2017 IL App (1st) 150878-U

SIXTH DIVISON
MARCH 31, 2017

No. 1-15-0878

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

UNIVERSAL GAMING GROUP, an Illinois limited liability company,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant and Cross-Appellee,	)	
	)	No. 14 L 10145
v.	)	
TAFT STETTINIUS & HOLLISTER LLP and PAUL JENSON,	)	Honorable Janet Adams Brosnahan, Judge Presiding.
Defendant-Appellees and Cross-Appellants	)	

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: The plaintiff's complaint alleging defamation, commercial disparagement, and violation of the Illinois Deceptive Trade Practices Act was properly dismissed pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)) for failing to state a cause of action. The defendants' cross-appeal is dismissed, as the trial court's dismissal order was not adverse to the defendants.

¶ 2 The plaintiff-appellant, Universal Gaming Group, LLC (UGG) appeals from an order of the circuit court of Cook County dismissing its complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) 735 ILCS 5/2-615 (West 2012). The defendants-appellees filed a cross-appeal, to the extent the trial court declined to dismiss on the basis of the Citizen Participation Act (735 ILCS 110/1 *et seq*. (West 2012)). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The plaintiff, UGG, owns and operates cash-operated electronic video game machines, known as gaming "terminals," that allow customers to play games such as poker and blackjack. UGG operates over 600 video gaming terminals in Illinois. Such "terminal operators" must be licensed pursuant to the Video Gaming Act (VGA), 230 ILCS 40/5 (West 2014). The VGA grants the Illinois Gaming Board (IGB) with jurisdiction to supervise all gaming operations. Pursuant to the VGA, the IGB conducts background investigations on applicants seeking licenses to operate gaming terminals. UGG has been a licensed terminal operator since 2012.

¶ 5 The defendants consist of a law firm, Taft Stettinius & Hollister LLP (Taft), and Paul Jenson, an attorney at Taft. According to the complaint, "Jenson's legal practice specializes in gaming law, particularly gaming law before the IGB." The defendants' clients include terminal operators who compete with UGG.

¶ 6 UGG's claims against the defendants arise out of an email from the defendants which commented on a 2014 settlement agreement between UGG and the IGB, after the IGB alleged that conduct by one of UGG's employees precluded the renewal of UGG's license.

¶ 7 The UGG-IGB dispute arose after the IGB adopted a motion to deny the annual renewal of UGG's terminal operator license on June 26, 2014. On July 1, 2014, the IGB issued a written notice to UGG that its license renewal had been denied (the notice of denial). According to the eventual settlement agreement, the notice of denial alleged "that UGG's employee Mr. Bottalla failed to properly identify a referring 'finder' of a putative location for an agreement for the placement of video gaming terminals, and thus the IGB alleged UGG did not demonstrate its qualification and suitability for 2014 licensure."

¶ 8 In response, UGG filed a complaint against IGB for declaratory and injunctive relief in the circuit court of Cook County. UGG also submitted a request to the IGB for an administrative hearing to contest the notice of denial. On July 24, 2014, the IGB granted UGG's request for an administrative hearing, finding that UGG established a *prima facie* case as to its suitability for renewal of its 2014 terminal operator license.

¶ 9 On August 21, 2014, UGG and the IBG entered into a settlement agreement, which recited that IGB and UGG "mutually desire to avoid the expense and risk of further protracted litigation and deem it in their best interests *** to resolve in their entirety all matters between them at issue ***."

¶ 10 The settlement agreement made no finding of wrongdoing by any UGG employee. However, the settlement provided that UGG's employee, Bottalla, was to resign effective September 26, 2014. UGG and Bottalla also agreed to pay, jointly and severally, "a $50,000 fine to the IGB for Mr. Bottalla's alleged conduct in regard to the allegations as set forth in the Notice of Denial". In addition, UGG agreed to "enhance its compliance policies," agreeing to "implement additional procedures for training video gaming location 'finders.'" UGG additionally agreed that "any finder in the future that pays or uses an undisclosed sub-finder in violation of UGG's polices and the IGB's practices will be promptly terminated." For its part, the IGB agreed to renew UGG's terminal operator license and agreed to "close its investigation *** relating to and/or arising out of the allegations in the denial of license renewal."

