2013 IL App (1st) 123799-U

No. 1-12-3799

SIXTH DIVISION
December 27, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL DAVITT, JACK EVANS, TIMOTHY HOLEVIS, CHRISTOPHER MIESZCZAK, CHRISTOPHER MUELLER, REBECCA SAILSBERY, and JAMES VELA, Plaintiffs-Appellants, v. LEWIS TOWERS, Individually and as Mayor of The Village of Sauk Village, an Illinois Municipality; and THE VILLAGE OF SAUK VILLAGE, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 12 L 4651 Honorable Kathy Flanagan, Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court did not improperly dismiss with prejudice, pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9)), plaintiffs-appellants' First Amended Complaint.

¶ 2 On appeal, plaintiffs-appellants Michael Davitt, Jack Evans, Timothy Holevis, Christopher Mieszczak, Christopher Mueller, Rebecca Sailsbery, and James Vela (plaintiffs) contend that the dismissal of their defamation and invasion of privacy action was improper because defendant-appellee Lewis Towers was not subject to absolute privilege and he was not acting within the scope of his duties as mayor of the Village of Sauk Village (Village) when he published the allegedly defamatory statements. Plaintiffs also contend that the publication was an invasion of their privacy.

¶ 3 For the reasons that follow, we affirm.

¶ 4 I. BACKGROUND

¶ 5 On May 1, 2012, the seven plaintiffs filed a three-count complaint for defamation and invasion of privacy against Towers, individually and as mayor of the Village, an Illinois municipality, and the Village.

¶ 6 After Towers and the Village filed a motion pursuant to section 2-615 of the Code (735 ILCS 5/2-615) to dismiss the complaint, plaintiffs were granted leave to file an amended complaint. In their First Amended Complaint, filed on August 1, 2012, plaintiffs alleged that, at all times complained of, they were peace officers of the Village holding various ranks. In the first count of the complaint, for defamation per se, plaintiffs alleged that: on February 18, 2012, three Village police officers drafted a five-page internal memo accusing them of committing various improper acts in regard to the performance of their duties as patrol officers, detectives, and sergeants; those three officers caused the memo to be tendered to a superior officer within the Sauk Village Police Department, who then caused a copy of the memo to be tendered to Towers prior to a meeting of the Village Board of Trustees on February 21, 2012. They further alleged that: Towers made

approximately 50 copies of the memo before the meeting and published the memo by handing it out to members of the public prior to the start of the February 21 board meeting "in a willful and malicious effort to discredit plaintiffs" and that Towers "published untrue and malicious statements via the memo" despite the fact that neither the memo nor its contents were on the agenda of the February 21 board meeting. Plaintiffs alleged that Towers did not make any attempt to speak with them to verify the veracity of the accusations within the memo prior to publishing it, nor did he conduct or order any meaningful investigation of the allegations in the memo prior to its publication; and, at the time of publication, Towers did not hold a good-faith belief that the allegations in the memo were true. As a result of the publication, plaintiffs alleged that they suffered grievous harm, including damage to their reputation and loss of earnings potential.

¶ 7 In the second count for defamation per se, plaintiffs alleged the existence of a collective bargaining agreement that mandates the terms and conditions of employment between sergeants of the Sauk Village Police Department and the Village. Among other things, they alleged that one section of the agreement (Section 17.10) contained provisions for compensatory time (called "T-days") and that Towers announced to the public at a village board meeting on March 13, 2012, that the five plaintiffs who were sergeants, i.e., all plaintiffs except Davitt and Meuller, were " 'stealing' village funds" in conjunction with their "T-days."

¶ 8 In the third count of the First Amended Complaint, plaintiffs alleged a reasonable expectation of privacy in "their personnel records and proprietary information contained therein" that was invaded when Towers published false statements about them by distributing copies of the internal disciplinary memo about them to the public before the February 21, 2012, Village board meeting.

They alleged that, as a result of Towers' providing the public access to the memo, they suffered damage to their reputation and loss of earnings potential.

¶ 9 On August 29, 2012,[1] defendants filed a motion to dismiss the First Amended Complaint pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9)) based on their absolute immunity from the claims raised therein. In response to defendants' motion, plaintiffs acknowledged the Village's immunity to liability from defamation actions and conceded its dismissal from the case.

¶ 10 On December 3, 2012, the court issued a written memorandum opinion and order granting with prejudice the motion to dismiss.

¶ 11 Plaintiffs timely filed a notice of appeal, seeking partial reversal of the December 3 order and remand with direction to reinstate the first and third counts of the First Amended Complaint.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiffs contend that the court's section 2-619(a)(9) dismissal of their First Amended Complaint was improper because the court mistakenly found that absolute privilege applied. Rather, plaintiffs claim that Towers' publication of the memo was not subject to absolute privilege because he failed to identify either "an express law" or regulation that compelled its publication and because he was not acting within the scope of his employment by publishing it to the general public. Plaintiffs also assert that they had sufficiently stated a claim for false light invasion of privacy because they had a reasonable expectation of privacy in the contents of their disciplinary files, including the memo at issue here.

