2017 IL App (2d) 160804-U
No. 2-16-0804
Order filed April 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TOVAR SNOW PROFESSIONALS, INC., and ERIC HARTMANN,	)	Appeal from the Circuit Court of McHenry County.
Plaintiffs-Appellants,	)	
v.	)	No. 16-LA-120
JAMES F. GREVE,	)	Honorable Michael T. Caldwell,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly dismissed intentional infliction of emotional distress claim, but erred in dismissing claim of defamation *per se*.

¶ 2 The plaintiffs, Tovar Snow Professionals, Inc., and Eric Hartmann (collectively, Tovar or the plaintiffs) appeal the dismissal of their amended complaint against the defendant, James Greve. We affirm in part and reverse in part, and remand.

¶ 3 I. BACKGROUND

¶ 4 The following facts are drawn from the allegations in the amended complaint which, for purposes of this appeal, we take as true. See *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. Tovar is

a company that, among other things, provides snow removal services. Hartmann is a vice president of Tovar. According to the complaint, Greve operates a construction company that has "a long history of competing [with Tovar] for work, including work for Huntley Community School District 158" (the District).

¶ 5 In 2015, the District conducted a bidding process for snow removal services. Greve allegedly made false statements about Tovar, saying that Tovar was not a "responsible bidder" as required by law, and that Tovar had fraudulently billed the District in previous years. Nevertheless, for the sixth year in a row, the District awarded the snow removal contract to Tovar.[1]

¶ 6 On February 25, 2016, at 1:13 a.m., Greve sent an email to Doug Renkosik, the District's Director of Operations and Maintenance. The email said:

> "Good morning Doug,
>
> Come on Doug really your [*sic*] salting tonight, your parking lots are bone dry and pavement temperature is 37 degrees. Do you even check these lots before you call Tovar out to salt[?] Can someone provide me with the rationale for this expense? I guess if you don't spend it this year you don't get it back next year[.] Our tax dollars at work.
>
> Jim"

Renkosik responded to the email later that same day, explaining why the District had asked Tovar to provide "an ice melt application" to its school parking lot.

[1] The plaintiffs also alleged that Greve made defamatory statements about Tovar in 2010. However, as they have conceded that any claim based on such statements would be time-barred, we do not discuss the alleged 2010 statements.

¶ 7 On March 2, 2016, Greve sent another email to Renkosik, sending a copy of the email to the District's superintendant:

> "What concerns me the most is how can Tovars' [*sic*] people pull into a parking lot that is completely dry with residual salt apparent, the ambient temperature as well as pavement temperature above freezing, and in good conscience spread an ice melt application and bill the school district?"

The plaintiffs allege that these statements were false and imputed to Tovar both "a want of integrity" and "a lack of ability *** to operate its business."

¶ 8 On April 8, 2016, Tovar filed a complaint against Greve, claiming defamation *per se* and commercial disparagement. On April 25, 2016, Tovar filed an amended complaint that added Hartmann as a plaintiff. The amended complaint included the allegation that, on April 22, 2016, Hartmann had seen Greve sitting in a parked truck about 50 feet from Hartmann's daughter's school bus stop during the time she was waiting for the bus, despite the fact that Greve did not live in the neighborhood. Based on this allegation, the amended complaint added a third claim, intentional infliction of emotional distress.

¶ 9 Also on April 25, the plaintiffs filed an emergency motion for a temporary restraining order preventing Greve from coming within 100 yards of any children of Tovar employees. On April 27, the trial court entered an agreed order in which Greve agreed to stay 100 yards away from Hartmann's family members and certain specified locations. Although the agreed order initially was to expire on May 8, its terms were extended by agreement several times. The final such agreed order, dated July 8, 2016, stated that the terms of the April 27, 2016, agreed order would remain in effect "until the trial court issue[d] a ruling" on the motion for a temporary restraining order.

¶ 10 On July 14, Greve filed a motion to dismiss the amended complaint. The motion stated that it was brought pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)). Over the next six weeks, the parties briefed the motion.

¶ 11 On August 16, the trial court held a hearing on the motion for a temporary restraining order. It denied the motion and noted that, as it had issued its ruling on the matter, the April 27, 2016, agreed order had now expired.

¶ 12 On September 21, the day of the hearing on Greve's motion to dismiss, the plaintiffs filed a motion for a preliminary injunction along the same lines as the temporary restraining order they previously requested. At the close of the hearing, the trial court dismissed the complaint with prejudice and denied the plaintiffs' motion for a preliminary injunction.

