2020 IL App (1st) 190427-U

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Appellate Court of Illinois, First District,
SECOND DIVISION.

RANDY M. BROWN, Plaintiff-Appellant,
v.
THOMAS P. MCGARRY and HINSHAW & CULBERTSON, LLP, Defendants-Appellees.

No. 1-19-0427
|
April 28, 2020

Appeal from the Circuit Court of Cook County, Illinois.

No. 2017 L 007513

Honorable Daniel T. Gillespie, Judge Presiding.

ORDER

JUSTICE COGHLAN delivered the judgment of the court.

***1** ¶ 1 *Held*: Defamation claim was barred by litigation privilege, since defendant attorney sent allegedly defamatory material to plaintiff's counsel during pendency of appeal in underlying action.

¶ 2 In 2014, plaintiff Randy Brown brought a **legal malpractice** suit against his former counsel, Elizabeth Bacon. During that litigation, Bacon's counsel, defendant Thomas McGarry, made some negative statements about plaintiff to plaintiff's counsel. Plaintiff then brought the instant defamation suit against McGarry and his law firm, defendant Hinshaw & Culbertson, LLP.

¶ 3 The trial court dismissed plaintiff's defamation suit, finding that McGarry's statements were protected by the litigation privilege because they were made in furtherance of an ongoing judicial proceeding. Plaintiff now appeals. For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 In 2000, plaintiff entered into a licensing agreement with Harold's Chicken Shack, Inc., to operate a Harold's Chicken restaurant. To run the restaurant, plaintiff rented a storefront location in a shopping center in Broadview, Illinois.

¶ 6 On January 15, 2009, the roof of the shopping center collapsed, demolishing plaintiff's restaurant. On June 29, 2009,

plaintiff retained Bacon to represent him in a lawsuit for property damage against the shopping center's owners (the Restaurant Litigation) and to provide general business advice about his rights and obligations.

¶ 7 By 2012, the Restaurant Lawsuit was still pending, and plaintiff had not reopened his restaurant. In August 2012, Harold's notified plaintiff that his license was terminated, per the default provisions in the licensing agreement, because he failed to open for business on 21 successive business days.

¶ 8 In late 2012, the relationship between plaintiff and Bacon deteriorated. On December 12, 2012, Bacon sent a letter to plaintiff and his wife (the Bacon letter), urging plaintiff to accept her damage calculations and settlement strategies. Based on plaintiff's tax returns, Bacon calculated plaintiff's damages between $1,000,000 and $2,000,000. Plaintiff rejected her calculations and insisted on making a settlement demand of $7,750,000, to which the other party did not bother making a counteroffer.

¶ 9 In her letter, Bacon told plaintiff that he was unlikely to recover his desired amount of damages at trial. She said, "You believe that your tax returns do not fairly represent the profitability of the Broadview store because you funneled personal expenses through that business that reduced the yearly profit numbers." She explained that the jury "is likely to view your suggested dual accounting methods *** as tax evasion and unfair." She further stated: "We cannot allow you to perjure yourself by previously attesting to income numbers on your tax returns and then testifying under oath at trial that those profits were significantly understated." Bacon therefore advised plaintiff either to seek a settlement in the range of $1,000,000 to $2,000,000 or to seek new counsel.

***2** ¶ 10 Plaintiff discharged Bacon and retained new counsel. In 2013, he settled the Restaurant Lawsuit for $230,000.

¶ 11 On August 14, 2014, plaintiff filed a **legal malpractice** action (the Malpractice Litigation) against Bacon and her law firm. He alleged, in relevant part, that Bacon failed to advise him to reopen his restaurant at a new location within 21 days to avoid triggering the default provision in the licensing agreement. Bacon moved to dismiss, arguing that plaintiff could not establish proximate cause since he retained Bacon more than four months after the 21-day period expired. On November 30, 2015, the trial court dismissed plaintiff's suit.