[1] In their appellate brief, plaintiffs give the date of filing as September 5, 2012, which is the date of the order setting the briefing schedule on the motion to dismiss.

¶ 14 The grant of a dismissal pursuant to section 2-619 of the Code (735 ILCS 5/2-619) is reviewed de novo to determine whether a genuine issue of material fact exists and whether the defendant is entitled to judgment as a matter of law. Solaia Technology, LLC v. Specialty Publishing Co., 221 Ill. 2d 558, 579 (2006); Nichol v. Stass, 192 Ill. 2d 233, 248 (2000). A motion under section 2-619 admits all well–pleaded facts and it provides a mechanism to dispose of issues of law. Meyer v. McKeown, 266 Ill. App. 3d 324, 325 (1994); Geick v. Kay, 236 Ill. App. 3d 868, 874 (1992). Section 2-619(a)(9) of the Code provides that an action may be dismissed on the ground that the claim asserted is barred by other affirmative matter that avoids the legal effect or defeats the claim. 735 ILCS 5/2-619(a)(9); Geick, 236 Ill. App. 3d at 874. Affirmative matter includes matter in the nature of a defense that completely negates the alleged cause of action. Geick, 236 Ill. App. 3d at 874.

¶ 15 To establish a cause of action for defamation, a plaintiff must present facts showing that the defendant made a defamatory statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and the publication caused damages. Solaia Technology, LLC, 221 Ill. 2d at 579; Naleway v. Agnich, 386 Ill. App. 3d 635, 639 (2008). Where the statements are alleged to be defamatory per se, the plaintiff is not required to plead and prove actual damages to recover; statements considered actionable per se are thought to be so obviously and materially harmful that injury to the plaintiff's reputation may be presumed. Naleway, 386 Ill. App. 3d at 639. Among the types of statements considered to be defamatory per se are those that impute a person is unable to perform or lacks integrity in performing his or her employment duties, as are statements that impute a person has committed a crime. Naleway, 386 Ill. App. 3d at 639.

¶ 16 However, a defamatory statement is not actionable if it is privileged. Solaia Technology, LLC, 221 Ill. 2d at 585; Naleway, 386 Ill. App. 3d at 639. Whether a privilege exists is a question of law. Solaia Technology, LLC, 221 Ill. 2d at 585; Naleway, 386 Ill. App. 3d at 639. In contrast to a conditional or qualified privilege, an absolute privilege is a complete bar to a claim for defamation. Naleway, 386 Ill. App. 3d at 639; Thompson v. Frank, 313 Ill. App. 3d 661, 664 (2000). The question of privilege, or immunity, is an affirmative defense which may be raised and determined upon a motion to dismiss under section 2-619. Geick, 236 Ill. App. 3d at 875. A statement that is absolutely privileged is one for which no remedy can be had in a civil action, and one which cannot be overcome by a showing of improper motivation or knowledge of falsity. Geick, 236 Ill. App. 3d at 875.

¶ 17 Absolute privilege is a defense to defamation claims brought against governmental officials. Geick, 236 Ill. App. 3d at 875; see also Meyer, 266 Ill. App. 3d at 325. Absolute privilege for statements made within the scope of official duties extends to mayors of Illinois municipalities and executive officers and members of local government boards and councils at regular meetings. Meyer, 266 Ill. App. 3d at 325; Geick, 236 Ill. App. 3d at 876. See also Loniello v. Fitzgerald, 42 Ill. App. 3d 900, 902 (1976); McLaughlin v. Tilendis, 115 Ill. App. 2d 148, 155 (1969); Larson v. Doner, 32 Ill. App. 2d 471, 475 (1961).

¶ 18 Plaintiffs first contend that the court mistakenly found that absolute privilege applied to Towers' publication of the memo. They claim two bases of the court's allegedly mistaken finding of absolute privilege: that the memo was distributed and discussed at a Village board meeting and that Towers was acting within the scope of his duties.

¶ 19 In support of their first point, plaintiffs acknowledge that defamatory statements are not actionable if they are protected by absolute privilege but they insist that Towers' publication of the memo was not subject to absolute privilege because he failed to identify either "an express law" or regulation that compelled its publication. For this, they rely primarily upon Busch v. Bates, 323 Ill. App. 3d 823 (2001), and Anderson v. Beach, 386 Ill. App. 3d 246 (2008), and to a lesser extent, Weber v. Cueto, 209 Ill. App. 3d 936 (1991). Such reliance is misplaced.