¶ 11 The UGG-IGB settlement was discussed in an email alert sent by defendant Jenson, to the defendants' clients and others in the video gaming industry. According to UGG’s complaint, the defendants "represent that they are counsel for over 500 video gaming locations" in Illinois,

and act as chief legal counsel for the Illinois Coin Machine Operators Association (ICMOA), whose members operate the majority of video gaming terminals in Illinois.

¶ 12 On August 29, 2014, Jenson, through his email account at Taft, transmitted an email to the defendants' clients in the video gaming industry with the subject heading "Cook County Tax, Settlement Agreements & Disciplinary Complaints" (the Jenson email), beginning with the salutation "Clients & Friends." According to UGG's complaint, the defendants "publish similar monthly emails and know, expect and/or intend that the emails be republished or resent to the ICMOA and others."

¶ 13 Under the heading "IGB Settlements & Discipline," Jenson wrote: "we are providing you with some reading material that should be reviewed for educational purposes. As noted in our summary of the IGB's August meeting, the IGB announced it had reached two settlements and issued several disciplinary complaints. Set forth below is a brief description of each."

¶ 14 The Jenson email contained the following language regarding the UGG-IGB settlement, which forms the basis of UGG's allegations in this lawsuit:

> "Universal Gaming – This Settlement Agreement indicates that one of UGG's employees failed to properly identify a referring 'finder' of a prospective Use Agreement. The Agreement does not provide a detailed description of the behavior that caused the problem, so we will not speculate on the particular facts. The settlement requires the offending employee to resign from UGG ***. In addition, UGG and the employee will jointly pay $50,000. UGG also agreed to enhance its compliance policies by expanding the role of its compliance officer and hiring a consultant to analyze

> and improve its operating procedures. Together, these items will cost UGG approximately $50,000. Finally, UGG will implement additional procedures to train its location finders. Any finder that pays or uses in the future an undisclosed 'sub-finder' in violation of UGG's policies and the IGB's practices will be promptly terminated, which really should be true regardless of the Settlement Agreement. So, for the scores of Terminal Operators that have struggled with UGG's sales agents in the past, this Settlement Agreement apparently means those individuals have found religion and will not act outside of the IGB's rules and policies.
>
> Many of you have expressed significant disappointment with the aforementioned result. Regardless, we implore you not to engage in this type of behavior with the thought that the punishment will not be overly severe. This settlement should not be viewed as 'the cost of doing business' (i.e., it's worth a $50,000 fine if we can obtain a valuable Use Agreement regardless of how we do it). Please continue doing the right thing and educate your sales agents about the rules and policies that apply to them."

The Jenson email proceeded to describe an unrelated settlement between IGB and another entity, as well as fines imposed by IGB against other entities.

¶ 15 On September 29, 2014, UGG filed a verified complaint against the defendants, containing counts of defamation, commercial disparagement, and violation of the Illinois

Deceptive Trade Practices Act. The complaint alleged that the Jenson email contained false statements disparaging UGG, including the assertion "that [UGG's] sales agents have acted outside Illinois gaming laws, and that other terminal operators have 'struggled' with such conduct."

¶ 16 The complaint alleged that the Jenson email had been sent "to the majority of the video gaming industry," including UGG's competitors, as well as to "hundreds of existing and potential video gaming locations with which [UGG] is seeking to enter into use agreements for the placement" of video gaming terminals. UGG alleged that by sending the email, the "defendants tarnished or sought to tarnish [UGG's] reputation among [UGG's] prospective clients."

¶ 17 Count I alleged defamation *per se*, alleging that the email contained false statements that UGG "lack[s] integrity" and failed to comply with Illinois law or "general business ethics." Specifically, UGG alleged that the email stated that other terminal operators had "struggled" with illegal conduct of UGG's agents; and that the email's reference to "this type of behavior" stated or implied that UGG "br[oke] the law to get a use agreement by illegal or dishonest means." UGG otherwise alleged that the email attacked its ability to "legally *** or ethically perform its trade or profession"; "accuse[d] [UGG] of fraud or mismanagement; "impugned the integrity of [UGG's] business"; damaged its professional reputation, and deterred potential business partners.

