2014 IL App (2d) 130671-U
No. 2-13-0671
Order filed May 21, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KERRY FRIEDMAN, Plaintiff-Appellant, v. DAVID MOORE, Indiv. and as Alderman of the Second Ward of the City of Lake Forest, and THE CITY OF LAKE FOREST, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 12-L-427 Honorable Christopher C. Starck, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly granted defendants' motion to dismiss plaintiff's complaint.

¶ 2 Plaintiff, Kerry Friedman, sued defendants, David Moore, an alderman for the City of Lake Forest, and the City of Lake Forest (the City), for: (1) defamation *per se*; (2) false light; (3) negligent infliction of emotional distress; and (4) deprivation of civil rights (42 U.S.C. § 1983). On May 29, 2013, the trial court granted defendants' motion to dismiss plaintiff's complaint with prejudice. 735 ILCS 5/2-619.1 (Wes 2012). Plaintiff appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 By way of background, we note that this court previously resolved an appeal wherein plaintiff sued her neighbor and, initially, purported that she was acting on the City's behalf. *Friedman v. Bhalala*, 2013 IL App (2d) 120408-U (unpublished order under Supreme Court Rule 23). Specifically, from 2009 through 2011, plaintiff's neighbors, wishing to build a home on their property (which abutted plaintiff's property), hired architects and submitted plans to the City's Building Review Board. The City scheduled four public hearings regarding the plans and, on July 6, 2011, approved them. *Id.* at ¶ 7. On July 20, 2011, plaintiff appealed that decision, and, after a hearing on September 6, 2011, the City Council rejected plaintiff's appeal. *Id.* at ¶ 8. Plaintiff's neighbors commenced construction on their property. A few months later, however, in December 2011, plaintiff filed both an appeal with the City's zoning board and two complaints in the circuit court seeking temporary and permanent injunctive relief. *Id.* at ¶¶ 9-13. In her first complaint, plaintiff claimed to be suing as the City's representative but, after the City objected, she amended her complaint, in part, to pursue her complaint in only her individual capacity. *Id.* at ¶¶ 11, 13. In February 2012, the City moved to formally intervene and for the complaint to be dismissed for numerous reasons, including the fact that it had issued a permit for the challenged construction.[1] *Id.* at ¶ 14.

¶ 5 At this point, the timeline veers into events relevant to the instant appeal. According to plaintiff's second amended complaint here (which, again, raised defamation, false light, negligent infliction of emotional distress and deprivation of civil rights claims), on February 6, 2012, the City held a City Council meeting. Plaintiff alleged that City Council meetings generally concerned matters of public business, such as zoning issues. At the February 6, 2012,

[1] This court rejected plaintiff's claims on appeal. *Id.* at ¶56.

City Council meeting, defendant Moore, a City resident and alderman for the City's second ward, made "a series of defamatory statements" about plaintiff. The complaint attached an exhibit purporting to be a transcription of the allegedly defamatory statements. The exhibit notes that the "letter" was read into the City Council record "at 32:25 by the Alderman of the Second Ward, David Moore." It reads:

> "I wrote a letter I'd like to just read aloud. Speaking as an Alderman of the Second Ward and not on behalf of the City of Lake Forest.
>
> I'd like to take a moment and make public my disappointment in my neighbor, Kerry Friedman, and her Unkind, Relentless and Wasteful Pursuit of stopping a building project on land adjacent to her own.
>
> In spite of the fact the process [ ] followed [was] completely and properly vetted, she has cost the new homeowner months of delays and tens of thousands of dollars in legal bills. Not to mention neighborhood goodwill, countless hours of volunteer boards and commission members, this city council, the city staff and legal expenses all to amuse a selfish 'not in my backyard' behavior.
>
> I feel strongly that these types of righteous, self-serving actions are not in character with Lake Forest and damage all of us to some extent.
>
> So, that's my comment."

Plaintiff's complaint alleged that the foregoing statement was not only audible to those persons present at the meeting, but that the meeting was also televised and posted on the internet via YouTube.

¶ 6 Plaintiff alleged that, for a substantial period prior to the February 6, 2012, meeting, she had exercised her constitutional right to seek redress for issues regarding the physical area

adjacent to her property. Accordingly, in count I of her second amended complaint, plaintiff alleged that defendants, by publishing defamatory statements about her and acting under color of state, retaliated against her for exercising her constitutional and statutory rights to petition government. She alleged financial and reputational damage, deterioration to her physical and mental well-being, and that an unspecified amount of compensatory and punitive damages and attorney fees and costs should be awarded.