¶ 12 Plaintiff's counsel at the trial level was Ed Clinton. After plaintiff's suit was dismissed, Clinton declined to appeal the case, and plaintiff retained new counsel, Robert Black, to file his appeal. On January 13, 2016, during the pendency of the appeal, Bacon's counsel McGarry sent a letter (the McGarry letter) to Black, urging him to "conduct reasonable diligence" to ensure he was litigating a meritorious appeal. As evidence that plaintiff's claims in the Malpractice Litigation were "fabricated," McGarry attached a copy of the Bacon letter, and he suggested that Black could confirm with Clinton that plaintiff made statements in open court that were refuted by the Bacon letter. McGarry also carbon-copied the entire communication (*i.e.*, both the Bacon and McGarry letters) to Clinton.

¶ 13 After receiving the Bacon and McGarry letters, Black withdrew as plaintiff's counsel. Plaintiff retained Ed Moor, and McGarry also sent copies of the Bacon and McGarry letters to Moor.

¶ 14 On April 26, 2017, we affirmed the dismissal of the Malpractice Lawsuit. *Brown v. Bacon*, 2017 IL App 1st 153671-U, ¶ 33.

¶ 15 On July 25, 2017, plaintiff filed the instant lawsuit against defendants, seeking damages based on McGarry's actions in sending the Bacon and McGarry letters to his counsel. Plaintiff claimed that the allegations of wrongdoing therein were false and unsubstantiated, and McGarry's actions tarnished plaintiff's reputation and esteem in the eyes of his attorneys. Plaintiff therefore sought relief in three counts: He alleged that McGarry's sending of the letters constituted libel per se (count I) and false light (count II), and he alleged that Hinshaw & Culbertson was liable for McGarry's actions under the doctrine of respondeat superior (count III).

¶ 16 Defendants filed a section 2-619 (735 ILCS 5/2-619 (West 2016)) motion to dismiss plaintiff's claims based on the attorney litigation privilege, which applies to publications (1) made in a judicial proceeding, (2) that have some connection or logical relation to the action, (3) that are made to achieve the objectives of the litigation, and (4) that involve only litigants or other participants authorized by law. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 165

(2003).

¶ 17 In his response, plaintiff did not raise any argument as to the first three elements of the privilege, nor did he raise any argument as to the letters sent to his appellate attorneys, Black and Moor. Plaintiff argued solely that McGarry's communication to Clinton did not involve only litigants or other participants authorized by law. He presented evidence that McGarry, via his assistant, sent the Bacon and McGarry letters to Clinton's personal AOL email address, which he asserted "is shared or associated with nine other persons."

***3** ¶ 18 In support, plaintiff attached his own affidavit (the Spokeo affidavit). He stated that he conducted a search on the website spokeo.com, "which gathers and collects data on public sources," and found that nine people other than Clinton were "linked and matched" to Clinton's AOL email address. Plaintiff also attached a computer printout from spokeo.com (the Spokeo report) that lists "9 social profiles" in connection with Clinton's AOL email address.

¶ 19 On December 7, 2018, the trial court granted defendants' motion to dismiss. Initially, the trial court struck the Spokeo affidavit, because plaintiff's statements were hearsay, lacked foundation, and failed to comply with Supreme Court Rule 191(a), which requires affidavits in opposition to a 2-619 motion to attach sworn or certified copies of all documents upon which the affiant relies. In this regard, the court observed that the Spokeo report was neither sworn nor certified.

¶ 20 The trial court then found that the attorney litigation privilege applied to McGarry's statements in the Bacon and McGarry letters, and it stated that its decision would not change even if it declined to strike the Spokeo affidavit.

¶ 21 Plaintiff filed a motion to reconsider in which he raised "newly discovered evidence obtained from AOL-Yahoo," namely, emails with an AOL-Yahoo customer service representative on January 2 and 3, 2019. Plaintiff asked the representative whether it was possible for multiple people to share the same AOL username, and, if so, whether they would share access to all emails sent to that account. The representative replied:

> "AOL user names are unique, so once someone signs up for it another user can not sign up for that user name. As for sharing that user name, AOL's current Terms of Service does not allow for the sharing of master accounts (as only one person is able to agree to the ToS). *** Theoretically, if another person signed into that account they would see the emails located within it, but that would be consider[ed] a compromise of the account's security."