¶ 18 Count II, for "common law commercial disparagement," asserted that the defendants made false or demeaning statements about UGG's goods, services or business, and "accus[ed] [UGG] of dishonesty or reprehensible business methods." Count III pleaded violation of the Illinois Deceptive Trade Practices Act (DTPA) for "disparag[ing] the goods, services, or business of [UGG] by false or misleading representation of fact" and suggesting UGG obtained a "use agreement by illegal or dishonest means." That count cited sections 510/2(a)(8) and

510/2(a)(12) of the DTPA. 815 ILCS 510/2(a)(8), (12) (West 2012). The complaint sought damages, including punitive damages, but not injunctive relief.

¶ 19 On December 4, 2014, the defendants filed a motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)) which permits "combined motions" asserting arguments pursuant to section 2-615 and section 2-619 of the Code. The motion to dismiss first argued that, pursuant to section 2-615 of the Code, the complaint failed to state a viable claim for relief. With respect to the defamation claim, the defendants argued that dismissal was warranted because (1) the statements in the Jenson email were true; (2) the email stated an opinion; (3) the email was "capable of being innocently construed"; and (4) the complaint did not meet the "higher standard" for pleading a claim of defamation *per se*. The defendants also argued that Count II for commercial disparagement failed to state claim for the same reasons. With respect to Count III, the defendants argued that the complaint did not state a claim for violation of the DTPA because Jenson's email was not false or misleading and did not disparage UGG's goods or services.

¶ 20 In the alternative, the defendants' motion argued that dismissal was warranted pursuant to section 2-619(a)(9) of the Code, because Jenson's email was immunized as protected speech under the Citizen Participation Act (CPA), 735 ILCS 110/1 *et seq*. (West 2012). The defendants cited the CPA provision for dismissal where a "claim is based on *** any act or acts of the moving party in furtherance of the moving party's right of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15 (West 2012).

¶ 21 On January 9, 2015, UGG filed its response to the motion to dismiss, arguing that each of the three counts in the complaint stated a viable claim for relief, and that the Jenson email was not the type of speech that is protected by the CPA. On January 30, 2015, the defendants filed

their reply in support of their motion to dismiss. On February 6, 2015, the defendants, pursuant to an agreed motion, re-filed their brief, for the sole purpose of attaching the UGG-IGB settlement agreement as an exhibit.

¶ 22 On February 24, 2015, the trial court entered an order dismissing all counts of the complaint with prejudice. The order specified that "such dismissal is not made under the Citizen Participation Act" but that "Dismissal of Counts I-III shall be for the reasons set forth in defendants' submissions and by the court at the hearing on the motions." Notably, the record does not contain a transcript of a hearing on the motion to dismiss.

¶ 23 UGG filed a notice of appeal in the circuit court on March 25, 2015, seeking to challenge the February 24, 2015 dismissal. A copy of UGG's notice of appeal was filed with the clerk of the Appellate Court.

¶ 24 The defendants filed a notice of cross-appeal on April 7, 2015, appealing the portion of the February 24, 2015 order "denying relief under the Citizen Participation Act."

¶ 25 The record of appeal was filed with our court on June 8, 2015, but UGG's March 25, 2015, notice on appeal was not contained in the record at that time. UGG's opening appellate brief was filed on October 13, 2015. The appendix to that brief contains a copy of the March 25, 2015 notice of appeal.

¶ 26 On December 15, 2015**,** the defendants moved to dismiss the plaintiff's appeal for lack of jurisdiction, citing UGG's failure to include its notice of appeal in the record. On December 21, 2015, UGG filed a response which acknowledged that the notice of appeal had not been included in the record and stated that UGG would move to supplement the record. Our court denied the defendants' motion to dismiss the appeal on January 6, 2016.