¶ 7 In count II, plaintiff alleged defamation *per se*, in that Moore, in his individual capacity and speaking as the duly-elected alderman of the second ward, read into the record a series of non-privileged statements that were defamatory. Plaintiff alleged that the statements were derogatory, harmful, and defamatory *per se* in that they: (1) were calculated to harm her reputation by denigrating her character, ethics, and motivation for filing, with the City Council and elsewhere, complaints to protect her property; (2) used words "so obviously harmful and materially hurtful and harmful to the [p]laintiff that injury to her reputation can and should be presumed"; and (3) prejudiced plaintiff within her community and imputed that she "lacked ability to perform services within her chosen field." (Her chosen field or trade is not specified in either the complaint or appellate briefs). Plaintiff alleged that the comments were not capable of innocent construction and were malicious in nature. Plaintiff asserted that the City permitted and encouraged the statements to be made during an official City Council meeting and, therefore, it also committed the tort of defamation *per se*. Plaintiff sought compensatory ($500,000) and punitive ($2 million) damages and attorney fees and costs on the basis that she "has been damaged by [d]efendants' defamatory statements both in her reputation and her ability to enjoy her property as well as her ability to enjoy success with her chosen field by lowering her

reputation in the eyes of the community and deterring other people from associating with her on a personal and professional level."

¶ 8 In count III, plaintiff alleged false light, asserting that defendants infringed upon her "right to be free from public criticism by statements made placing her in a false light before the public as part of a public proceeding." Plaintiff alleged that she was placed in a false light when defendants made statements at the February 6, 2012, meeting, which denigrated her ethics and morals. She alleged that a reasonable person would be highly offended by the statements and that the statements were made with actual malice, with knowledge of or reckless disregard of their falsity, and were made to discourage her or intimidate her to stop asserting her right to protect her property and privacy. Plaintiff alleged that defendants exposed her to "public ridicule which violated the right of every citizen to be left alone." She also alleged that the City permitted and encouraged the statements and, therefore, it also committed the tort of false light. She sought compensatory ($500,000) and punitive ($2 million) damages and attorney fees and costs.

¶ 9 Finally, in count IV, plaintiff alleged "negligent infliction of emotional distress." She asserted that: defendants' actions were extreme and outrageous; defendants knew that there was a high probability that their conduct would cause her severe emotional distress; defendants' actions did, in fact, cause her severe emotional distress; and defendants acted for the purpose of intimidating her from seeking legitimate public redress for the damage being caused to "her person" and her property. Plaintiff alleged that, because the meeting was broadcast via television and YouTube, the publication to the community at large rendered the comments extreme and outrageous and beyond merely insulting. Plaintiff alleged that the City permitted and encouraged the statements and, therefore, it also committed the tort of negligent infliction of

emotional distress. She sought compensatory ($500,000) and punitive ($2 million) damages and attorney fees and costs.

¶ 10 Defendants moved to dismiss the complaint pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)), arguing, in sum, that: (1) the statements were absolutely privileged and, therefore, defendants were immunized from any liability (735 ILCS 5/2-619(a)(9) (West 2012)); (2) defendants were entitled to judgment on the pleadings (735 ILCS 5/2-615(e) (West 2012)); or (3) alternatively, plaintiff failed to properly state her claims (735 ILCS 5/2-615(a) (West 2012)).

¶ 11 On May 29, 2013, the trial court granted with prejudice defendants' motion to dismiss. Plaintiff appeals.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiff argues that the court improperly dismissed her complaint and that: (1) "legislative immunity should not apply to defamatory statements made in a legislative session outside the scope of the legislator's official duties and intended to infringe upon an individual's rights"; (2) she properly stated a cause of action for each count in her complaint; and (3) her requests for punitive damages and attorney fees should not have been stricken.

¶ 14 We review *de novo* the trial court's grant of a section 2-619.1 combined motion to dismiss. See *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶ 9. Here, for the following reasons, we agree with defendants that the trial court properly granted their motion to dismiss because there exists an absolute privilege protecting Moore's statements and, therefore, all of plaintiff's alleged claims fail. Accordingly, we need not address plaintiff's alternative arguments.

¶ 15 Under section 2-619(a)(9) of the Code, an action may be dismissed where the claim asserted is barred by affirmative matter defeating it. 735 ILCS 5/2-619(a)(9) (West 2012). The affirmative defense of absolute immunity or privilege qualifies as affirmative matter under section 2-619(a)(9). *Meyer v. McKeown*, 266 Ill. App. 3d 324, 325 (1994). "Illinois courts have uniformly recognized a privilege for statements made by executive officers and members of local government boards and councils at regular meetings." *Id*. (citing, *e.g.*, *Larson v. Doner*, 32 Ill. App. 2d 471 (1961) (mayor's publication of defamatory matter in the course of a city council meeting was absolutely privileged) and *Geick v. Kay*, 236 Ill. App. 3d 868 (1992) (recognizing absolute immunity for libelous statements issued in a press release by the president of a village board of trustees)). Absolute immunity has been applied to virtually every common-law tort, including invasion-of-privacy claims. *Geick*, 236 Ill. App. 3d at 879. Indeed, the absolute privilege provides a complete immunity from civil action. *Zych v. Tucker*, 363 Ill. App. 3d 831, 834 (2006); see also *Muck v. Van Bibber*, 251 Ill. App. 3d 240, 242 (1993) (the absolute privilege "provides a complete immunity from civil action."); and Restatement (Second) of Torts § 590 (1977) (a member of a local legislative body is "absolutely privileged to publish defamatory matter concerning another in the performance of his legislative functions"). Although absolute immunity restricts the right of an individual to be secure in his or her reputation, the "restriction is justified by the countervailing policy that officials of government should be free to exercise their duties without fear of potential civil liability." *Geick*, 236 Ill. App. 3d at 876.

