2013 IL App (1st) 113806

No. 1-11-3806

SIXTH DIVISION
June 28, 2013

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| ROBERT J. STEIN III, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 06 L 4914 |
| | ) | |
| CLINTON A. KRISLOV and KRISLOV AND ASSOCIATES, LTD., | ) | The Honorable |
| | ) | Allen S. Goldberg, |
| Defendants-Appellees. | ) | Judge Presiding. |

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court, with opinion.
Justices Hall and Reyes concurred in the judgment and opinion.

**OPINION**

¶ 1 This case appears before us a second time. Pursuant to our initial review, we concluded that this court did not have jurisdiction to consider the trial court's denial of defendant's motion to dismiss as an interlocutory appeal and that the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2008)) did not confer subject matter jurisdiction on this court. *Stein v. Krislov*, 405 Ill. App. 3d 538 (2010).[1] Following remand, plaintiff now appeals the trial court's dismissal of

[1]On February 16, 2011, the Illinois Supreme Court amended Supreme Court Rule 306(a)(9) to allow an interlocutory appeal by permission from an order denying a motion to

his third amended complaint where the court found the Act barred his claims for libel, violation of the Illinois Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 (West 2002)), and breach of contract against defendants, Clinton Krislov and Krislov & Associates, Ltd. (K&A). Plaintiff contends the Illinois Supreme Court's recent decision in *Sandholm v. Kuecker*, 2012 IL 111443, requires reversal. Based on the following, we reverse and remand.

¶ 2 FACTS

¶ 3 We adopt from our prior opinion those facts salient to the current appeal:

> "Plaintiff is an attorney that was employed by K&A from 1994-2001. Krislov is the sole shareholder. After leaving K&A, plaintiff and his firm were named as one of three firms representing the plaintiff on a motion for class certification in an action in a federal district court in Pennsylvania. While performing unrelated research, Krislov discovered plaintiff's motion for class certification in the Pennsylvania case. Attached to the motion was a description of plaintiff's and his firm's prior experience. On June 13, 2005, Krislov sent an unsigned letter to the judge presiding over the Pennsylvania case, advising that the representations made by plaintiff regarding his experience were 'beyond puffing' and were 'simply misstatements, known by the filers to be untrue.' The federal judge contacted the attorneys for the parties and provided them with a copy of Krislov's letter. On June 24, 2005, plaintiff responded by letter to the federal judge, disputing Krislov's claims and providing supporting documentation to

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dismiss under the Act.

verify plaintiff's and his firm's experience. On July 14, 2005, Krislov sent a reply letter to the federal judge, responding to plaintiff's June 24, 2005, letter. Ultimately, class certification was granted as to count I and denied, for reasons unrelated to Krislov's letter, as to counts II and III.

On May 10, 2006, plaintiff filed his first amended complaint against defendants, alleging libel and libel *per se* as a result of Krislov's letter, in addition to claims for vacation and bonus pay allegedly owed to him from his K&A employment. Defendants filed a motion under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2004)) to dismiss the libel claims, arguing that the June 13, 2005, letter was absolutely privileged. On September 20, 2006, the trial court granted defendant's motion to dismiss the libel claims. In response, plaintiffs filed a motion to reconsider. On December 6, 2006, the trial court reversed its September 20, 2006, order, finding instead that the June 13, 2005, letter was not absolutely privileged. The libel claims were reinstated.

On January 11, 2007, defendants moved to reconsider the December 6, 2006, order. On February 1, 2008, the trial court denied the motion to reconsider, finding that '[a]bsolute privileges must be narrowly construed, and where an attorney has injected himself into litigation with which he has absolutely no connection, we do not find that *any* kind of absolute privilege exists' (emphasis in original), and that Krislov had no absolute duty under the Illinois Rules of Professional Conduct to report misconduct elsewhere.

On February 29, 2008, plaintiff filed a third amended complaint,[2] realleging the libel claim and claims for uncompensated vacation and bonus pay. On August 26, 2009, defendants filed a motion to reconsider the trial court's February 1, 2008, order denying defendants' motion to reconsider the trial court's September 20, 2006, finding that the letter was not absolutely privileged. Defendants additionally filed a motion to dismiss the libel claim based on the Citizen Participation Act (Act). Defendants argued, for the first time, that they were immunized under the Act because the libel suit was filed in response to Krislov's exercise of his constitutional rights to free speech and participation in government.