¶ 13 II. ANALYSIS

¶ 14 The plaintiffs appeal the dismissal of their claims of defamation *per se* and intentional infliction of emotional distress. (Their briefs make it clear that they do not challenge the dismissal of their commercial disparagement claim.) Further, in the event that we reverse the dismissal of their claim of intentional infliction of emotional distress, they ask that we also order the trial court to entertain their motion for a preliminary injunction.

¶ 15 Before plunging into the substance of the appeal, we pause to note the variety of arguments raised in the motion to dismiss. Greve styled the motion as being brought under section 2-619(a) of the Code, which provides for dismissals of claims that are barred as a matter of law by some affirmative matter. 735 ILCS 5/2-619(a) (West 2014). However, he also argued that the plaintiffs had failed to adequately plead some of their claims, an argument premised on a different section of the Code: section 2-615 (735 ILCS 5/2-615 (West 2014)). On appeal, the plaintiffs argue that the motion should have been considered only under section 2-619 and that,

to the extent that the trial court found that the complaint failed to state a claim, it "applied the wrong standard."

¶ 16 It is true that the legal bases for the two types of motion are different. A motion to dismiss brought under section 2-615 of the Code attacks the sufficiency of the complaint, on the basis that, even assuming the allegations of the complaint to be true, the complaint does not state a cause of action that would entitle the plaintiff to relief. 735 ILCS 5/2-615 (West 2014); *Kanerva v. Weems*, 2014 IL 115811, ¶ 33. A section 2-619 motion to dismiss likewise assumes the allegations of the complaint are true, but asserts an affirmative defense or other matter which would defeat the plaintiff's claim. 735 ILCS 5/2-619 (West 2010); *Nielsen-Massey Vanillas, Inc., v. City of Waukegan*, 276 Ill. App. 3d 146, 151 (1995).

¶ 17 Technically, it was improper for Greve to combine all of these arguments within a motion brought pursuant section 2-619. Rather, such combined motions are to be brought under section 2-619.1, and the parts of the motion addressing each provision of the Code should be clearly delineated, with separate arguments as to each provision. 735 ILCS 5/2-619.1 (West 2014). Greve's motion to dismiss did not comply with this requirement. Nevertheless, the introductory paragraphs of the motion clearly stated that Greve was arguing, in part, that portions of the complaint were not adequately pled (a section 2-615 type of argument), as well as that certain claims were defeated by some affirmative matter. Further, the plaintiffs' written response brief squarely addressed Greve's contention that their claims for commercial disparagement and intentional infliction of emotional distress were not adequately pled. Thus, we do not accept the plaintiffs' protest that they were sandbagged at the hearing by arguments regarding the sufficiency of the complaint under section 2-615 that had never been raised earlier, nor their

argument that the trial court applied the wrong standard by considering the sufficiency of the complaint.

¶ 18 Moreover, regardless of whether a claim is dismissed under section 2-615 or 2-619, we review that dismissal *de novo*, taking as true all of the allegations of the complaint. *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002). Under either section, a claim "should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover." *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 86-87 (1996). Thus, in reviewing whether the trial court's dismissal of the amended complaint was proper, we consider whether each of the claims raised was adequately pled as well as whether it is defeated by some affirmative matter. For ease of discussion, we first address the claim of intentional infliction of emotional distress.

¶ 19 A. Intentional Infliction of Emotional Distress

¶ 20 "To properly plead a cause of action for intentional infliction of emotional distress, a plaintiff must allege facts to establish: '(1) that the defendant's conduct was extreme and outrageous; (2) that the defendant knew that there was a high probability that his conduct would cause severe emotional distress; and (3) that the conduct in fact caused severe emotional distress.' " *Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶ 82, quoting *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 20 (1992). Further, " 'mere insults, indignities, threats, annoyances, petty oppressions or trivialities' do not constitute extreme and outrageous conduct." *Id*., quoting *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 89-90 (1976). "Rather, the nature of the defendant's conduct must be so extreme as to go beyond all possible bounds of decency, and to be regarded as intolerable in a civilized community." *Kolegas*, 154 Ill. 2d at 21.