¶ 22 On February 5, 2019, the trial court denied plaintiff's motion to reconsider. Plaintiff now appeals.

¶ 23 ANALYSIS

¶ 24 Where, as here, an action is dismissed pursuant to a section 2-619 motion, the question on appeal is whether defendants are entitled to judgment as a matter of law, accepting as true all allegations in the plaintiff's complaint and all reasonable inferences arising therefrom. *Zych v. Tucker*, 363 Ill. App. 3d 831, 833-34 (2006).

¶ 25 The trial court dismissed plaintiff's suit based on the absolute litigation privilege, which applies to statements (1) made in a judicial proceeding, (2) that have some connection or logical relation to the action, (3) that are made to achieve the objectives of the litigation, and (4) that involve only litigants or other participants authorized by law. *Edelman*, 338 Ill. App. 3d at 165; *August v. Hanlon*, 2012 IL App (2d) 111252, ¶ 35; see also Restatement (Second) of Torts § 586 (1977). The privilege is designed to provide attorneys with "the utmost freedom in their efforts to secure justice for their clients," including efforts to resolve cases without resorting to expensive litigation. (Internal quotation marks omitted.) *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 24. As an absolute privilege, it provides a complete bar to a defamation claim, regardless of defendant's motives or the unreasonableness of his conduct. *Johnson v. Johnson & Bell, Ltd.*, 2014 IL App (1st) 122677, ¶ 15; see also *Zych*, 363 Ill. App. 3d at 834 ("An absolute privilege provides a complete immunity from civil action even though the statements were made with malice because public policy favors the free and unhindered flow of such information.").

***4** ¶ 26 On appeal, plaintiff argues that McGarry's communication with Clinton fails to satisfy any of the elements of the privilege. Specifically, he argues that (1) because Clinton no longer represented plaintiff at the time McGarry emailed him, McGarry's statements were not "made in a judicial proceeding" and did not further any "legitimate purpose"; (2) the Bacon and McGarry letters were not pertinent to the action; and (3) McGarry's email, sent to Clinton's AOL address, could have been accessed by people other than Clinton who are not involved in the litigation.

¶ 27 Initially, we note that plaintiff has forfeited his arguments with regard to the first, second, and third elements of the litigation privilege, since he failed to raise those arguments in the trial court. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶ 85. Nevertheless, since forfeiture is a restriction on the parties and not on the jurisdiction of the reviewing court, we shall proceed to the merits of those issues. *Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217, ¶ 41.

¶ 28 Clinton's Status as Plaintiff's Former Attorney

¶ 29 Plaintiff first argues that, because Clinton no longer represented him at the time McGarry sent him the Bacon and McGarry letters[1], McGarry's statements to Clinton were not "made in a judicial proceeding," nor did they further any "legitimate purpose."

¶ 30 When courts consider whether a statement is made in a judicial proceeding for purposes of the litigation privilege, "the only requirement is that the communication pertain to proposed or pending litigations." *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 832 (2006). Thus, the privilege applies to "communications made before, during, and after litigation" (*Scarpelli v. McDermott Will & Emery LLP*, 2018 IL App (1st) 170874, ¶ 25), including out-of-court communications between the litigants' attorneys. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 26.

¶ 31 Here, the Bacon and McGarry letters clearly pertained to an ongoing judicial proceeding, since plaintiff's appeal was pending. Nor do we find it fatal to defendants' claim of privilege that Clinton had been discharged prior to receiving the letters. See *Golden v. Mullen*, 295 Ill. App. 3d 865, 872 (1997) (communication between attorney and former client was protected by litigation privilege, notwithstanding the fact that attorney had been discharged). Contrary to plaintiff's assertion, Clinton was not an unrelated third party to the litigation; he was plaintiff's former attorney.[2]

¶ 32 We additionally find, under the circumstances, that McGarry's communication was made to achieve the objectives of the litigation. One purpose of the litigation privilege is to facilitate "an attorney's ability to settle or resolve cases favorably for his client without resorting to expensive litigation or other judicial processes." *Atkinson*, 369 Ill. App. 3d at 833 (litigation privilege applied to counsel's letter to potential opposing party prior to litigation). Here, McGarry sought to resolve the Malpractice Litigation favorably for his client without a potentially expensive and time-consuming appeal. To that end, he attempted to convince Black that his client did not commit malpractice in the underlying Restaurant Litigation, and he apparently sought to secure Clinton's cooperation in confirming that plaintiff made statements in open court that were refuted by the Bacon letter.

