2012 IL App (5th) 110225-U

NO. 5-11-0225

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| JAMES PERDUE, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Shelby County. |
| | ) | |
| v. | ) | No. 10-L-19 |
| | ) | |
| NANCY FINLEY and FANNY URFER, | ) | Honorable |
| | ) | Douglas L. Jarman, |
| Defendants-Appellees. | ) | Judge, presiding. |

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where defendants are covered by the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201 (West 2010)), the circuit court's dismissal of the plaintiff's complaint is affirmed.

¶ 2 This case comes before us on appeal from the dismissal of the plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)). The circuit court held that all counts of the plaintiff's complaint were barred by the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/2-201 (West 2010)). For the reasons that follow, we affirm the circuit court's dismissal.

¶ 3 At the time this case was filed, the plaintiff was a resident of the Village of Tower Hill, a community of approximately 650 residents, and the defendants were employees of the village. Nancy Finley was the village's treasurer, water billing clerk, and Freedom of Information Act (FOIA) (5 ILCS 140/1 *et seq.* (West 2010)) officer. Fanny Urfer served as the village's mayor from 1986 to 2009 and later became a member of the village's board of

trustees.

¶ 4 On March 3, 2010, the plaintiff filed a FOIA request for: (1) copies of the village's contract between itself and the city attorney, Michael Antoline, (2) copies of billings received from Antoline, and (3) copies of disbursements made to Antoline. The plaintiff later amended this request to include a demand to inspect the original copies of the requested documents.

¶ 5 The village denied the plaintiff's FOIA request, citing the undue burden it would place on the village. Because the plaintiff's request contained no date restrictions, the village alleged that it would take a substantial amount of time and effort for its employees to meet the request and that the village would lose the benefit of its employees' productivity during that prolonged time.

¶ 6 The plaintiff then filed a petition for judicial review of the village's denial of his FOIA request. In its answer, the village reiterated the burden of the plaintiff's request. As to the request to inspect the original documents, the village asserted that an official would be required to remain with the documents while they were inspected. The village noted that its FOIA officer, Nancy Finley, "expressed fear of being in the same room with [plaintiff] believing [plaintiff] to be unbalanced and possibly violent." The report also stated that Finely was "aware of reports of at least one overt violent act and threats of violence made by [plaintiff] to her relatives." These statements were taken from Finley's affidavit, which was attached to the answer.

¶ 7 Also attached to the village's answer was Fanny Urfer's affidavit. According to Urfer, the plaintiff had interrupted one of the village's board meetings by yelling and shouting profanities, behavior which caused Urfer to fear for her physical safety. She believed that the plaintiff had "dangerous and violent propensities," and she was "aware that [plaintiff] has exhibited violent behavior toward a resident of the Village in the past." She further stated

that she "would be fearful and apprehensive to be alone with [plaintiff] without others being present to provide protection."

¶ 8 On November 24, 2010, the plaintiff filed a civil complaint against Nancy Finley and Fanny Urfer, based on the contents of their affidavits. The plaintiff's complaint sounded in the following counts: (I) libel, (II) intentional infliction of emotional distress, (III) invasion of the right to privacy, (IV) conspiracy to commit extortion, and (V) willful and wanton conduct.

¶ 9 The defendants filed a motion to dismiss, citing sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2010)). On March 22, 2011, a hearing was held on the defendants' motion to dismiss. On April 25, 2011, the court ruled that all counts of the complaint were barred by the Local Governmental and Governmental Employees Tort Immunity Act (the Act) (745 ILCS 10/2-201 *et seq.* (West 2010)) and dismissed the complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)). The court also dismissed counts I and III pursuant to section 2-619(a)(9) because the affidavits were filed in a legal proceeding, the defendants' statements were pertinent and material, and the statements were made in connection with their official duties in defending the village against the lawsuit.

¶ 10 It is from the circuit court's dismissal of his complaint that the plaintiff appeals. The plaintiff argues that his complaint should not have been dismissed because the Act does not apply to the instant case. He argues that the defendants did not make policy nor did they undertake discretionary duties. He also argues that the statements at issue were not made in connection with the performance of the defendants' official duties, are not pertinent or material to the matter in controversy, and are personal attacks against the plaintiff.

¶ 11 Section 2-619 dismissals are reviewed *de novo*. *Gonnella Baking Co. v. Clara's Pasta di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003). Under this standard, the inquiry 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. *Hargan v. Southwestern Electric Cooperative, Inc.*, 311 Ill. App. 3d 1029, 1031 (2000).

¶ 12 Section 2-619 of the Code of Civil Procedure provides for involuntary dismissal of complaints based upon certain defects or defenses. 735 ILCS 5/2-619 (West 2010). One ground on which a complaint may be dismissed is if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Immunity under the Act is an affirmative matter properly raised in a section 2-619 motion. *Doe v. Dimovski*, 336 Ill. App. 3d 292, 295 (2003).

¶ 13 Section 2-201 of the Act provides that "a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2010). Section 2-201 requires that the act or omission be both a determination of policy and an exercise of discretion. *Valentino v. Hilquist*, 337 Ill. App. 3d 461, 472 (2003).

¶ 14 To make a policy determination, the governmental entity or employee must balance competing interests and then make a judgment call as to what solution will best serve those interests. *Kevin's Towing, Inc. v. Thomas*, 351 Ill. App. 3d 540, 548 (2004). Policy determinations need not occur at the planning level or involve the formulation of principles to achieve a common public benefit. *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 474 (2001). Policy determinations have been found where: a principal revealed to a bully that another student complained about him (*Albers v. Breen*, 346 Ill. App. 3d 799 (2004) (balancing confidentiality of the information source, parental concerns, punishment, and impact on larger student body)), a police officer chose not to remove someone from a fire (*Fender v. Town of Cicero*, 347 Ill. App. 3d 46 (2004)

(balancing the officer's own safety with his chance of success)), and a high school principal denied a student's request for early dismissal due to inclement weather (*Harrison*, 197 Ill. 2d 466 (balancing the student's interest with the school's interest in an orderly dismissal)).