¶ 21 Here, the plaintiffs have alleged that, two days after Greve was served with the initial complaint in this case, Hartmann saw him sitting parked in his truck near Hartmann's daughter's school bus stop. There are no allegations that Greve threatened Hartmann or his daughter; that he expressed any anger or violent intention toward them; or, indeed, that Greve did anything other than sit in his parked truck. The trial court found that these allegations, even if taken as true, simply do not rise to the level of extreme and outrageous conduct as would be required to state a claim for intentional infliction of emotional distress. We agree, and affirm the trial court's dismissal of this claim. Our decision also renders moot the plaintiffs' request that we reinstate their motion for a preliminary injunction (which was conditioned on our reversing the dismissal of the emotional distress claim).

¶ 22 B. Defamation *Per Se*

¶ 23 We now turn to the heart of Tovar's alleged injury, its claim of defamation *per se*. Although Tovar referred to several statements by Greve in the amended complaint, including statements during the 2015 bidding process that occurred at some unspecified time and Greve's February 25 email to Renkosik, on appeal Tovar argues the validity of the defamation claim with respect to one only statement—the March 2 email.[2] According to the amended complaint, that email included the following defamatory language:

> "What concerns me the most is how can Tovars' [*sic*] people pull into a parking lot that is completely dry with residual salt apparent, the ambient temperature as well as pavement

[2] The plaintiffs were wise to abandon their assertion that the February 25 email constituted defamation *per se*. That email criticizes Renkosik for his decision to order ice melt applied to the District's parking lots. It does not criticize or speak negatively about Tovar.

> temperature above freezing, and in good conscience spread an ice melt application and bill the school district?"

Tovar contends that this email constituted defamation *per se*, in that it falsely impugned Tovar's integrity by suggesting that Tovar unnecessarily salted the District's lot in order to increase its profits. The trial court dismissed the defamation claim on the basis that Greve's statements, as reported in the amended complaint, were not defamatory.

¶ 24 "To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). A statement may be defamatory *per se*, meaning that the harm from the statement is obvious and the plaintiff need not plead and prove specific damages. *Id*. In Illinois, "words that impute a person is unable to perform or lacks integrity in performing her or his employment duties" or that "otherwise prejudice[] that person in her or his profession" fall within the categories of words that can be defamatory *per se*. *Id*. at 492. The question of whether a statement is defamatory is a question of law. *Id*.

¶ 25 Applying these standards, we believe that the trial court erred when it held that the March 2 email could not, as a matter of law, constitute defamation *per se*. Tovar alleged that the email contained false statements of fact (regarding the conditions of the parking lot and the temperatures, for instance) and falsely imputed to Tovar a lack of integrity in performing its professional services. Further, Greve does not dispute that the element of publication was adequately pled. Taking these allegations as true, as we must at this stage, they are sufficient to state a claim of defamation *per se*.

¶ 26 Nevertheless, the trial court's error does not necessarily require reversal of its judgment dismissing the defamation claim. "[A] reviewing court can uphold the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct." *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 192 (2007). Accordingly, we proceed with our *de novo* consideration of whether dismissal of the defamation claim was proper on some other ground.

¶ 27 Greve argues that the email is not defamatory under the innocent construction rule. "Even if a statement falls into one of the recognized categories of words that are actionable *per se,* it will not be found actionable *per se* if it is reasonably capable of an innocent construction." *Bryson*, 174 Ill. 2d at 90. In determining whether the innocent construction rule defeats a claim of defamation *per se*, a court must consider the words of the statement "in context, giving the words, and their implications, their natural and obvious meaning." *Id*. If a statement reasonably can be interpreted as non-defamatory, or as referring to someone other than the plaintiff, it cannot be defamatory *per se*. *Id*. However, the "innocent" or non-defamatory interpretation of the statement must be a reasonable and natural reading, not a far-fetched or unusual interpretation. *Id*. at 93. "When a defamatory meaning was clearly intended and conveyed, this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibellous under the innocent construction rule." *Id*. "Whether a statement is reasonably susceptible to an innocent interpretation is a question of law for the court to decide." *Id*. at 90.

¶ 28 Here, Greve suggests that the March 2 email could reasonably be interpreted as expressing concern about whether the District had adequate procedures and oversight to prevent

unnecessary salting of parking lots. However, the most obvious and natural reading of Greve's comments in the email is that Tovar was not acting "in good conscience" in salting the District's lots, given the temperature and the appearance of residual salt. Thus, the innocent construction rule does not support the dismissal of the defamation claim.