¶ 27 Meanwhile, on December 21, 2015, UGG filed a "motion to amend and supplement the record." However, UGG did not submit any bound and certified supplemental record, as required by Supreme Court Rule 329 (eff. Jan. 1, 2006) On December 29, 2015, UGG's motion to supplement the record was denied by our court, without prejudice to refile in compliance with Supreme Court Rules.

¶ 28 On February 16, 2016, the defendants filed a combined brief, in response to UGG's opening brief and in support of the defendants' cross-appeal. The defendants' brief noted that UGG had not supplemented the record to include its notice of appeal, and thus urged that our court lacked jurisdiction. On April 19, 2016, UGG filed its combined reply brief in support of its appeal and in response to the defendants' cross-appeal. In that brief, UGG again stated that it would file a motion to amend and supplement the record.

¶ 29 On February 23, 2017, on the court's own motion, we entered an order recognizing that UGG had not yet supplemented the record with its notice of appeal. We directed UGG to do so within 21 days, or to show cause why its appeal should not be dismissed.

¶ 30 On March 16, 2017, UGG filed a motion for leave to file a supplemental record *instanter*, representing that it had filed with our court a properly bound and certified supplemental record containing a copy of the notice of appeal. Our court has granted that motion under a separate order.

¶ 31 ANALYSIS

¶ 32 Before we address the merits, we note that we have jurisdiction because UGG filed a timely notice of appeal from the final order dismissing its complaint with prejudice. See Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303(a) (eff. June 4, 2008). Furthermore, as the notice of appeal has now been properly added to the record, any jurisdictional defect from its prior

omission from the record has been corrected. See *Tunca v. Painter*, 2012 IL App (1st) 093384 (failure to include notice of appeal in the record on appeal deprives the court of appellate jurisdiction).

¶ 33 We first turn to the merits of UGG's appeal from the dismissal of its claims pursuant to section 2-615 of the Code of Civil Procedure. "A section 2-615 motion to dismiss tests the legal sufficiency of the complaint. On review, the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *** A cause of action should not be dismissed under section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. [Citation.] The standard of review is *de novo*." *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009).

¶ 34 We first review dismissal of Count I, for defamation *per se*, and conclude that dismissal of this count was proper. "To state a defamation claim, a plaintiff must present facts showing that the defendant made false statements about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. [Citation.] A defamatory statement is a statement that harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him. [Citation.] " *Green*, 234 Ill. 2d at 491.

¶ 35 "A statement is defamatory per se if its harm is obvious and apparent on its face." *Id.* In Illinois there are five categories of statements that are considered defamatory *per se*; three of those categories are implicated by UGG's allegations: (1) "words that impute a person has committed a crime", (2) "words that impute a person is unable to perform or lacks integrity in performing her or his employment duties" and (3) "words that impute a person lacks ability or

otherwise prejudices that person in her or his profession." *Id.* at 491-92. "The preliminary construction of an allegedly defamatory statement is a question of law, and our review therefore is *de novo*." *Id.* at 492.

¶ 36 On appeal, UGG argues that "the crux of this case is Mr. Jensen's e-mail which [UGG] alleges made a clear statement that one of UGG's employees violated the IGB's rules and policies." UGG urges that motion to dismiss was improperly granted because it pleaded actionable, demonstrably false statements; the statements were not protected "opinion"; the statements were "not capable of an innocent construction" and that UGG's complaint "met the higher standard for pleading defamation *per se*."

¶ 37 In response, the defendants argue, as they did in the trial court, that UGG failed to plead an actionable defamation claim because (1) the statements were true; (2) the statements consisted of non-actionable opinions; (3) the statements are capable of an innocent construction; and (4) UGG did not meet the "higher standard" for pleading defamation *per se*. In addition, although not raised in the trial court, UGG further asserts that the statements in Jenson's email are also non-actionable because they are protected by the "fair-reporting privilege."