¶ 15 Here, the defendants balanced competing interests, including the plaintiff's right to public information with the burden of the request on the village. The safety of the village's employees and the employees' inability to work on village matters was also weighed against the plaintiff's right to the information. The defendants ultimately determined that the village's interests prevailed. Accordingly, the defendants filed affidavits to support the village, particularly the village's refusal to allow the plaintiff to inspect the original copies of the requested documents.

¶ 16 The second requirement for immunity is that the act be one of discretion. Discretionary acts are those which are unique to a particular public office and require the exercise of discretion. *Hanania v. Loren-Maltese*, 319 F. Supp. 2d 814, 835 (N.D. Ill. 2004). Ministerial acts are those which a person performs on a given set of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act. *Harrison*, 197 Ill. 2d at 472.

¶ 17 Here, the defendants were exercising discretion when they filed their affidavits. As the FOIA officer for the village, Finley was responsible for responding to FOIA requests and protecting original copies of village documents. As a member of the board of trustees, Urfer was also responsible for protecting village documents and ensuring the safety of village employees. As a result of each of their positions, the defendants were uniquely qualified to respond to the plaintiff's FOIA request and to participate in the resulting litigation. No evidence was presented of a "mandate of legal authority" requiring certain behavior in response to a petition for judicial review of the village's denial of a FOIA request. The defendants made their own decisions to file affidavits in support of the village. As such, their

actions were discretionary.

¶ 18 Because the defendants' actions in filing their affidavits are determinations of policy as well as discretionary actions, they fall within the purview of the Act. 745 ILCS 10/2-201 (West 2010). As such, the defendants are immune from liability under the Act and we affirm the circuit court's dismissal of the plaintiff's complaint under section 2-619(a)(9). 735 ILCS 5/2-619(a)(9) (West 2010).

¶ 19 We next turn to the issue of absolute privilege. In its April 25, 2011, order dismissing the plaintiff's complaint, the circuit court found that counts I and III were properly dismissed pursuant to section 2-619(a)(9) because "the affidavits in question were filed in a legal proceeding and the statements were pertinent and material" and that the affidavits were made "in connection with their official duties as Village Board member and Treasurer and FOIA Officer to defend a lawsuit against the Village."

¶ 20 As noted above, section 2-619(a)(9) permits the dismissal of an action on the ground that a claim is barred by an affirmative matter which avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2010). "In the context of a defamation action, the issue of absolute privilege is an affirmative defense which may be raised by and determined upon a section 2-619 motion." *Harris v. News-Sun*, 269 Ill. App. 3d 648, 651 (1995). Whether absolute privilege exists depends upon the necessity for the privilege, as well as the character of the body receiving the information. *Muck v. Van Bibber*, 251 Ill. App. 3d 240, 242 (1993). It is settled law that "anything said or written in a legal proceeding, including pleadings, is protected by an absolute privilege against defamation actions, subject only to the qualification that the words be relevant or pertinent to the matters in controversy." *Defend v. Lascelles*, 149 Ill. App. 3d 630, 633 (1986). The terms relevancy or pertinency, however, are not intended in the technical legal sense, nor are they a strict requirement. *Defend*, 149 Ill. App. 3d at 634. Courts are generally liberal in construing all doubts in favor

of relevancy or pertinency. *Defend*, 149 Ill. App. 3d at 634.

¶ 21 Here, the defendants filed their affidavits in response to the plaintiff's petition for judicial review of the village's denial of his FOIA request. The village denied the plaintiff's request because of the undue burden it would have placed on the village's employees, notably that an official would have been required to be present while the plaintiff inspected the original copies of the requested documents. Finley's affidavit is relevant because it relates to the plaintiff's request to inspect the original documents, provides a basis for her hesitancy about being alone with the plaintiff, and relates to the village's burden of responding to the plaintiff's request. Urfer's affidavit is relevant because it substantiates Finley's fear and relates to the village's burden in meeting the plaintiff's request.

¶ 22 We now turn to the absolute privilege afforded to statements made by government officials. Government officials are immune from civil liability for statements made during the exercise of their duties. *Harris*, 269 Ill. App. 3d at 651. "The justification for the privilege is the need to ensure that government officials are 'free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties.' " *Harris*, 269 Ill. App. 3d at 651 (quoting *Barr v. Matteo*, 360 U.S. 564, 571 (1959)). This privilege applies to a wide range of government officials, including police department administrators. *Harris*, 269 Ill. App. 3d at 652.

¶ 23 Here, because Urfer is a member of the village's board of trustees and Finley is the village's FOIA officer and treasurer, both qualify as government officials. Because Finley's and Urfer's affidavits related to their positions within the village's government and were filed in response to a lawsuit against the village, they were acting within their official duties. Because Finley and Urfer are government officials and the statements contained within their affidavits were made within the course of their official duties, they are protected by the doctrine of absolute privilege.

¶ 24 We therefore find that counts I and III of the plaintiff's complaint are barred by the doctrine of absolute privilege for statements made in a judicial proceeding and absolute privilege for statements made by government officials.

¶ 25 For the foregoing reasons, we affirm the decision of the circuit court of Shelby County dismissing the plaintiff's complaint.

¶ 26 Affirmed.