¶ 29 Greve also argues that, even if the amended complaint adequately states a claim of defamation *per se*, the March 2 email is subject to a qualified privilege, and thus should be dismissed as a matter of law. A qualified or conditional privilege may shield a defendant from liability for defamation if the allegedly defamatory statement was made under circumstances in which public policy supports "protecting honest communications of misinformation *** in order to facilitate the availability of correct information." *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 24 (1993). Qualified privilege may apply where, among other things, "the information affects an important public interest and this interest requires the information to be communicated to a public officer capable of taking action if the information is true." *Anderson v. Beach*, 386 Ill. App. 3d 246, 251 (2008). Greve argues that, even if the March 2 email was defamatory, it contained information that affected an important public interest, namely, the prevention of unnecessary public expenditure.

¶ 30 Qualified privilege is "an affirmative defense that may be raised in a motion for the involuntary dismissal of a defamation action." *Id*. at 248. The existence of a qualified privilege is an issue of law for a court to decide. *Kuwik*, 156 Ill. 2d at 26. If a defendant establishes that a conditional privilege applies, the burden shifts to the plaintiff to show that the defendant abused the privilege. *Anderson*, 386 Ill. App. 3d at 251. "A privileged communication loses protection if the publisher: (1) knew it was false or recklessly disregarded its falsity; (2) published it for an improper purpose; (3) published it to people not reasonably believed to be necessary recipients;

or (4) did not reasonably believe that publication was necessary to accomplish its privileged purpose." *Id*. at 252. Whether a qualified privilege has been abused is a question of fact. *Kuwik*, 156 Ill. 2d at 26.

¶ 31 Here, even if we were to decide that the March 2 email was subject to a qualified privilege, the question of whether Greve abused that privilege would still remain. That question is a factual one that cannot be resolved in the context of a motion to dismiss unless the allegations of the complaint, as a matter of law, negate all possibility that the plaintiffs could prove that the privilege was abused. See *Bryson*, 174 Ill. 2d at 86-87 (a claim "should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to recover."). That standard is not met here, where the complaint alleges that the March 2 email contained malicious falsehoods. Greve argues that Tovar was obliged to respond to his motion with evidence, not merely allegations, but that principle applies only when a motion for summary judgment is being decided. Although he apparently has forgotten, Greve's motion was to dismiss the complaint, and at that stage we may (and indeed must) take the allegations of the complaint as true. *Id*. at 86. Accordingly, the possibly privileged status of the March 2 email does not require its dismissal.

¶ 32 Finally, Greve argues that the defamation claim was properly dismissed under the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq*. (West 2014)). This ground for dismissal is a type of affirmative matter that may be raised under section 2-619(a). *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54. In order to show that a lawsuit is subject to dismissal under the Act, a defendant must show that the lawsuit is "solely based on, related to, or in response to *** acts *** in furtherance of the rights of petition and speech." *Id.* ¶ 57. Here, Greve argues that the defamation claim is solely based on his protected exercise of his right as a taxpayer to complain

to an appropriate official about the possible misuse of public funds. However, the plaintiffs have alleged that Greve's statements arose at least in part from his competition against the plaintiffs for the District's snow removal contract and from personal animus against Tovar. In *Sandholm*, the supreme court held that the complaint at issue could not be dismissed under the Act where it appeared that the goal of the complaint was to seek damages for the harm to the plaintiff's reputation rather than to interfere with or burden the defendant's rights of free speech and petition. *Id*. We view Tovar's defamation claim in the same light. Accordingly, we find that it cannot be dismissed under the Act. See *id*. ¶ 49 (the Act applies only to meritless lawsuits aimed solely at inhibiting a party's first amendment rights).

¶ 33 As none of Greve's arguments provide an adequate alternate ground for sustaining the trial court's dismissal of the defamation *per se* claim, we reverse that dismissal. In doing so, we do not foreclose the possibility that Greve may be able to mount some other successful attack on (or defense against) the claim at a later date. However, for now, at least, Tovar may proceed with its claim that the March 2 email constituted defamation *per se*.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, the judgment of the circuit court of McHenry County is affirmed in part and reversed in part. The portion of the judgment dismissing the plaintiffs' claim of defamation *per se* as it relates to the March 2, 2016, email is reversed, and the case is remanded for further proceedings on that claim. All other portions of the judgment are affirmed.

¶ 36 Affirmed in part and reversed in part; remanded.