On November 20, 2009, the trial court denied defendants' motion to reconsider its finding that the letter was not absolutely privileged where defendants relied on *Ficaro v. Funkhouser, Vegosen, Liebman & Dunn, Ltd.*, Nos. 1-07-1469, 1-07-3433 cons. (July 31, 2009) (unpublished order pursuant to Supreme Court Rule 23), to support the allegation that there had been a change in the law. The trial court held that defendants' reliance on an unpublished, nonprecedential order was improper. The trial court further held that the Act, which was enacted on August 28, 2007, could not provide immunity because it was not created until after plaintiff's June 13, 2005, letter and the filing of plaintiff's lawsuit on May 10, 2006, and the Act did not have retroactive

[2]Plaintiff's second amended complaint is not relevant to this appeal.

application.

Defendants filed a notice of interlocutory appeal citing Supreme Court Rule 307(a) (188 Ill. 2d R. 307(a)) and section 20(a) of the Act (735 ILCS 110/20(a) (West Supp. 2007)) on December 17, 2009." *Id.* at 538-40.

As previously stated, we remanded the case for further review because this court did not have jurisdiction to consider defendants' appeal.

¶ 4 On remand, on March 16, 2011, the trial court granted defendants' motion to dismiss plaintiff's third amended complaint in its entirety based on this court's September 30, 2010, decision in *Shoreline Towers Condominium Ass'n v. Gassman*, 404 Ill. App. 3d 1013 (2010), wherein we held that the Act had retroactive application. *Id*. at 1023. On July 29, 2011, the trial court entered final judgment and awarded attorney fees and costs to defendants pursuant to the Act in the amount of $99,334,18.

¶ 5 Then, on November 29, 2011, the trial court entered a written order denying plaintiff's motion to reconsider the dismissal of his third amended complaint. For the first time, plaintiff argued that defendants' conduct was not immunized by the Act and that the court separately should have considered plaintiff's libel, wage, and contract claims. The trial court disagreed. Relying on *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113 (2010), the trial court found that plaintiff's wage and contract claims were "filed only in response to Defendants' motion to dismiss based on" the Act and that plaintiff failed to present clear and convincing evidence that the claims were not in response to or in retaliation for defendants' protected conduct.

¶ 6 Finally, on December 7, 2011, the trial court granted defendants' supplemental petition for attorney fees, awarding defendants a total of $120,420.43 in fees and costs. This timely appeal followed.

¶ 7 DECISION

¶ 8 Plaintiff contends the trial court erred in dismissing his meritorious claims for libel, violations of the Wage Act, and breach of contract where the Illinois Supreme Court's recent decision in *Sandholm*[3] established that the Act did not create a new immunity for defamation and that the Act only applies to meritless, retaliatory lawsuits, which is not the case here.

¶ 9 A motion to dismiss based on immunity under the Act is properly raised under section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)) wherein the legal sufficiency of the plaintiff's complaint is admitted, but the motion asserts certain defects or defenses outside of the pleadings defeat the claim. *Sandholm*, 2012 IL 111443, ¶ 55. When ruling on a section 2-619 motion, the court should construe the pleadings and supporting documents in a light most favorable to the nonmoving party, while accepting as true all well-pleaded facts in the complaint and drawing all reasonable inferences in the plaintiff's favor. *Id*. On appeal, the question for the court is "whether the existence of a genuine issue of material fact should have precluded dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." (Internal quotation marks omitted.) *Id*. We review *de novo* the dismissal of a

[3]We note that *Sandholm* was decided after the orders appealed from in this case. In the interest of creating a uniform body of law, we, therefore, consider the arguments raised by plaintiff despite any waiver.

complaint pursuant to section 2-619 of the Code. *Id*.

¶ 10 As an initial matter, the parties dispute whether Krislov's letters were absolutely privileged as either statements made in a judicial proceeding or as statements made in the discharge of a duty under the express authority of law.