¶ 20 In Busch, a section 2-619 dismissal of a defamation action was affirmed. Busch, 323 Ill. App. 3d at 834. There, the statements that were allegedly defamatory were made by three Illinois State Police officers who were legally obligated to report the plaintiff's perceived misconduct; as such, the statements were correctly determined to be absolutely privileged. Busch, 323 Ill. App. 3d at 834. Although Anderson also involved a section 2-619 dismissal in a defamation action against a police officer, it concerned the defendant officer's conditional privilege. Anderson, 386 Ill. App. 3d at 246. The court found that the statements at issue were conditionally privileged but further found that determination of alleged abuse of that privilege involved a fact question that required reversal of the dismissal and remand. Anderson, 386 Ill. App. 3d at 253-54.

¶ 21 Finally, in Weber, the dismissal of a complaint for defamation against an attorney was affirmed in part because the attorney's mandatory duty to report misconduct made the statements to a county board absolutely privileged. Weber, 209 Ill. App. 3d at 947. The dismissal was reversed as to the allegations that the defendant caused the statements to be published by various newspapers because the obligation to report concerned only those reports made to a tribunal or other authority empowered to investigate or act upon a violation of a disciplinary rule of professional conduct.

Weber, 209 Ill. App. 3d at 948.

¶ 22 Those three cases involve privileged statements: in two cases, Busch and Weber, the statements were absolutely privileged because the publisher was required to make such a report; in the third case, Anderson, the statements were conditionally privileged. All three cases discuss the nature of the allegedly defamatory statements and the duties of the publishers to make such statements. As already noted, the defendant publishers were Illinois State Police officers in Busch, a former municipal police officer in Anderson, and an attorney in Weber. None were officials of the executive branch of State or local government. Therefore, they are fundamentally distinguishable from the instant case.

¶ 23 The instant case involves a defendant mayor. Illinois courts have long extended absolute privilege to mayors regarding communications made within the scope of their official duties. Meyer, 266 Ill. App. 3d at 325; Geick, 236 Ill. App. 3d at 876; Loniello, 42 Ill. App. 3d at 902. Therefore, plaintiffs' assertion that absolute privilege is absent here because Towers, allegedly, was not required to publish the memo, fails. Moreover, were the existence of absolute privilege here dependant upon a requirement to report, plaintiffs acknowledge that Section 31.21 of the Sauk Village Code of Ordinances in fact provides that the mayor "examine the grounds of all reasonable complaints made against any village officer and cause all violations *** to be promptly punished or reported to the proper tribunal for correction." However, we need not determine whether a Village board meeting would be a "proper tribunal" to meet what the plaintiffs assert is a necessary legal compulsion to publish. Again, the cases cited by plaintiffs concerning defamatory statements that were required by law or regulation did not involve officials of the executive branch of government. Rather,

absolute privilege applies here because Towers was the mayor and such privilege attaches to statements made by officials of the executive branch within the scope of their official duties. See e.g., Meyer, 266 Ill. App. 3d at 325; Geick, 236 Ill. App. 3d at 876.

¶ 24 Plaintiffs also dispute that the distribution of the memo at the Village board meeting on February 21, 2012, fell within the scope of Towers' official duties. On this point, plaintiffs rely upon their own allegations in the first count of their First Amended Complaint to claim that the memo was distributed before the start of the meeting, it was given to members of the public, and that neither it nor its contents were on the meeting agenda. For these reasons, they contend the publication was not made within the performance of Towers' official duties. After acknowledging the absolute privilege that attaches to public officials of the executive branch, plaintiffs, correctly, frame the "relevant inquiry" as "whether the allegedly defamatory statement of the government official was reasonably related to his or her public duties." That is the relevant question here, and it must be answered in the affirmative.

¶ 25 The facts alleged, including the distribution of the memo before the start of the Village board meeting, must be taken as true. See, e.g., Meyer, 266 Ill. App. 3d at 325 (a 2-619(a)(9) motion to dismiss admits all well-pleaded facts). Nonetheless, plaintiffs provide no support whatsoever for their implicit assertion that the distribution before the Village board meeting started rendered it "outside" of Towers' official duties. The same is true of the alleged facts that the memo was given to members of the public and that it was not on the agenda for that particular meeting. To the contrary, this Court has held that a mayor was not required to be addressing a board meeting at all to invoke the privilege, nor was pending litigation required. Geick, 236 Ill. App. 3d at 877.

Therefore, whether the statements were published prior to the start of the meeting, whether publication was made to individuals other than members of the Village board, or whether the memo was or was not on the meeting agenda, does not render the publication of them outside the scope of Towers' duties as mayor.

