

2013 IL App (1st) 110772-U

No. 1-11-0772

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SIXTH DIVISION
May 3, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MAGDALENA KRESTA,)	Appeal from the
)	Circuit Court of
Plaintiff and Counterdefendant-Appellant,)	Cook County
)	
v.)	No. 09 L 006349
)	
WITOLD ZAJEWSKI, M.D., P.C., and WITOLD)	
ZAJEWSKI,)	Honorable
)	Drella C. Savage,
Defendants and Counterplaintiffs-Appellees.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.

Justice Hall concurred in the judgment.

Justice Gordon dissented.

ORDER

¶ 1 Held: Because defendants' counterclaim was not solely based on, related to, or in response to the acts of plaintiff in furtherance of the rights of petition or speech, the trial court's denial of plaintiff's motion to dismiss was proper.

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¶ 2 At issue in this appeal is the applicability of the Citizen Participation Act (Act) (735 ILCS 110/*et seq.* (West 2010)), commonly referred to as the anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, to defendants' counterclaim. Plaintiff Magdalena Kresta sued defendants Witold M. Zajewski, M.D., P.C., and Dr. Zajewski for assault, battery, sexual harassment, retaliation, and intentional infliction of emotional distress. Defendants filed a counterclaim against plaintiff for defamation and intentional infliction of emotional distress. Plaintiff moved the trial court to dismiss defendants' counterclaim, contending she is entitled to immunity under the Act. The trial court denied plaintiff's motion to dismiss, she petitioned for leave to appeal, and this matter is before this court pursuant to a supervisory order from the Illinois Supreme Court. We affirm the judgment of the trial court.

¶ 3

I. BACKGROUND

¶ 4 Plaintiff initially was a patient of defendants in or about February 2006, was hired by defendants as a medical assistant in May 2007, and was fired by defendants in November 2007.

¶ 5 According to plaintiff, she satisfactorily performed her duties at all times during her employment. However, in May 2007, Dr. Zajewski began sexually harassing and assaulting her and conditioned her employment on submission to his sexual demands. When she complained and refused his continued sexual demands, he terminated her employment in retaliation.

¶ 6 According to defendants, the Department of Homeland Security had stepped up pressure to require employers to guarantee the employability of their employees. Consequently, in November 2007, Dr. Zajewski asked his staff to complete I-9 employment eligibility forms. Plaintiff, however, was unable to sign the document because she was not present in this country

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legally. As a result, defendants were forced to terminate her employment, at which point she threatened to sabotage defendants' business. According to defendants, plaintiff made false accusations against defendants of fraud to Medicare and Medicaid, and of rape, sexual harassment and retaliation to the police, government agencies, the media, and the Polish community, which plaintiff knew was defendants' primary clientele.

¶ 7 According to the record, plaintiff filed against defendants charges of discrimination based on sexual harassment and retaliation with the Illinois Department of Human Rights (IDHR) in May 2008 and the Cook County Commission on Human Rights (CCCHR) in June 2008. She alleged that Dr. Zajewski subjected her to unwelcome and offensive sexual behavior, conditioned her employment on her submission to his demands for sexual favors, and terminated her employment when she informed him that she would no longer submit to his demands for sexual favors.

¶ 8 In May 2009, plaintiff filed a complaint in the circuit court against defendants alleging claims of assault, battery, and intentional infliction of emotional distress. Thereafter, her IDHR and CCCHR complaints were dismissed. In November 2009, her first amended complaint alleged defendants were liable to her for assault and battery, intentional infliction of emotional distress, sexual harassment and retaliation. Her IDHR and CCCHR complaints were attached to her amended complaint as exhibits.

¶ 9 In October 2010, defendants filed their answer, additional defenses and counterclaim. They denied plaintiff's allegations of wrongful conduct and asserted that she was fired based on her failure to provide employability documentation. Defendants alleged that at the time of the

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first alleged sexual touching, plaintiff was not an employee of defendants but, rather, despite the alleged touching, willingly accepted employment from defendants. Defendants also alleged that when plaintiff realized that her employment was at issue, she made threats against the office and its employees. Defendants alleged that, because plaintiff's position at the office afforded her the opportunity to disrupt operations and harm the company, defendants had no option other than to terminate her employment in order to protect the company from the feared sabotage and protect other employees, patients and the public from physical danger.

