IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

TABITHA OWENS and CHAD WALTERS, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
vs.	)	**Case No. 3:16-CV-1109-NJR-SCW**
GLH CAPITAL ENTERPRISE, INC., M.L.K. ENTERPRISES, LLC, BACKSTREET ENTERTAINMENT, LTD., CHARLES "JERRY" WESTLUND, JR., an individual, and DOES 1-10,	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

A Motion to Dismiss Defendant Westlund's Counterclaims (Doc. 36), filed by Plaintiffs Tabitha Owens and Chad Walters, and a Motion to Dismiss (Doc. 29) filed by Defendant Charles "Jerry" Westlund are pending before the Court. For the reasons set forth below, the Court grants the Motion to Dismiss Westlund's Counterclaims and denies Westlund's Motion to Dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, and the Illinois Minimum Wage Act, 820 ILCS § 105/1. Tabitha Owens (Owens) and Chad Walters (Walters) (collectively "Employees") are former employees of Defendants GLH Capital Enterprise, Inc., M.L.K. Enterprises, LLC, Back Street Entertainment, Ltd.,

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Charles "Jerry" Westlund, Jr., and Does 1-10 (collectively "Employers").

Under the FLSA employers are prohibited from requiring an employee to work more than forty hours in a workweek unless the employee receives compensation of at least one-and-a-half times their regular rate. 29 U.S.C. § 207(a)(1). Employees filed an Amended Complaint on December 19, 2016, alleging Employers willfully violated the FLSA by failing to pay overtime. (Doc. 25, pp. 1-2). Employers timely filed an Answer, Affirmative Defenses, and Counterclaims. (Doc. 28). At issue are Westlund's counterclaims for false light and defamation. (Doc. 28, pp. 18-19). Both claims are based on language in paragraph 24 of Employees' Amended Complaint stating "Plaintiffs and other employees understand that Hamilton is simply Westlund, Jr.'s 'fall guy.'" (Doc. 25, ¶ 24). Employees filed the pending Motion to Dismiss Westlund's Counterclaims arguing the statement in paragraph 24 of their Amended Complaint is privileged and they are immune from suit for false light and defamation. (Doc. 36, pp. 1-2).

Westlund also has filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), alleging Employees' Amended Complaint fails to state facts to support any allegations against defendant Westlund personally and he should be dismissed as an individually named defendant. (Doc. 29, ¶¶ 3-4).

ANALYSIS

I. MOTION TO DISMISS COUNTERCLAIMS

Employees' Motion to Dismiss Defendant Westlund's Counterclaims raises two arguments for dismissal: (1) Westlund's Counterclaims are barred as a matter of law; and (2) Westlund's Counterclaims fail to establish subject matter jurisdiction for his

permissive counterclaims. (Doc. 36, pp. 1-2). Because the Court finds Westlund's Counterclaims are barred as a matter of law, Employees' second argument is deemed moot.

A. BARRED AS A MATTER OF LAW

There is a long standing principal in Illinois that anything said or written in a legal proceeding, including pleadings, is protected by an absolute privilege against defamation actions, as long as the words are relevant or pertinent to the matters in controversy. *Defend v. Lascelles,* 500 N.E.2d 712, 714 (1986); *see also Libco Corp. v. Adams,* 426 N.E.2d 1130, 1131 (1981) ("The absolute privilege protects anything said or written in a legal proceeding."); *Ritchey v. Maksin*, 376 N.E.2d 991, 993 (Ill. App. Ct. 1978); *Wahler v. Schroeder,* 292 N.E.2d 521, 523 (Ill. App. Ct. 1972); *Harrell v. Summers*, 178 N.E.2d 133, 134 (Ill. App. Ct. 1961); *Dean v. Kirkland*, 23 N.E.2d 180, 187 (Ill. App. Ct. 1939). This rule flows from the principle that the judicial system is best served when individuals are free to report facts to a court without fear of civil liability. *Defend,* 500 N.E.2d at 714.

An absolute privilege has been held to apply in both defamation and false light claims. *McGrew v. Heinhold Commodities, Inc.,* 497 N.E.2d 424, 432 (Ill. App. Ct. 1986) ("Every jurisdiction that has considered the question has concluded that this privilege also applies to 'false light' suits.") The question before this Court, therefore, is whether the complained of statement in Employees' Amended Complaint is relevant or pertinent to the matters in controversy, and therefore privileged against Westlund's defamation and false light claims. Statements are considered relevant or pertinent if

they have any bearing upon the subject matter of the litigation. *Talley v. Alton Box Board Co.*, 185 N.E.2d 349, 352 (Ill. App. Ct. 1962). Courts are generally liberal in construing this question, resolving all doubts in favor of relevancy or pertinence. *Harrell,* 178 N.E.2d at 134.

Employees' Amended Complaint alleges Employers willfully failed to pay overtime for work performed in excess of forty-hours in a workweek. (Doc. 25, ¶¶ 68, 75, 79). Employees further allege Garrett L. Hamilton (Hamilton) is employed by Defendants as the manager and/or president of Employers' named business entities. (Doc. 25, ¶ 24). In that role, he is responsible for general business and financial operations (Doc. 25, ¶ 24), which the Court infers to include payroll. The complained of language—that Mr. Hamilton is Westlund's "fall guy"—indicates that Mr. Hamilton is working at the direction of Westlund, and thus Mr. Westlund is responsible for either knowingly or recklessly failing to pay overtime. Since that is the gravamen of Employees' complaint, the statement has a direct bearing on the subject matter of the litigation, and the statement is privileged.