***5** ¶ 33 *Edelman*, 338 Ill. App. 3d 156, is inapposite. In *Edelman*, the court held that the litigation privilege did not apply when the defendant attorney sent allegedly defamatory material to attorneys with "no relationship" to the underlying proceedings. *Id.* at 166. Under those circumstances, the publication of the allegedly defamatory material was "mere gossip" and did not advance the interests of any client. *Id.* at 167. By contrast, as discussed, Clinton was plaintiff's former attorney, and, by contacting him, McGarry sought to advance his client's interests by potentially averting an appeal. Accordingly, we find that McGarry's communication to Clinton satisfies both the element of being made in a judicial proceeding and the element of advancing the objectives of the litigation.

¶ 34 Pertinency Requirement

¶ 35 Plaintiff next argues that the Bacon and McGarry letters were not pertinent to the Malpractice Litigation.

¶ 36 It is well established that the pertinency requirement "is not strictly applied" and "will *** protect an attorney even when the communication is not confined to specific issues related to the litigation." *Scarpelli v. McDermott Will & Emery LLP*, 2018 IL App (1st) 170874, ¶ 25; see also *Doe v. Williams McCarthy, LLP*, 2017 IL App (2d) 160860, ¶ 19; *Golden*, 295 Ill. App. 3d at 870. Moreover, all doubts will be resolved in favor of a finding of pertinency. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25.

¶ 37 Notwithstanding this weight of authority, plaintiff asserts that the party claiming the litigation privilege is required to "make a specific showing that the publication was pertinent to the particular claim in question." Plaintiff's citations wholly fail to support this proposition. His first citation, *Novel v. Zapor*, 2015 WL 12734021 *11 (S.D. Ohio 2015), is an Ohio district court case not applying Illinois law, and, in any case, the court does not discuss the pertinency requirement. His second citation is to an unpublished order that, under Supreme Court Rule 23, "may not be cited by any party" (with exceptions not applicable here). Ill. S. Ct. R. 23(e)(1) (eff. Apr. 1, 2018); see *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 17 ("neither an appellant nor appellee can use a Rule 23 order to support any claim or argument in his or her brief").[3] Thus, plaintiff's assertion is without merit.

¶ 38 Under the facts of this case, we find that the Bacon and McGarry letters satisfy the pertinency requirement, because they both relate directly to the merits of the Malpractice Litigation. In the McGarry letter, McGarry asserts that plaintiff's malpractice claims against Bacon are "false" and "fabricated." He further asserts that plaintiff refused to follow Bacon's advice or to allow her to contact Harold's Chicken Shack, Inc., regarding the renewal of plaintiff's licensing agreement—allegations that are corroborated by the Bacon letter. Resolving all doubts in favor of a finding of pertinency, as we must (*O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25), we find that McGarry's communications were pertinent to the action.

¶ 39 Publication to Litigants and Other Participants Authorized by Law

¶ 40 Finally, plaintiff argues that the litigation privilege does not apply because McGarry's email, sent to Clinton's AOL address, could have been accessed by participants not authorized by law. See *August*, 2012 IL App (2d) 111252, ¶ 37 ("Illinois courts have expressly declined to extend the attorney-litigation privilege to third parties not connected with the litigation.").

***6** ¶ 41 Plantiff cites his January 2019 email conversation with an AOL-Yahoo customer service representative as evidence that Clinton shared his AOL email address with at least nine other individuals. But plaintiff's conversation does not support this conclusion. On the contrary, the representative stated that AOL usernames are unique and that AOL does not permit sharing of master accounts.