¶ 16 On appeal, plaintiff effectively concedes that absolute privilege applies to Moore's statements. For example, she asserts in her brief that "[p]resently, a legislator may use his or her position to trample upon the rights of the ordinary person without fear of consequences through

this immunity." Further, she states in her reply brief that "[a]s the law stands presently, Alderman Moore is immunized from civil liability for any suit based on [legislative] immunity." Thus, plaintiff's argument is purely policy based. Specifically, without citation to particularly relevant authority, plaintiff questions the soundness of the policy behind legislative immunity, asserts that the application of the immunity to tortious conduct by legislators "needs to be curtailed," and concludes that "an exception to this absolute immunity needs to be created." Plaintiff asserts that she "is asking that an exception be created so that malicious defamatory speech not be immunized just because it was uttered in the legislature by a legislator especially when that speech was not remotely germane to the matters before the legislative body." Plaintiff's final request is that "Moore's defamatory statement have the same consequences as a defamatory statement uttered by a non-legislator."

¶ 17 We decline plaintiff's invitation to effectively gut legislative privilege. Moore's statements do not have the same consequences as those uttered by a non-legislator because the privilege is one that attaches to elected office for the purpose of allowing an official to exercise his or her duties without fear of civil liability. We disagree with plaintiff that the statement was "not even arguably germane to matters before the legislative body." When Moore made his statement, he spoke "as Alderman of the Second Ward," at a City Council meeting, regarding plaintiff's actions that had embroiled the City in administrative and legal proceedings. Plaintiff's complaint specifically acknowledged that zoning matters were generally discussed at City Council meetings, and Moore's comments addressed plaintiff's zoning dispute. Accordingly, regardless of whether plaintiff's zoning disputes were on the City Council's agenda that evening, Moore's comments were not unrelated to his legislative function. See also *Geick*, 236 Ill. App. 3d at 876-77 (rejecting argument that the absolute privilege did not apply because the board

president was not acting within the scope of his duties when making statements and noting "the only consideration is whether the statements made were reasonably related" to the speaker's duties). In fact, it has been said that the absolute privilege applies to a legislator's publication of defamatory matter while performing a legislative function even where "the defamatory matter has no relation to a legitimate object of legislative concern." Restatement (Second) of Torts § 590 cmt. a (1977); see also *Meyer*, 266 Ill. App. 3d at 328 (adopting Restatement and majority position that statements made in the course of board proceedings are privileged). Moreover, we note that even Moore's motivations for the statements are immaterial, because, "[w]here the privilege is absolute, it cannot be overcome by a showing of improper motivation or knowledge of falsity." *Blair v. Walker*, 64 Ill. 2d 1, 5-6 (1976).

¶ 18 We similarly reject plaintiff's unsupported suggestion that the privilege does not apply simply because Moore prepared his remarks outside of a legislative session. To exclude from the privilege remarks that were prepared outside of a legislative session would, again, effectively eviscerate the privilege, as legislators presumably routinely prepare remarks before legislative proceedings. In any event, there is nothing illegal about simply writing down defamatory statements; instead, it is the *publication* of those statements that gives rise to the causes of action alleged in plaintiff's complaint and, here, that publication is immunized by an absolute privilege.[2]

[2] For example, in count I, plaintiff alleges that defendants violated her civil rights by reading into the record at a public hearing defamatory statements. In count IV, plaintiff alleges that emotional distress was caused by virtue of the fact that the statements occurred at a public meeting and were broadcast on the internet. See also *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009) (defamation is unprivileged *publication* of a false statement); *Lovgren v. Citizens First*

¶ 19 Similarly, the City here is immune from liability. 745 ILCS 10/2-107 (West 2012) ("[a] local public entity is not liable for an injury caused by any action of its employees that is libelous or slanderous"); 745 ILCS 10/2-109 (West 2012) ("A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.").

¶ 20 In sum, setting aside the sufficiency of her claims, plaintiff simply cannot overcome the fact that Moore's statements at the February 6, 2012, meeting were absolutely privileged. Her claims necessarily fail and were properly dismissed.

¶ 21 III. CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 23 Affirmed.

National Bank of Princeton, 126 Ill. 2d 411, 418 (1989) (the "heart of [false light] lies in the *publicity*") (emphasis added.))