¶ 26 On this point, plaintiffs acknowledge and cite Section 31.21 of the Village Code that outlines the duties of the mayor. Those duties include: presiding at all meetings of the corporate authorities, enforcing all the ordinances, orders and resolutions passed, supervising the conduct of the officers of the Village except the trustees, and examining the grounds of all reasonable complaints against any village officer and causing all violations of duties or other neglects to be promptly punished or reported to the proper tribunal for correction. Additionally, Section 31.21 provides that the mayor shall have the "same powers and perform the same duties as the mayor of a city." These official duties are expansive in scope: nothing in the Village Code language limits them to begin at the start of a Village board meeting, nor is there a prescribed manner for causing complaints or violations of duties "or other neglects" to be punished or reported. Thus, it is reasonable to conclude that bringing the matter of the disciplinary memo to the attention of the board is within the scope of Towers' official duties as mayor. Again, the description of the official duties of the mayor do not contain such limitations on the manner in which he is to fulfill them as the plaintiffs assert. Nor does Section 31.21 prohibit republication of an internal memo or its publication to members of the public who may be in attendance at a board meeting. Therefore, there is no basis for plaintiffs' additional claim that, because the memo was authored by police officers, and not by Towers himself, then publishing the memo to members of the public prior to the start of the Village board meeting was

not within the scope of Towers' official duties.

¶ 27 In conjunction with this point, plaintiffs assert that the cases relied upon by the trial court were not applicable here. However, the trial court properly relied upon authorities finding absolute privilege for statements made by executive officers. In addition to cases already cited and discussed such as Naleway, Meyer, Geick, and Anderson, the court also cited Larson v. Doner, 32 Ill. App. 2d 471 (1961), in which a mayor's statements in the form of a resolution presented at a city council meeting to have a city clerk suspended from office for malfeasance and negligence were held absolutely privileged. Such citations by the court were entirely appropriate.

¶ 28 Further, there was no error in the court's reliance on Geick, wherein a mayor's statements in press releases were held to be absolutely privileged, given the mayor's powers of general supervision over employees and of appointment and removal of officers. See also Blair v. Walker, 64 Ill. 2d 1 (1976) (governor's statements issued in press releases were absolutely privileged); Loniello, 42 Ill. App. 3d at 902 (mayor's statements addressing a city council were absolutely privileged). Here, Towers also had authority over Village officials and the enforcement of ordinances, among other things, pursuant to the duties stated in Section 31.21 of the Village Code of Ordinances. In their reply brief, plaintiffs challenge Towers' reliance on Section 31.21 in his response brief, claiming that its submission lacked foundational support and that it was superseded by other rules. However, plaintiffs failed to raise this challenge before the trial court. In fact, they discussed Towers' duties as set out in Section 31.21 in their response to the motion to dismiss, as they did in their appellate brief. Because the challenge was not raised before the trial court, any such challenge as contained in plaintiffs' reply brief is waived on appeal. Kessler v. Zekman, 250 Ill. App. 3d 172 (1993) (issues

not raised in trial court are waived and may not be raised for first time on review). As previously noted, the official duties of the mayor as set out in Section 31.21 are not narrowly limited to actions during the course of Village board meetings. Thus, it is reasonable to conclude that Towers' official duties would include addressing the memo and its contents in the context of the Village board meeting and, thus, his statements would be absolutely privileged.

¶ 29 Plaintiffs also assert that they sufficiently stated a claim for false light invasion of privacy in count three of their First Amended Complaint. They contend that they had a reasonable expectation of privacy in the contents of their disciplinary files, including the memo which contained numerous allegations of misconduct that Towers knew to be false and which would be highly offensive to a reasonable person. They further assert that Towers acted with actual malice when he republished the memo to the general public.

¶ 30 The absolute immunity that attaches to the mayor's performance of his official duties also applies to virtually every common law tort, including, but not limited to, malicious prosecution, tortious interference with business, and invasion of privacy. Geick, 236 Ill. App. 3d at 879. As in Geick, here, too, the false light invasion of privacy claim in the third count of the First Amended Compliant was barred by the absolute privilege doctrine that applies to Towers' actions in his official duties as mayor. Therefore, the court properly granted the section 2-619(a)(9) dismissal of the third count.

¶ 31 Finally, we note that Towers argued in his response brief that dismissal of the First Amended Complaint was proper due to the absolute privilege that attached to his actions. Although he noted that the trial court did not reach the applicability of conditional privilege, he argued that, in the

alternative, conditional privilege would also apply. In their reply brief, plaintiffs object that the issue of conditional privilege is not properly before this Court. Because the dismissal of the First Amended Complaint was proper due to the doctrine of absolute privilege, we need not address the issue of conditional privilege.

¶ 32 Accordingly, the order appealed from, dismissing with prejudice plaintiffs' First Amended Complaint pursuant to section 2-619(a)(9), is affirmed.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, the above-stated order of the trial court is affirmed.

¶ 35 Affirmed.