¶ 38 Reviewing the complained-of statements in the context of the Jenson email in its entirety, as well as the settlement agreement which it described, we agree that dismissal of the defamation count was appropriate for a number of reasons. First, to the extent UGG complains that the Jensen email falsely stated or implied that one of UGG's employees had violated IGB regulations, the settlement agreement demonstrates the statements were substantially true.

¶ 39 "A defendant is not liable for a defamatory statement if the statement is true. [Citation.] Only 'substantial truth' is required for the defense. [Citation.] While determining 'substantial truth' is normally a question for the jury, the question is one of law where no reasonable jury

could find that substantial truth had not been established." *Moore v. People for the Ethical Treatment of Animals, Inc.*, 402 Ill. App. 3d 62 (2010). "Substantial truth refers to the fact that a defendant need prove only the 'gist' or the 'sting' of the statement." *Id.* If substantially true, "allegedly defamatory material is not actionable even where it is not technically accurate in every detail." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 42.

¶ 40 UGG argues that the suggestion that UGG or its employees did not comply with the law was false because, at the time of the email, there "was no finding by the IGB that UGG had violated the statutory requirements for renewal of the license." UGG emphasizes that, as recited in the settlement agreement, in July 2014, the IGB granted UGG's request for an administrative hearing, "finding that UGG established a prima facie case as to its suitability for renewal of its 2014 terminal license." UGG argues that this demonstrates "as a matter of law [that] UGG rebutted any allegations of wrongdoing." UGG thus alleges that Jenson's email was "demonstrably false."

¶ 41 We disagree. To the extent the defamation claim relies on statements indicating that UGG's employee violated IGB regulations, our review of the settlement agreement convinces us that it was substantially true that the settlement agreement "indicated" misconduct by a UGG employee. Although the settlement made no explicit finding of wrongdoing, the settlement agreement: (1) recited specific allegations of misconduct by UGG's employee; (2) indicated that the investigation was closed without any finding that the misconduct *had not* occurred; and (3) imposed significant remedial measures, including a "fine," termination of the employee whose conduct was at issue, and requiring UGG to "enhance" its compliance measures.

¶ 42 As acknowledged by UGG's complaint, the settlement agreement recites that IGB "issued its Notice of Denial to UGG alleging in material part that UGG's employee Mr. Bottalla failed to

properly identify a referring 'finder' of a putative location for an agreement for the placement of video gaming terminals."

¶ 43 Although UGG's license was never suspended, and UGG's license was renewed, this does not mean that it was "demonstrably false" that the employee misconduct actually occurred. Parties routinely settle allegations without any findings of liability, in order to avoid the expense of litigation. Similarly, the settlement in this case recites that it was reached based on the parties' "mutual[] desire to avoid the expense and risk of further protracted litigation." However, the entry of such an agreement does not mean that the alleged conduct did not occur. Although the IGB-UGG settlement made no finding of any violation, it also made no finding that Bottalla had *not* violated IGB regulations.

¶ 44 Significantly, the remedial measures imposed by the agreement suggested that, at least, IGB continued to believe Bottalla had engaged in misconduct, as it (1) called for Bottalla's resignation, (2) required that Bottalla and UGG jointly pay a "$50,000 fine" to IGB; (3) and required Bottalla to surrender his terminal handler license. A reasonable person can infer that remedial measures "indicated" at the least, IGB maintained the belief that Bottalla had violated IGB rules. In this sense, the settlement agreement showed the truth of the "gist" or "sting" of the allegedly defamatory statements in Jenson's email. *Coghlan*, 2013 IL App (1st) 120891, ¶ 42. Thus, we agree that Jenson was substantially truthful in stating that the settlement agreement "*indicates* that one of UGG's employees failed to properly identify a referring 'finder' of a prospective Use Agreement." (Emphasis added.)

¶ 45 Separately, we agree with the defendants that certain other challenged statements – specifically, Jenson's comments suggesting that UGG agents "have found religion," and his

advice "not to engage in this type of behavior" — were not verifiable statements of fact, but were non-actionable statements of opinion.