¶ 11 Illinois courts have adopted the attorney litigation privilege as provided in section 586 of the Restatement (Second) of Torts. *August v. Hanlon*, 2012 IL App (2d) 111252, ¶ 35. The provision reads:

> "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding *in which he participates as counsel*, if it has some relation to the proceeding." (Emphasis added.) Restatement (Second) of Torts § 586 (1977).

The policy supporting the absolute privilege is that "of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice *for their clients*." (Emphasis added.) Restatement (Second) of Torts § 586 cmt. a (1977).

¶ 12 Due to the complete immunity provided by the absolute privilege, the scope of absolutely privileged communication is necessarily narrow. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 165 (2003). Courts have extended the attorney litigation privilege to out-of-court communications between opposing attorneys, out-of-court communications between attorney and client related to pending litigation, out-of-court communications between attorneys representing different parties who are suing the same entities,

statements made during quasi-judicial proceedings, communications necessarily preliminary to quasi-judicial proceedings, and posttrial remarks related to judicial proceedings made by an attorney to his client. *August*, 2012 IL App (2d) 111252, ¶ 36 (citing *Golden v. Mullen*, 295 Ill. App. 3d 865, 870-71 (1997) (and cases cited therein)). Illinois courts, however, have never extended the privilege to other persons having no connection to the lawsuit. *Edelman, Combs & Latturner*, 338 Ill. App. 3d at 166. In fact, Illinois courts have expressly rejected extending the privilege to third parties lacking connection with the litigation. *August*, 2012 IL App (2d) 111252, ¶ 37; see *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 705 (2000) (refusing to extend the privilege to statements made by an attorney to a reporter in connection with a case); *Thompson v. Frank*, 313 Ill. App. 3d 661, 664 (2000) (refusing to extend the privilege to out-of-court communications between an attorney and an opposing party's spouse); *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 166 (1998) (finding that statements made to the media regarding a case are not privileged because they are not part of the judicial proceeding); *Golden*, 295 Ill. App. 3d at 872 (refusing to extend the privilege to an out-of-court communication between an attorney and a former client's spouse).

¶ 13 "[C]ourts have required that the act to which the privilege applies must not only bear some relation to the judicial proceeding but must also be 'in furtherance of that representation.' " *Kurczaba*, 318 Ill. App. 3d at 706 (quoting *Samson Investment Co. v. Chevaillier*, 1999 OK 90, ¶ 9, 988 P.2d 327). Noting the policy reasons for the privilege were to protect zealous advocacy, courts have found that the privilege is not applicable under circumstances for which there are no safeguards against abuse of the privilege, *i.e.*, where the authorities do not have the ability to

discipline the attorney and strike from the record any statements exceeding the bounds of permissible conduct. *Id*.

¶ 14 We conclude that the attorney litigation privilege does not apply to this case. In the facts before us, defendant was essentially acting as a third party with no connection to the federal litigation. Through his letters to the federal judge, defendant was not attempting to secure justice for *his* client in a proceeding in which *he participated as counsel*, as described in the Restatement. Restatement (Second) of Torts § 586 cmt. a (1977). Because the absolute privilege must be construed narrowly and Illinois courts have not extended the privilege to uninterested third parties, we find the privilege should not be extended here.

¶ 15 The cases cited by defendants are distinguishable from the case at bar. In *Lykowski*, this court concluded that the defendant's statement to the Attorney Registration and Disciplinary Commission (ARDC) regarding the plaintiff's alleged attorney misconduct was absolutely privileged as a communication made to a quasi-judicial body during a preliminary and necessary step in maintaining authority. *Lykowski*, 299 Ill. App. 3d at 165. In *Parillo, Weiss, & Moss v. Cashion*, 181 Ill. App. 3d 920 (1989), this court concluded that the defendant's statements made in a letter written to the director of this state's Department of Insurance were absolutely privileged as a preliminary step toward a quasi-judicial proceeding where the letter was designed to prompt the regulatory agency to investigate the contents thereof. *Id*. at 928-29. In *Kalish v. Illinois Education Ass'n*, 157 Ill. App. 3d 969 (1987), this court concluded that the defendant's statements made to the character and fitness committee were absolutely privileged as statements made to a quasi-judicial body whose function was to investigate the moral character and fitness

of attorney applicants. *Id*. at 975-76.