Westlund argues that he filed the defamation and false light claims against Employees, not their attorneys (Doc. 38, ¶ 6), presumably arguing the privilege against defamation applies only to attorneys. Westlund provides no legal authority for his argument[1] and ignores mandatory authority on point. Specifically, the Seventh Circuit

[1] Westlund simply argues that Plaintiffs' reliance on *ZDEB v. Baxter Int'l., Inc.,* 697 N.E.2d 425 (Ill. App. Ct. 1988) and *Scheib v. Grant,* 22 F.3d 149 (7th Cir. 1994) is misplaced because both address only immunity for attorneys. (Doc. 38, pp. 1-2). Westlund is correct that both cases focus on immunity of attorneys. In *Scheib,* the question of whether the parties had immunity was never raised, *Scheib,* 22 F.3d at 149-157, and in *ZDEB* it was waived, *ZDEB,* 697 N.E.2d at 431. However, the inapplicability of these two cases does not support Westlund's claim that Plaintiffs are not immune from defamation claims.

has repeatedly held parties are also immune to defamation for statements made during the course of a legal proceeding.[2] *Novoselsky v. Brown*, 822 F.3d 342, 353 (7th Cir. 2016); *see also Zanders v. Jones,* 680 F.Supp. 1236, 1238 (N.D. Ill. 1988) aff'd, 872 F.2d 424 (7th Cir. 1989); *Bond v. Pecaut,* 561 F.Supp. 1037, 1038 (N.D. Ill. 1983), aff'd, 734 F.2d 18 (7th Cir.1984).

Because the statement at issue has bearing on the subject matter of the litigation, the Court finds Employees have complete immunity against Westlund's false light and defamation claims. The Court therefore **GRANTS** Employees' Motion to Dismiss Westlund's Counterclaims (Doc. 36) with prejudice.

II. MOTION TO DISMISS PURSUANT TO 12(b)(6)

A complaint must contain a short plain statement of the claim showing the pleader is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Detailed factual allegations are not required, but a complaint must contain sufficient facts that, if accepted as true, state a claim for relief that is plausible on its face. *Id*. A claim is facially plausible where the facts pled allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Id*.

Defendant Westlund filed an Amended Motion to Dismiss, asking that he be dismissed as an individual defendant pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 29). Westlund's motion argues that Employees have failed to assert any facts showing that he violated Employees' rights and therefore have failed to state a

[2] Employees raise a second basis for immunity, arguing that the Complaint was drafted and filed by Employees' attorneys. (Doc. 39, p. 2). Presumably, because the attorneys drafted the document, their clients are not liable for any statements contained therein. Because the Court finds the parties themselves are immune under 7th Circuit jurisprudence, the issue of who made the complained of statement need not be addressed.

claim. (Doc. 29, ¶¶ 4-8).

Exhibit A of the Amended Complaint, however, identifies Westlund as the Manager/President of Back Street Entertainment, LLC, (Doc 25-1), and the Illinois Secretary of State lists him as the President and Secretary of that corporation (Doc. 37-1). Exhibit A also lists five other companies having their principal office located at the same address as Back Street Entertainment, with Westlund as their Manager/President: Dead Presidents, LLC, Repeating Rifle, LLC, Silent Strippers, LLC, Mississippi Adult Properties, LLC, and The Pony Bama, LLC. (Doc. 25-1). The Court draws the reasonable inference from these facts that Westlund is a corporate officer for at least six of the listed companies. Courts in the Seventh Circuit have held that a corporate officer with operational control can be personally liable for the corporation's failure to pay owed wages. *Morgan v. SpeakEasy, LLC,* 625 F.Supp.2d 632, 646 (N.D. Ill. 2007); *Herman v. Harmelech,* No. 93 C 3458, 2000 WL 420839, at *8 (N.D. Ill April 14, 2000).

Employees further point to paragraph 23 of the Amended Complaint which states:

> Defendant Westlund, Jr. is the primary owner of the named Defendant business entities and is directly involved with their business operations including but not limited to negotiating purchase agreements, obtaining alcohol and gaming licenses, developing marketing strategies, decisions on employee staffing at specific locations, and reviewing and signing employee paychecks.

(Doc. 25, ¶ 23). The Amended Complaint further alleges that Westlund makes decisions related to employee staffing and payroll. (Doc. 25, ¶66). The pled facts, accepted as true for purposes of the Rule 12(b)(6) Motion to Dismiss, support the reasonable inference that Westlund is responsible for the failure to pay Employees overtime as alleged in the

Amended Complaint.

Because Employees have pled sufficient facts to state a claim for relief that is plausible on its face, Westlund's Motion to Dismiss (Doc. 29) is **DENIED.**

IT IS SO ORDERED.

DATED: July 14, 2017

NANCY J. ROSENSTENGEL
United States District Judge