¶ 46 "Only statements capable of being proven true or false are actionable; opinions are not." [Citations.] Specifically, the first amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe represented facts." *Coghlan*, 2013 IL App (1st) 120891, ¶ 40. "Four points are stressed in opinion analysis: the (1) precision of the statement; (2) verifiability of the statement; (3) literary context of the statement and (4) public and social contexts of the statement. If it is clear that the writer is exploring a 'subjective view, an interpretation, a theory, conjecture or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.' [Citation.] " *Moriarty v. Greene*, 315 Ill. App. 3d 225, 235 (2000) (finding non-actionable statements of opinion where they appeared "in a regularly featured column by a journalist who regularly expressed his personal opinion.").

¶ 47 Applying these criteria, we find that the complained-of statements were non-actionable opinions. The Jenson email's suggestion that "scores of Terminal Operators" have "struggled with UGG's sales agents in the past" is ambiguous and imprecise; the email does not identify who these individuals were or their conduct, and the phrase "struggled with" is broad and susceptible to many possible interpretations. Similarly, the email's suggestion that individuals at UGG "have found religion" is loose, figurative language without any precise meaning; this appears to be Jenson's speculation or conjecture about the significance of the settlement agreement. Further, it is difficult to see how these vague general statement about the behavior and attitudes of unspecified individuals could be verifiable. Viewed in context—as part of a periodic message to clients in the gaming industry— these statements are reasonably understood as speculation offered with general advice regarding IGB compliance.

¶ 48 Similarly, the email's language that "we implore you not to engage in this type of behavior"; that such a settlement should not be viewed as "the cost of doing business"; and to "Please continue doing the right thing and educate your sales agents about the rules and policies that apply" are clearly not statements of verifiable fact. Rather, in the context of an email to clients from a law firm specializing in the gaming industry, they are clearly general statements of advice and opinion concerning compliance with IGB rules.

¶ 49 Furthermore, we also agree with the defendants that dismissal of the defamation claim is independently warranted under the innocent construction rule. "[E]ven statements that fall into one of the categories of words that are defamatory *per se* are not actionable *per se* if they can be reasonably capable of an innocent construction. [Citation.] Under the innocent-construction rule, a court must consider the statement in context and give its words, and any implications arising from them, their natural and obvious meaning. [Citation.] While a court should not strain to see an inoffensive gloss where the defendant clearly intended and unmistakably conveyed a defamatory meaning, if the statement in context is reasonably capable of a nondefamatory interpretation, it should be interpreted as such." (Internal quotation marks omitted.) *Coghlan*, 2013 IL App (1st) 120891, ¶ 41.

¶ 50 Viewing the Jenson email in context, we have no difficulty concluding that its statements are capable of an innocent construction**.** As alleged by UGG, the Jenson email was one of periodic emails from a law firm specializing in Illinois gaming law, sent to clients and members of the gaming industry. The Jenson email is offered "for educational purposes," updated clients on various recent disciplinary matters, and generally advised its recipients to ensure their compliance with IGB rules. A reasonable reader could view the email's summary of the IGB-UGG settlement not as a defamatory attack on UGG, but as an educational example of the

potential consequences (such as the settlement's remedial measures) for engaging in the behavior that was alleged against UGG's employee. As we find that the Jenson email was subject to an innocent construction, dismissal of the defamation count was proper on this independent basis. *Pompa v. Swanson*, 2013 IL App (2d) 120911, ¶ 21.

¶ 51 As we find dismissal of the defamation complaint was proper on the foregoing grounds, we need not examine the merits of defendants' independent argument that UGG's complaint did not meet a "higher standard for pleading corporate defamation *per se*." We also need not address the additional argument (raised by the defendants for the first time in this appeal), that the Jenson email was independently immune from suit under the fair reporting privilege.