¶ 16 The cases relied upon by defendants involved regulatory bodies that were charged with the duty of investigating reports of improper activities and enforcing the rules of the particular agency. In those cases, the absolute privilege was applied because public policy encourages free communication of relevant information from the public to the agencies in order to ensure compliance with the rules of those agencies. In the case before us, however, the Restatement, and cases interpreting the Restatement, expressly restricts the absolute privilege for attorneys reporting to a judiciary to those instances where the attorney is involved in the judicial proceeding and is advocating for his client. Therefore, the attorney litigation privilege did not protect Krislov's statements from potential liability.

¶ 17 Next, after having reviewed whether Krislov's statements were made in the discharge of a duty under the express authority of law, we conclude that Krislov had no duty to report plaintiff's alleged misconduct to the federal Pennsylvania judge. As a result, Krislov's statements were not privileged as a discharge of a duty under the express authority of law. The version of Rule 8.3(a) of the Illinois Rules of Professional Conduct (Ill. R. Prof. Conduct, R. 8.3(a) (eff. Aug. 1, 1990))[4] applicable at the relevant time required that an attorney report the misconduct of another attorney to "a tribunal or other authority empowered to investigate or act upon such violation," including criminal acts reflecting on his trustworthiness, honesty, or fitness as an attorney and conduct involving fraud, dishonesty, deceit, or misrepresentation. Section 592A of the Restatement

[4]On January 1, 2010, Rule 8.3(a) was amended to require a report to the "appropriate professional authority."

(Second) of Torts (1977) provides immunity for compliance with Rule 8.3(a), such that "one who is required by law to publish defamatory matter is absolutely privileged to publish it." Restatement (Second) of Torts § 592A (1977); see *Weber v. Cueto*, 209 Ill. App. 3d 936, 942 (1991).

¶ 18 In *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214 (2000), the Illinois Supreme Court clarified that the relevant language of Rule 8.3(a) obligated an Illinois attorney to report known attorney misconduct to the ARDC. *Id*. at 229. Relying on the language of the rule, the supreme court found that, due to the delegation of the supreme court's singular authority "to investigate or act upon" a report of attorney misconduct to the ARDC, an attorney's duty to report was discharged only by contacting the ARDC with information regarding the alleged misconduct. *Id*.

¶ 19 Defendants argue that, because the Pennsylvania federal judge was "empowered to investigate or act" as provided under the applicable version of Rule 8.3(a), Krislov's June 13, 2005, letter satisfied his obligation to report alleged misconduct under the rule and was, therefore, privileged. Defendants' reasoning is flawed in that, unlike former Rule 8.3(a), the local Pennsylvania rule cited by defendants did not *require* Krislov to report plaintiff's alleged misconduct. Rather, the local Pennsylvania rule merely stated that a judge who became aware of potentially sanctionable attorney misconduct must "refer the matter to the Chief Judge who shall issue an order to show cause." In particular, defendants cited E.D. Penn. Local R. 83.6, R. V (eff. July 1, 1995), which states:

> "When the misconduct or other basis for action against an attorney *** or allegations of same which, if substantiated, would warrant discipline or other

> action against an attorney admitted to practice before this court shall come to the attention of a Judge of this court *** the judge shall refer the matter to the Chief Judge who shall issue an order to show cause."

¶ 20 The rule does not speak to the requisite actions an attorney need take after learning of alleged attorney misconduct. In contrast, *Skolnick* did speak to an Illinois attorney's obligation under Rule 8.3(a), in that an attorney's duty is discharged only by reporting alleged attorney misconduct to the ARDC. *Skolnick*, 191 Ill. 2d at 229. As a result, we cannot say that Krislov's statements in his June 13, 2005, letter were made in the discharge of a duty under the express authority of law. *Cf. Weber*, 209 Ill. App. 3d at 942-48; *Busch v. Bates*, 323 Ill. App. 3d 823, 833-34 (2001) (absolute privilege extended to statements made pursuant to mandatory duty to report conduct violations in order to avoid the plaintiffs' own discipline for failure to report). Therefore, the statements were not protected by an absolute privilege. See Restatement (Second) of Torts § 592A (1977) ("one who is required by law to publish defamatory matter is absolutely privileged to publish it").