¶ 42 At most, a third party might have gained unauthorized access to Clinton's email account and read the emails therein. Not only is this an entirely speculative possibility, but, even if true, it would not defeat the litigation privilege. In this regard, *Popp v. O'Neil*, 313 Ill. App. 3d 638 (2000), is instructive. In *Popp*, an attorney sent a letter to a prospective client declining to represent him in a personal injury action. The letter was mailed to the client's residence and addressed to the client only, but it was opened and read by the client's wife, who had no connection to the litigation. *Id.* at 640. The *Popp* court held that the allegedly defamatory statements in the letter were protected by the litigation privilege. *Id.* at 643. In doing so, the court rejected the argument that the privilege was defeated because the client's wife intercepted and read mail that was not addressed to her. *Id.* at 644.

¶ 43 Similarly, in the present case, the McGarry letter (to which the Bacon letter was attached) was addressed to Black and carbon-copied to Clinton. McGarry's email contained the header "PRIVATE AND CONFIDENTIAL" and the disclaimer,

"The contents of this email message and any attachments are intended solely for the addressee(s) named in this message." Under these circumstances, even if an unknown and unauthorized third party read the email, we do not find that it defeats the litigation privilege.

¶ 44 Plaintiff additionally claims that even if the litigation privilege applies, McGarry may be held liable for "abusing" the privilege by sending the Bacon and McGarry letters to Clinton's AOL email in reckless disregard of plaintiff's rights. Plaintiff relies on a line of cases discussing abuse in the context of qualified, or conditional, privilege. *Anderson v. Beach*, 386 Ill. App. 3d 246, 251-52 (2008) ("Generally, a defendant who abuses her *conditional* privilege by publishing defamatory material will be subject to liability." (Emphasis added.)); see also *Kuwik v. Starmark Star Marketing and Administration, Inc.*, 156 Ill. 2d 16 (1993); *Stavros v. Marrese*, 323 Ill. App. 3d 1052 (2001); *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 402 (1999). These cases have no application to the case at hand, which involves *absolute* privilege. See *Zych*, 363 Ill. App. 3d at 834 ("An absolute privilege provides a complete immunity from civil action even though the statements were made with malice because public policy favors the free and unhindered flow of such information."). Accordingly, plaintiff's argument regarding abuse lacks merit.

¶ 45 Finally, in his reply brief, plaintiff argues for the first time that Bacon defamed him by sending the Bacon letter to his wife, who was not a party to the Restaurant Litigation. See *Golden*, 295 Ill. App. 3d at 872 (declining to extend the litigation privilege to out-of-court communication between attorney and former client's spouse). Not only is this argument forfeited (*Romano*, 2012 IL App (2d) 091339, ¶ 85 (issues not raised in the trial court are forfeited); *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29 (issue raised for the first time in appellant's reply brief was forfeited)), but it has no relevance to this appeal, since Bacon is not a defendant and her liability is not at issue.

¶ 46 CONCLUSION

***7** ¶ 47 Because the trial court correctly found that McGarry's communications were protected by the absolute litigation privilege, we affirm the dismissal of plaintiff's suit.

¶ 48 Affirmed.

Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

All Citations

Not Reported in N.E. Rptr., 2020 IL App (1st) 190427-U, 2020 WL 2061476

Footnotes

[1] Although there is some dispute as to the exact chronology, the record reflects that on December 14, 2015, Clinton notified plaintiff in writing that "[a]s you know, we have declined to handle any appeal of the Bacon matter." Plaintiff then retained Black, who filed a notice of appeal on December 29, 2015. On January 13, 2016, McGarry sent Black the Bacon and McGarry letters and carbon-copied them to Clinton.

[2] Perplexingly, plaintiff claims in his brief that Clinton "was not part of or no longer part of the judicial proceeding *at any time before*, at any time during or at any time after the defamatory statements/matter were made/published." (Emphasis added.) The record flatly contradicts this assertion, since Clinton was clearly retained by plaintiff before the allegedly defamatory statements were made.

[3] Additionally, plaintiff misrepresents the holding of the Rule 23 order, which correctly states that "the [litigation] privilege will attach even where the defamatory communication is not confined to specific issues related to the litigation." (Internal quotation marks omitted.) *Reger Development, LLC v. Courtney*, No. 3-09-0436 (2011).

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