¶ 52 Turning to the count of the complaint alleging commercial disparagement, we also find that this count was properly dismissed. We first recognize, as the defendants note, that our precedent is somewhat unclear as to whether this tort remains a viable independent cause of action. See *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 766 (2002) ("Currently, it is disputed as to whether a cause of action for commercial disparagement remains viable in Illinois."). A 2006 opinion by our court held that Illinois law recognizes commercial disparagement as a tort "separate and distinct from the tort of defamation." *Imperial Apparel, Ltd v. Cosmo's Designer Direct*, 367 Ill. App. 3d 48, 60 (20060 (*aff'd in part, rev'd in part*, 227 Ill. 2d 381 (2008)). Although our supreme court subsequently reversed the appellate court's finding that a claim for defamation had been alleged in that case, the supreme court did not need to decide the viability of the commercial disparagement claim. *Imperial Apparel, Ltd v. Cosmo's Designer Direct*, 227 Ill. 2d 381, 402 (2008) ("a determination that language is not actionable under the first amendment not only is fatal to plaintiffs' defamation claims, it precludes them from obtaining recovery under any of the other common law and statutory claims they asserted").

¶ 53 Nonetheless, even assuming this cause of action is still available, we do not find that UGG has pleaded commercial disparagement. To state such a claim, UGG "must show that defendants made false and demeaning statements regarding the quality of [UGG's] goods and services." *Schivarelli*, 333 Ill. App. 3d at 330; *Soderlund Bros., Inc. v. Carrier Corp.*, 278 Ill. App. 3d 606, 619-20 (1995). We agree with the defendants that the statements in the Jenson email did not disparage the quality of UGG's goods or services. As argued by the defendants: "Jenson said nothing about UGG's goods and services—the provision of video gaming terminals ***. At worst, Jenson speculated on his readers' experiences with UGG's sales agents." UGG has not pleaded how Jenson's statements suggesting that a UGG employee may have "failed to properly identify a referring 'finder' of a prospective Use Agreement" amounts to an attack on the quality of UGG's video gaming terminals or related services. Moreover, as discussed with respect to the defamation claim, we have determined that such statements were substantially true or constituted opinions. However, a commercial disparagement claim must plead false statements, and cannot be based on "expressions of opinion." *Soderlund Bros.*, 278 Ill. App. 3d at 619-20.

¶ 54 We also affirm the dismissal of Count III, alleging violation of the Illinois Deceptive Trade Practices Act (DTPA). "The purpose of the [DTPA] is to prohibit unfair competition, and it is primarily directed toward acts that unreasonably interfere with another's conduct of his or her business." *Chicago's Pizza, Inc. v. Chicago Pizza Franchise Limited USA*, 384 Ill. App. 3d 849, 866 (2008). The DTPA provides, in relevant part, that "[a] person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, the person ***

(8) disparages the goods, services, or business of another by false or misleading representations of fact." 815 ILCS 510/2(a)(8) (West 2012).[1]

¶ 55 UGG points out that a violation of section 510/2(a)(8) is not limited to disparagement of goods or services, as the statutory language extends to disparagement of the another person's "business." 815 ILCS 510/2(a)(8) (West 2012). UGG also urges that "by asserting that UGG was subject to non-renewal of its license for violating the IGB's rules and policies, Mr. Jenson was indeed disparaging the quality of UGG's services."

¶ 56 In response, the defendants cite case law suggesting that, notwithstanding the statutory reference to disparagement of a "business," this provision only applies to statements disparaging goods and services. See *Fedders Corp. v. Elite Classics*, 268 F. Supp. 2d 1051, 1064 (S.D. Ill. 2003) (" 'So long as the statements at issue do not disparage the quality of the plaintiff's goods or services, no cause of action will lie under [the statute].' [Citation.]"); *Crinkley v. Dow Jones and Co*., 67 Ill. App. 3d 869, 876 (1978) (explaining that the DTPA "substantially embodies the common law tort of commercial disparagement" which "has consistently been applied to statements which disparage the quality of one's goods or services"). On the other hand, our court has more recently stated that "[a] defendant engages in a deceptive trade practice when he disparages the services *or business* of another by a false or misleading representation of fact." (Emphasis added.) *Associated Underwriters of America Agency, Inc. v. McCarthy*, 356 Ill. App. 3d 1010, 1020 (2005).