¶ 21 We now turn to the parties' dispute regarding the application of the Act to the facts before this court. The Act was created as anti-SLAPP legislation. *Sandholm*, 2012 IL 111443, at ¶ 33. "SLAPPs" are "Strategic Lawsuits Against Public Participation," which constitute meritless lawsuits " 'aimed at preventing citizens from exercising their political rights or punishing those who have done so.' " *Id.* (quoting *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 630 (2010). "Plaintiffs in SLAPP suits do not intend to win but rather to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense, and

distraction. *** While the case is being litigated in the courts, however, defendants are forced to expend funds on litigation costs and attorney fees and may be discouraged from continuing their protest activities." *Id.* at ¶ 34.

¶ 22 A lawsuit may only be dismissed due to immunity under the Act if:

> "(1) the defendants' acts were in furtherance of their right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the plaintiffs' claims are solely based on, related to, or in response to the defendants' 'acts in furtherance'; and (3) the plaintiffs fail to produce clear and convincing evidence that the defendants' acts were not genuinely aimed at solely procuring favorable government action." *Hammons v. Society of Permanent Cosmetic Professionals*, 2012 IL App (1st) 102644, ¶ 18 (citing *Sandholm*, 2012 IL 111443, ¶¶ 53-57).

¶ 23 In order to determine whether dismissal was appropriate here, we must first ascertain whether defendants' actions were protected by the Act. More specifically, were Krislov's actions in furtherance of his constitutional right of speech, association, or to participate in government to obtain favorable government action? The complained-of statements were made by Krislov in his June 13, 2005, letter[5] addressed to the Pennsylvania federal judge considering plaintiff's motion for class certification. Krislov's statements were made to a government official in an effort to obtain favorable government action by way of barring plaintiff from obtaining class certification

[5]Plaintiff briefly mentions Krislov's June 24, 2005, response letter in his third amended complaint, but does not identify any statements from that letter as a basis for challenge.

based on inflated credentials. See 735 ILCS 110/10 (West 2008); see also *Hytel*, 405 Ill. App. 3d at 120; *Cartwright v. Cooney*, No. 10-CV-1691, 2012 WL 1021816 (N.D. Ill. Mar. 26, 2012). Defendants' conduct, therefore, was protected by the Act.

¶ 24 Next, we must determine whether plaintiff's claims were "solely based on" defendants' protected actions. Plaintiff contends the trial court erred in dismissing his complaint and providing defendants with absolute immunity in opposition to the holding in *Sandholm*. Defendants respond that plaintiff's complaint was properly dismissed because it was brought "solely" to burden Krislov's exercise of his constitutional rights.

¶ 25 While interpreting the language of the Act, the *Sandholm* court found the "clear legislative intent expressed in the statute to subject only *meritless, retaliatory* SLAPP suits to dismissal." (Emphasis added.) *Sandholm*, 2012 IL 111443, ¶ 45. The supreme court explained that "where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on defendant's rights of petition, speech, association, or participation in government. In that case, the suit would not be subject to dismissal under the Act. It is clear from the express language of the Act that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute." *Id*. "The party moving for dismissal under the Act bears the initial burden of proving that the claim was solely based on, related to or in response to acts in furtherance of the movant's rights of petition, speech and association." *Chicago Regional Council of Carpenters v. Jursich*, 2013 IL App (1st) 113279, ¶ 20. The defendants must meet the burden of affirmatively demonstrating that the plaintiff's suit was retaliatory and meritless before

it becomes the plaintiff's burden to provide clear and convincing evidence that the defendants' activities were not immunized under the Act. *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 18; *Jursich*, 2013 IL App (1st) 113279, ¶ 20; *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 21.

¶ 26 Although the trial court dismissed plaintiff's libel and Wage Act/breach of contract claims as a group, we find it appropriate to discuss each claim separately. Turning first to plaintiff's libel claim, we must address whether the claim was retaliatory and meritless. In ascertaining whether plaintiff's libel claim was retaliatory, we note that although *Hytel* is a pre-*Sandholm* decision, it remains useful "for the question of whether a claim is retaliatory within the meaning of the Act." *Ryan*, 2012 IL App (1st) 120005, ¶ 23. Two nonexclusive factors to consider in determining whether a claim is retaliatory are (1) the proximity in time between the protected activity and the filing of the complaint, and (2) whether the damages requested are reasonably related to the facts alleged in the complaint and present a good-faith estimate of the injury sustained. *Id*. (citing *Hytel*, 405 Ill. App. 3d at 126).