¶ 10 In their counterclaim for defamation and intentional infliction of emotional distress, defendants alleged that plaintiff knowingly made false, malicious and offensive statements about defendants regarding her allegations of assault, battery, sexual harassment, intentional infliction of emotional distress and retaliation. Further, defendants alleged that plaintiff made an unprivileged publication to third parties, including but not limited to other staff members, office patients, the media, the Polish community, the CCCHR, and the IDHR related to her allegations in this matter. Defendants also alleged that plaintiff intentionally and recklessly made false and outrageous statements that Dr. Zajewski lacked integrity in performing his employment duties, harmed her in the scope of his profession, and engaged in fornication. Defendants asserted that plaintiff's false statements damaged Dr. Zajewski's personal and professional life, damaged his reputation, resulted in a loss of income and the loss of existing and new business, and caused severe emotional distress, mental distress, pain and suffering, embarrassment, and interference with personal relationships. Defendants sought a judgment against plaintiff for \$50,000 for defamation, defamation *per se*, and intentional infliction of emotional distress, plus attorney fees

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and costs.

¶ 11 Plaintiff moved to dismiss defendants' counterclaim pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)), contending that she was entitled to immunity under the Act. After briefing and argument by the parties, the trial court, in February 2011, denied plaintiff's motion to dismiss. However, the trial court found that the matter involved a question of law as to which there was substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. Accordingly, the trial court certified questions to the appellate court on interlocutory appeal pursuant to Illinois Supreme Court Rule 308.

¶ 12 Plaintiff filed a petition for leave to appeal under Rule 308 but later moved to withdraw that appeal and filed a petition for leave to appeal under Rule 306(a)(9), which was amended to permit petitions for leave to appeal a circuit court order denying a motion to dispose under the Act. After this court denied plaintiff's Rule 306 petition for leave to appeal, she petitioned the supreme court for leave to appeal. The supreme court denied her petition but entered a supervisory order directing this court to vacate our denial of her petition for leave to appeal and consider the merits of the appeal in light of *Sandholm v. Kuecker*, 2012 IL 111443. We have complied with that order.

¶ 13

II. ANALYSIS

¶ 14 Plaintiff sought dismissal of defendants' counterclaim based on the Act and pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)). The 2-619(a)(9) motion admits the legal sufficiency of defendants' counterclaim but asserts defects or defenses outside

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the pleadings which defeat the claim. *Sandholm*, 2012 IL 111443, ¶ 55. Our review is *de novo*.

Id. In our review of plaintiff's motion to dismiss, we construe the pleadings and supporting documents in the light most favorable to defendants and accept as true all well-pleaded facts in the counterclaim and all inferences that may reasonably be drawn in defendants' favor. See *id.*

¶ 15 SLAPPs "are lawsuits aimed at preventing citizens from exercising their political rights or punishing those who have done so." *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 630 (2010). "SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation." *Id.* at 630. "The purpose of the Act is to give relief, including monetary relief, to citizens who have been victimized by meritless, retaliatory SLAPP lawsuits because of their 'act or acts' made 'in furtherance of the constitutional rights to petition, speech, association, and participation in government.'" *Id.* at 633, quoting 735 ILCS 110/15 (West 2008); see also *Sandholm*, 2012 IL 111443 ¶ 44.

¶ 16 In the instant case, which involves plaintiff's motion to dismiss defendants' counterclaim, the counterclaim is subject to dismissal under the Act if (1) plaintiff's acts were in furtherance of her rights to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) defendants' counterclaim was solely based on, related to, or in response to plaintiff's acts in furtherance of her rights of petition, speech, association, or other participation in government; and (3) defendants failed to produce clear and convincing evidence that plaintiff's acts were not genuinely aimed at procuring favorable government action. 735 ILCS 110/15 (West 2010); *Sandholm*, 2012 IL 111443, ¶¶ 45, 52, 56. See also *Hammons v. Society of Permanent Cosmetic Professionals*, 2012 IL App (1st) 102644, ¶ 18; *Ryan v. Fox Television*

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Stations, Inc., 2012 IL App (1st) 120005, ¶ 18; *Chicago Regional Council of Carpenters v. Jursich*, 2013 IL App (1st) 113279, ¶ 17. If defendants' counterclaim genuinely sought relief for damages for the alleged defamation or intentionally tortious acts of plaintiff, the counterclaim is not solely based on plaintiff's rights of petition, speech, association, or participation in government (see *Sandholm*, 2012 IL 111443, ¶ 45), and, accordingly, "it is irrelevant whether [plaintiff's] actions were 'genuinely aimed at procuring favorable government action, result or outcome.'" (see *id.* ¶ 53). The clear language of the Act establishes that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the Act. *Id.*, ¶ 45.

¶ 17 The first requirement to obtain immunity under the Act is met here. By filing a police report, filing charges with government agencies alleging sexual harassment and retaliation, and filing a lawsuit to seek compensation from her former employer for alleged assault, battery, sexual harassment, retaliation and intentional infliction of emotional distress, plaintiff was exercising her constitutional right to participate in government to obtain favorable governmental action. See *Jursich*, 2013 IL App (1st) 113279, ¶ 18 (filing a lawsuit to reduce to judgment the fines assessed against the defendant was exercising a constitutional right to participate in government to obtain favorable governmental action); *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 120 (2010) (the filing of a lawsuit based on unpaid wages was an exercise of the right to petition for redress of grievances). Yet merely because plaintiff's activities are the kind that the Act is designed to protect does not necessarily mean that defendants' counterclaim is a SLAPP and is therefore subject to dismissal under the Act.