[1] UGG's complaint also cited section 510/2(a)(12) of the DTPA, which states that a violation occurs when one "engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding." 815 ILCS 510/2(a)(12) (West 2012). However, UGG's argument in its appellate brief only concerns section 510/2(a)(8). Thus, we agree with the defendants that UGG has forfeited any argument that it stated a claim for violation of section 510/2(a)(12). See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 57 However, we need not attempt to reconcile this case law because we conclude that UGG's DTPA count fails for a more fundamental reason: a violation must be based on a "*false or misleading representation of fact*." (Emphasis added.) 815 ILCS 510/2(a)(8) (West 2012). As already discussed with respect to the defamation count, we have concluded that the allegedly disparaging statements in the Jenson email were either substantially true statements describing the settlement agreement, or were merely vague, unverifiable statements of opinion. UGG has simply not identified any false or misleading representation of fact in the Jenson email.

¶ 58 Moreover, we agree with the defendants that the DTPA count was improperly pleaded, to the extent that it sought monetary damages rather than injunctive relief. " [P]laintiffs cannot seek damages under the [DTPA]. [Citations.] Rather, a 'person likely to be damaged by a deceptive trade practice of another may be granted injunctive relief upon terms that the court considers reasonable.' " *Chicago's Pizza*, 384 Ill. App. 3d at 866 (quoting 815 ILCS 510/3 (West 2004)); *Greenberg v. United Airlines*, 206 Ill. App. 3d 40, 46 (1990). Notably, UGG's reply brief does not dispute this point, but complains that the defendants did not raise this argument in the trial court. However, we may affirm a dismissal on any basis, regardless of whether it was relied upon by the trial court. *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 734 (2009).

¶ 59 For the foregoing reasons, we affirm the trial court's dismissal of each of the counts of UGG's complaint pursuant to section 2-615 of the Code.

¶ 60 Having addressed and rejected UGG's arguments on appeal, we turn to the defendants' cross-appeal. We first note that we have jurisdiction, as the defendants filed their notice of cross-appeal within 10 days of service of UGG's notice of appeal. Ill. S. Ct. R. 303(a)(3) (eff. June 4, 2008).

¶ 61 The defendants' cross-appeal seeks to challenge the trial court's order dismissing UGG's complaint, insofar as the trial court declined to grant its section 2-619.1 motion to dismiss on the basis of the Citizen Participation Act (CPA) (735 ILCS 110/1 *et seq.* (West 2012)), but instead dismissed the complaint pursuant to section 2-615 of the Code. However, we find that the cross-appeal is improper, because the judgment granted the defendants the dismissal they sought.

¶ 62 Our supreme court has held that "[a] party cannot complain of error which does not prejudicially affect it, and one who has obtained by judgment all that has been asked for in the trial court cannot appeal from the judgment." *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 386 (1983) ("It is fundamental that the forum of courts of appeal should not be afforded to successful parties who may not agree with the reasons, conclusion or findings below."). "Where a trial court's judgment is entirely in favor of a party, specific findings of the trial court that may have been adverse to the party, do not give rise to an appeal. [Citations.] It is the trial court's judgment, not its reasoning, that is reviewed on appeal." *Argonaut-Midwest Insurance Co. v. E.W. Corrigan Construction Co.*, 338 Ill. App. 3d 423, 427 (2003).

¶ 63 Thus, "a cross-appeal does not lie from the denial of a motion to dismiss where no part of the trial court's final judgment was adverse to [the defendants]." *Hampton v. Cashmore*, 265 Ill. App. 3d 23, 26 (1994) (citing *Boles Trucking, Inc. v. O'Connor*, 138 Ill. App. 3d 764, 772 (1985)); see also *Dowe v. Birmingham Steel Corp.*, 2011 IL App (1st) 091997, ¶ 25 (defendant's cross-appeal was improper where the circuit court "granted summary judgment in favor of [defendant] as to all claims pending against it").

¶ 64 In this case, the trial court granted the relief sought by the defendants: dismissal of UGG's complaint. Accordingly, their cross-appeal was improper and must be dismissed.

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and dismiss the defendants' cross-appeal.

¶ 66 Affirmed; cross-appeal dismissed.