel*, 405 Ill. App. 3d at 126 ("We note that, in this case, the trial court conducted a painstaking analysis of whether Hytel's suit was a retaliatory claim that fell within the Act or a valid claim that simply happened to have been filed after Butler filed her wage claim."). The question thus becomes whether plaintiff's claim for defamation is a valid claim that "happened to have been filed" during the course of Neerhof's candidacy. We find plaintiff's claim is a valid claim not subject to dismissal under the Act.

¶ 31 Several factors are relevant to our determination as to whether a lawsuit is a retaliatory SLAPP suit, including the potential validity of the claims; the timing of the filing of the lawsuit;

and the amount of damages requested. *Chicago Regional Council of Carpenters v. Jursich*, 2013 IL App (1st) 113279, ¶ 27. We note there is no exhaustive list of factors to consider when making a determination that a claim is retaliatory within the meaning of the Act. *Ryan*, 2012 IL App (1st) 120005, ¶ 23 (repeating observation in *Hytel* that (1) the proximity in time between the protected activity and the filing of the complaint, and (2) whether the damages requested are reasonably related to the facts alleged in the complaint and a good-faith estimate of the injury sustained is not an exclusive list, and there may well be other factors that are relevant in future cases to question of whether a claim is retaliatory within the meaning of the Act). In this case, the fact plaintiff filed his complaint one month before the election, the media covered the lawsuit, or any of the other factors defendants list as demonstrative of plaintiff's alleged retaliatory intent, are not dispositive. Defendants focus on the timing of the lawsuit in relation to the date of the election. However, plaintiff notes that the protected activity (running for office) began several months before plaintiff filed the complaint. Defendants have not met their burden of proof to establish that the timing of plaintiff's complaint indicates that the suit was in retaliation for Neerhof's candidacy. Defendants also point to the total damages alleged in the complaint of "more than $9 million," but plaintiff did not seek this amount as compensatory damages for "a single defamation claim" as in *Ryan*. See *id.* ¶ 24. Rather, plaintiff filed an 18-count complaint seeking $500,000 for each claim. Defendants have not met their burden of proof to establish that the damages alleged in each count of plaintiff's complaint are not a "good-faith estimate of the extent of the injury sustained" for each count.

¶ 32 We find defendants have failed to satisfy their burden under the Act to demonstrate plaintiff's lawsuit was filed solely in response to defendants' activities as a candidate. Moreover, if Neerhof's candidacy is the protected activity this court should consider, then we would conclude that plaintiff's complaint, based on the publication of allegedly defamatory statements,

has a "substantial basis other than or in addition to the [protected] activities. [Citation.]" *Sandholm*, 2012 IL 111443, ¶ 47 (quoting *Duracraft Corp.*, 691 N.E.2d at 943). Based on the record before us we cannot say that plaintiff's lawsuit was filed solely in response to Neerhof's candidacy. Therefore, the case is not subject to dismissal under the Act. Accordingly, the trial court's judgment denying defendants' section 2-619(a)(9) motion is affirmed.

¶ 33 CONCLUSION

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

¶ 35 Affirmed.