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¶ 18 Plaintiff has failed to satisfy her burden under the next step in the analysis. Specifically, plaintiff has not shown that the counterclaim was solely based on, related to, or in response to her acts in furtherance of her rights of petition, speech or association. See *Sandholm*, 2012 IL 111443, ¶ 53. To satisfy this burden, plaintiff was required to demonstrate affirmatively that defendants' counterclaim was retaliatory and meritless. *Ryan*, 2012 IL App (1st) 120005, ¶ 21; *Jursich*, 2013 IL App (1st) 113279, ¶ 20. Moreover, plaintiff was required to meet this burden before defendants would have been required to provide clear and convincing evidence that plaintiff's activities were not immunized under the Act. *Sandholm*, 2012 IL 111443, ¶ 56.

¶ 19 Relevant factors we may consider in determining whether the counterclaim was retaliatory include the potential validity of defendants' causes of action, the timing of the filing of the counterclaim, and the amount of damages requested. *Jursich*, 2013 IL App (1st) 113279, ¶¶ 22-23. This court has rejected the argument that a court may deem a lawsuit meritless under the Act if the lawsuit fails to state a legal claim sufficient to survive a summary motion to dismiss under section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)). *Hammons*, 2012 IL App (1st) 102644, ¶ 21; *Ryan*, 2012 IL App (1st) 12005, ¶ 22. Because a motion to dismiss under the Act is considered under section 2-619 of the Code, and a 2-619 motion concedes the legal sufficiency of a claim, the issue of whether a complaint had properly stated a claim under section 2-615 is irrelevant to the issue of merit in the context of the Act. *Ryan*, 2012 IL App (1st) 12005, ¶ 22.

¶ 20 The evidence in this case does not support the inference that defendants' counterclaim was filed in order to deter plaintiff from proceeding with her lawsuit or interfere with and burden

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her speech and petition rights. The counterclaim presents potentially viable causes of action for defamation and intentional infliction of emotional distress. Moreover, it is readily apparent that defendants' objective in filing the counterclaim was to seek damages for the harm done to Dr. Zajewski's personal and professional reputation, business, and good will in the community from plaintiff's alleged defamatory and tortious acts. Defendants alleged that plaintiff had falsely told their patients, employees, immigrant community and the media that Dr. Zajewski lacked integrity as an employer and a doctor and had harmed plaintiff by assault, battery and harassment.

¶ 21 Furthermore, defendants' counterclaim does not resemble in any way a strategic lawsuit intended to chill participation in government or to stifle political expression. This is not a situation where a developer filed a lawsuit for damages against residents after the residents spoke out in a manner that resulted in an unfavorable zoning decision for the developer. See *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (1990). Nor is this a situation where a homeowner's association filed a complaint alleging defamation, civil conspiracy and malicious prosecution and sought an injunction against a former resident years after she had prevailed in her religious discrimination complaints against the association. See *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013, 1015-17 (2010).

¶ 22 In addition, the evidence in this case concerning the timing of the filing and the damages sought does not support an inference that defendants' counterclaim was a SLAPP. Defendants' counterclaim was filed over two years after plaintiff made her charges against defendants with the CCCHR and the IDHR and over one year after she filed her lawsuit in the circuit court. Thus, the counterclaim was not intended to deter plaintiff from filing those claims. Moreover,

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defendants do not seek extraordinarily high damages; they seek \$50,000 in damages for the three counts in their counterclaim and attorney fees and costs.

¶ 23 It is apparent that the true goal of defendants' counterclaim is not to interfere with and burden plaintiff's free speech and petition rights, but to seek compensation for her alleged defamatory and tortious acts. Because plaintiff has failed to carry her burden to show that defendants' counterclaim was filed solely based on plaintiff's exercise of her rights of speech and petition, the counterclaim is not subject to dismissal under the Act.

¶ 24 We express no opinion on the actual merits of plaintiff's and defendants' causes of action. We simply hold that defendants' counterclaim is not a SLAPP within the meaning of the Act and, thus, is not subject to dismissal on that basis. We acknowledge that plaintiff's criticisms concerning the counterclaim's lack of specificity and clarity are not without merit. Specifically, plaintiff complains that defendants have not alleged the nature of the statements that they claim were defamatory, to whom the statements were made, or when the alleged statements were made. Plaintiff also asserts that the doctrine of absolute privilege from civil suit applies to her statements made in the IDHR and CCCHR proceedings. See *Jurgensen v. Haslinger*, 295 Ill. App. 3d 139, 141-42 (1998); *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 165-67 (1998). Moreover, plaintiff argues that a corporation is not entitled to relief for intentional infliction of emotional distress.