¶ 27 In the instant case, plaintiff did not file his first amended complaint[6] until May 10, 2006, which was 11 months after Krislov sent his initial letter to the Pennsylvania federal judge. Moreover, in his libel claim, plaintiff requested compensatory and punitive damages in excess of $50,000, yet described his damages as those to his reputation and the costs associated with defending himself to the federal judge through responsive letters. Plaintiff did not suffer lost income and it is undisputed that the federal judge's class certification decision was not affected

[6]The parties refer to the first amended complaint as the initial complaint.

by Krislov's letter. To the extent plaintiff has pled a claim for libel *per se*, damage to his reputation is presumed. *Bryson v. News America Publications, Inc.*, 174 Ill. 2d 77, 87 (1996). However, the requested $50,000 was not a "good-faith estimate" for the cost of responses to the federal judge. Based on the timing of the lawsuit, in that it was filed just before the expiration of the statute of limitations (735 ILCS 5/13-201 (West 2002)), and the relief requested, especially for punitive damages, it is apparent that plaintiff preserved his libel claim in an effort to make defendants "pay" for the letter to the federal judge despite minimal loss and speculative damages. We, therefore, conclude defendants have shown evidence of retaliatory intent for plaintiff's libel claim.

¶ 28 In determining whether a claim is subject to dismissal under the Act as one "solely based on" protected conduct, the *Sandholm* court further instructed that a SLAPP is also "by definition, meritless." *Sandholm*, 2012 IL 111443, ¶ 34. It was defendants' burden to "show that there are undisputed facts that demonstrate plaintiff's claim is meritless." *Ryan*, 2012 IL App (1st) 120005, ¶ 26. Keeping in mind that we review a motion to dismiss under the Act pursuant to section 2-619 of the Code, we must presume the legal sufficiency of plaintiff's libel claim. *Ryan*, 2012 IL App (1st) 120005, ¶ 22. A claim is meritless if the moving party disproves some essential element of the nonmovant's claim. *Garrido*, 2013 IL App (1st) 120466, ¶ 19. Therefore, we may consider whether plaintiff has alleged sufficient facts to show the claim was genuine and not factually baseless. *Sandholm*, 2012 IL 111443, ¶ 45; *Garrido*, 2013 IL App (1st) 120466, ¶ 23.

¶ 29 Plaintiff's third amended complaint alleged that Krislov's June 13, 2005, letter "knowingly and intentionally made false representations to the court regarding Plaintiff's firm resume that Plaintiff had filed in support of the motion for class certification." Plaintiff added that he drafted a response letter with an attached summary and appendix of supporting documents demonstrating Krislov's statements were untrue. According to the third amended complaint, defendants sent a response letter on July 14, 2005. In the complaint, plaintiff listed five false statements (*i.e.*, that his previous case accomplishments were beyond puffing and that he misrepresented and misstated his accomplishments) and alleged that Krislov's statements would impugn his integrity and affect his ability to be found qualified to represent a class in other class action cases. Taking all well-pled facts as true, drawing reasonable inferences in favor of plaintiff, and viewing the pleading in a light most favorable to plaintiff, we conclude that plaintiff's libel claim was not meritless where defendants failed to satisfy their burden of demonstrating the truth of the contents of Krislov's letters. See *Ryan*, 2012 IL App (1st) 120005, ¶¶ 27-29. Defendants have not offered any evidence, either in their appellate brief or at oral argument, that plaintiff's claim lacked merit. We, therefore, conclude that plaintiff's libel claim does not qualify as a SLAPP. As a result, the trial court erred in dismissing the claim.

¶ 30 We next address whether plaintiff's Wage Act and breach of contract claims were "solely based" on protected conduct. Turning our attention to whether those claims were retaliatory, the two nonexclusive factors provided in *Hytel* are "(1) the proximity in time between the protected activity and the filing of the complaint, and (2) whether the damages requested are reasonably related to the facts alleged in the complaint and present a good faith estimate of the injury

sustained." *Ryan*, 2012 IL App (1st) 120005, ¶ 23 (citing *Hytel*, 405 Ill. App. 3d at 126).