¶ 25 Nevertheless, upon review of the record, and construing the pleadings and supporting documents in the light most favorable to defendants and accepting as true all inferences that may reasonably be drawn in their favor, we cannot conclude, in the context of our analysis under the

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Act, that defendants have not presented potentially viable causes of action for defamation and intentional infliction of emotional distress. Although defendants' defamation claim lacks specificity and clarity, the supporting documents, particularly the documents concerning the proceedings before the IDHR and CCCHR, establish that defendants could plead a potentially viable defamation claim. Plaintiff may raise any pleading or other deficiencies concerning the counterclaim to the trial court by the appropriate motion.

¶ 26

III. CONCLUSION

¶ 27 We affirm the circuit court order that denied plaintiff's motion to dismiss defendants' counterclaim.

¶ 28 Affirmed.

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¶ 29 Justice Gordon, dissenting:

¶ 30 For the following reasons, I must dissent.

¶ 31 The majority writes that "it is readily apparent that defendant's objective in filing the counterclaim was to seek damages for the harm done to Dr. Zajewski's personal and professional reputation." *Supra* ¶ 20. Plaintiff's firing occurred in November 2007; and she filed her complaint with DHR in May 2008 and her complaint in the circuit court in May 2009. Even though two years had elapsed since the firing, defendant found no need to file a complaint concerning his own "readily apparent" harm. In October 2010, when it was clear that plaintiff was undeterred from pursuing her claims, defendant then filed an answer to plaintiff's amended complaint which included the counterclaim.

¶ 32 The majority writes that "[t]his is not a situation where a developer filed a lawsuit for damages against residents after the residents spoke out." *Supra* ¶ 21. That is exactly what this is. Plaintiff spoke out about sexual harassment, and remained undeterred in the pursuit of her claims, and so defendant started filing claims of his own.

¶ 33 The majority writes that "the counterclaim was not intended to deter plaintiff from filing" her claims. *Supra* ¶ 20. But it was intended to deter her from pursuing them.

¶ 34 The majority finds that "it is apparent that the true goal of defendant's counterclaim" is not to interfere with plaintiff's rights (*supra* ¶ 23), although the events giving rise to his counterclaim are almost impossible to discern from his pleading. The majority states that it will not comment on the "merits" of defendant's claims, and acknowledges that "defendants have not alleged the nature of the statements that they claim were defamatory, to whom the statements

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were made, or when the alleged statements were made." *Supra* ¶ 23. However, to rule on plaintiff's SLAPP claim, we must determine whether defendant's claim has some merit.

Sandholm v. Kuecker, 2012 IL 111443, ¶ 45. Without allegations about the nature of the alleged defamatory statements, to whom they were made or when they were made, I cannot find merit in defendant's claim.

¶ 35 The case at bar stands in stark contrast to the facts of *Sandholm*, where our supreme court found that a plaintiff's claims of defamation appeared sufficiently genuine to withstand a motion to dismiss based on SLAPP. *Sandholm*, 2012 IL 111443, ¶¶ 45, 57. In *Sandholm*, plaintiff's complaint alleged specific emails, internet postings, letters, and radio broadcasts, which occurred every few days between February 28, 2008, and April 24, 2008. *Sandholm*, 2012 IL 111443, ¶¶ 3-18. On April 25, 2008, the plaintiff filed his complaint providing names, dates, places and means of communication for the specified acts of defamation. *Sandholm*, 2012 IL 111443, ¶¶ 3-18.

¶ 36 The counterclaim in the case at bar bears no relationship to the complaint in *Sandholm*. The counterclaim lacks specifics and was filed years after the original events, and only after plaintiff persisted in her claims. I would find, from the face of the pleadings and their timing, that plaintiff has satisfied her burden in showing that defendant's counterclaim was not "genuinely seeking relief" for his allegations of unspecified defamation. *Sandholm*, 2012 IL 111443, ¶ 45.

¶ 37 It is true that whether a claim is legally sufficient to survive a section 2-615 motion is irrelevant to the issue of "merit" in this context. *Ryan*, 2012 IL App (1st) 120005, ¶ 22. Thus,

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we do not list the elements of his alleged causes of action and ask whether he has alleged sufficient facts to support each element, as we would do when faced with a section 2-615 motion.

Bonhomme v. St. James, 2012 IL 112393, ¶¶ 34, 35; *Doe v. McClean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶¶ 19-20. However, we may still consider whether he has alleged sufficient facts to show a "genuinely" made claim. *Sandholm*, 2012 IL 111443, ¶ 45.

This is what defendant has failed to do.

¶ 38 For the foregoing reasons, I must dissent.