¶ 31 Plaintiff left his employment at defendant law firm in 2001; however, he did not file a complaint until May 10, 2006. Based on the lengthy gap in time from having allegedly not received his vacation and bonus pay prior to leaving defendant firm and the relatively short span of time between Krislov's letter and the filing of the complaint, plaintiff's claims appear retaliatory. In terms of the damages requested, plaintiff requested a total of $65,007.66 in damages for the Wage Act and breach of contract claims with $21,807.66 for vacation pay and $43,200 for 2001 bonus pay. Under the Wage Act claims, plaintiff additionally requested prejudgment interest. Plaintiff alleged he was owed 42 days of vacation pay and, based on previous bonuses, a 20% increase from the prior year's bonus. Although the damages requested appear reasonably related to the facts alleged in the complaint, we conclude that defendants have shown evidence of retaliatory intent where plaintiff sat on his claims for nearly six years and only filed a complaint after Krislov interfered in the federal lawsuit.

¶ 32 As advised in *Sandholm*, we must also determine whether plaintiff's claims for violation of the Wage Act and breach of his employment contract were meritless. In his claims related to vacation and bonus pay, plaintiff alleged he was entitled to additional compensation. In regard to his vacation pay, plaintiff alleged that when he was hired as an attorney at defendant law firm in 1994 he was informed of the compensation package, which included paid vacation. Plaintiff alleged that the vacation policy was not written, but was provided orally by the office manager. When hired, plaintiff was informed that he would earn two weeks of vacation pay during his first four years of service and three weeks of vacation pay thereafter. According to plaintiff's third

amended complaint, he signed a nonequity partner employment agreement in 2000. That agreement was silent to the vacation policy where it stated that "Plaintiff was entitled to paid vacations and holidays in accordance with the firm's customary employment policies." Plaintiff alleged that he exceeded the three-year vacation allotment in 2000, but was allowed to use previously accrued vacation time. According to plaintiff, there was no notice of a policy change during his employment. In regard to his bonus pay, plaintiff alleged that defendant law firm customarily paid bonuses to its attorneys on the last working day before Christmas each year. However, at a meeting in October 2001, Krislov informed the attorneys that bonuses might be deferred beyond year-end. In late December 2001, Krislov confirmed that the bonuses were going to be deferred until defendant law firm received fees from a client. In response, plaintiff informed Krislov that he was resigning because the bonus pay deferment was "unacceptable."

¶ 33 Defendants have not produced undisputed facts demonstrating that plaintiff's Wage Act and breach of contract claims were meritless. *Ryan*, 2012 IL App (1st) 120005, ¶ 26. Indeed, as with the libel claim, defendants failed to produce any evidence to challenge plaintiff's claims. *Id.* at ¶¶ 27-29. We, therefore, conclude that plaintiff's claim does not qualify as a SLAPP. As a result, we find the trial court erred in dismissing plaintiff's third amended claims based on the Wage Act and breach of contract.

¶ 34 Due to our finding, we also conclude that the trial court erred in awarding defendants' attorney fees under the Act.

¶ 35 As a final matter, we note that defendants did not allege that Krislov's statements were subject to a qualified privilege. However, to the extent the trial court mentioned the potential for

a qualified privilege in its February 1, 2008, in relation to plaintiff's second amended complaint, we find that a qualified privilege would not be appropriate in this case. In *Sandholm*, the supreme court was clear that the Act did not create a qualified privilege on libel. *Sandholm*, 2012 IL 111443, ¶ 50 ("had the legislature intended to radically alter the common law by imposing a qualified privilege on defamation within the process of petitioning the government, it would have explicitly stated its intent to do so").

¶ 36 CONCLUSION

¶ 37 Based on the foregoing, we reverse the trial court's March 16, 2011, order dismissing plaintiff's third amended complaint and its November 29, 2011, order denying plaintiff's motion to reconsider the March 16, 2011, order. We further reverse the trial court's July 29, 2011, and December 7, 2011, orders granting attorney fees to defendants pursuant to the Act. We remand this cause for further proceedings.

¶ 38 Reversed and remanded.