IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Thomas Sheehy, Plaintiff, v. Jorge Torres, Defendant.	No. 20 L 8492

MEMORANDUM OPINION AND ORDER

Absolute privilege is a narrow common-law doctrine requiring an evidentiary record before a court may apply the doctrine. The Tort Immunity Act immunizes governmental entities, but not their employees, from defamation claims, but whether a person is a public official under the statute and, thereby, immunized from punitive damages is a fact requiring an evidentiary record. For these reasons, the defendant's motion to dismiss the complaint is denied without prejudice with leave to re-file at the appropriate time, while two of the defendant's affirmative defenses are stricken with prejudice.

Facts

Thomas Sheehy worked as the maintenance director of Lyons Elementary School District 103 from 1997 until his retirement in June 2016. In 2015, Jorge Torres was elected to and became a member of the Lyons board of education.[1] In March or April 2019, Torres became the board president.

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[1] This court takes judicial notice of section 2:30 of the Lyons School District 103's policy manual, stating that board of education members are elected every two years at the consolidated election. *See* Lyons School District 103's policy manual, *available at* https://boardpolicyonline.com/?b=lyons_103 (last visited February 3, 2021); *see also Veazey v. Rich Twp. High Sch. Dist. 227*, 2016 IL App (1st) 151795, ¶ 29 (court may take judicial notice of public website information, including school district's board of education policy manual).

On August 13, 2019, the board held an open meeting live streamed on Facebook. The meeting's agenda included the discussion of a settlement agreement with the former superintendent, Carol Baker, but no discussion was scheduled regarding Sheehy. Members of the board moved to go into closed executive session to discuss the settlement, but the motion failed, so the members discussed and approved the settlement in an open meeting. During that discussion, Torres stated that Sheehy "stole from the district" and "stole from the kids." A video of Torres' statements is publicly available on Facebook.[2]

On August 12, 2020, Sheehy filed a two-count complaint against Torres for defamation *per se* and false light. On October 15, 2020, Torres filed a motion to dismiss Sheehy's complaint, claiming the common-law absolute privilege doctrine covers his statements, thereby providing him with absolute immunity, and that he is statutorily immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act (TIA). On November 20, 2020, Torres filed a motion for leave to cite supplemental authority, *Masters v. Murphy*, 2020 IL App (1st) 190908, a case decided on November 17, 2020. This court granted the motion. On December 4, 2020, Sheehy filed his response to Torres's motion to dismiss, and on January 8, 2021, Torres filed his reply.

Analysis

A section 2-619 motion to dismiss admits the legal sufficiency of a complaint, but raises defects, defenses, or some other affirmative matter appearing on the face or by external submissions, which defeat the plaintiff's claim. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of easily proven factual issues. *Kedzie &*

[2] Pursuant to Torres' request and Illinois Rule of Evidence 201(d), this court takes mandatory judicial notice of the video of the August 13, 2019 school board meeting, located at https:// www.facebook.com/1262468800451644/videos/509901753148426 (last visited January 28, 2021). The discussion begins approximately twelve minutes and twenty-five seconds into the video. Pursuant to Illinois Rule of Evidence 201(b), the video's existence is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, namely, a publicly available recording of a public meeting.

103rd Currency Exch. v. Hodge, 156 Ill. 2d 112, 115 (1993). When considering a section 2-619 motion, a court must construe all pleadings and supporting matter in the light most favorable to the non-movant. *Doe v. University of Chicago Med. Ctr.*, 2015 IL App (1st) 133735, ¶ 35. Dismissal is appropriate only if no set of provable facts support a cause of action. *Id.*

Section 2-619(a)(9) permits dismissal when affirmative matter outside the pleadings bars the claim asserted by avoiding the legal effect or defeating the claim. *Doe*, 2015 IL App (1st) 133735 ¶ 37. "Affirmative matter" encompasses any type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusion of material fact unsupported by allegations of fact contained or inferred from the complaint. *Id.*, ¶ 38. The affirmative matter must do more than contest or refute a well-pleaded fact and must be apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Id.*, ¶¶ 37, 39.

1. Absolute Privilege

Torres argues the absolute privilege doctrine applies to his statements about Sheehy, regardless of their truth or falsity. The doctrine provides absolute immunity for defamation and related torts by public officials acting within the scope of their duties. *See Blair v. Walker*, 64 Ill. 2d 1 (1976); *Hartlep v. Torres*, 324 Ill. App. 3d 817 (1st Dist. 2001); *Geick v. Kay*, 236 Ill. App. 3d 868 (2d Dist. 1992); *Morton v. Hartigan*, 145 Ill. App. 3d 417 (1st Dist. 1986); *Klug v. Chicago Sch. Reform Bd. of Trs.*, 197 F.3d 853, 861 (7th Cir. 1999). "The class of absolutely privileged communications is narrow and is practically limited to legislative and judicial proceedings and other acts of State, including communications made in the discharge of a duty under express authority of law." *Weber v. Cueto*, 209 Ill. App. 3d 936, 942 (1st Dist. 1991) (citing *Larson v. Doner*, 32 Ill. App. 2d 471, 473-74 (2nd Dist. 1961)). Absolute privilege may also attach to quasi-judicial proceedings that perform a judicial function and determine legal rights. *Allen v. Ali*, 105 Ill. App. 3d 887, 890 (1st Dist. 1982) (citing *Richardson v. Dunbar*, 95 Ill. App. 3d 254, 256-57 (3rd Dist. 1981)).

To be cloaked by absolute privilege, alleged defamatory comments must be sufficiently related to the proceedings. *Hartlep,* 324 Ill. App. 3d at 819-20. The requirement that statements be pertinent or relevant "is not strictly applied and must be broadly interpreted." *Krueger v. Lewis,* 359 Ill. App. 3d 515, 523 (1st Dist. 2005) (citing *Hartlep,* 324 Ill. App. 3d at 819; *Malevitis v. Friedman,* 323 Ill. App. 3d 1129, 1131 (1st Dist. 2001)). Parties may not rest on their briefs. If the record does not address the powers, authority, or procedures of an entity that would allow the court to find the proceeding was quasi-judicial, absolute privilege is not established. *See Richardson v. Dunbar,* 95 Ill. App. 3d 254, 258 (3d Dist. 1981).

The parties failed to provide a sufficient record with which this court could conclude the August 13, 2019 board meeting was a quasi-judicial proceeding or that Torres was acting in a quasi-judicial capacity when he made statements about Sheehy. That record may be developed later during discovery. At this point, however, Torres's motion to dismiss based on the absolute privilege doctrine must be denied without prejudice.

2. Tort Immunity Act

The Tort Immunity Act, 745 ILCS 10/1-101 *et seq.* (2004), is the principal, although not exclusive, source of immunity on which local public entities and their employees rely in cases in which they have been sued for negligent or willful and wanton misconduct. The TIA provides only defenses and immunities; it is not a source of duties or liabilities. 745 ILCS 10/1-101.1(a); *Sparks v. Starks,* 367 Ill. App. 3d 834, 838 (1st Dist. 2006); *Swett v. Village of Algonquin,* 169 Ill. App. 3d 78, 92 (2d Dist. 1988). Immunity under the TIA is an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss. *Abruzzo v. City of Park Ridge,* 231 Ill. 2d 324, 331 (2008).

A. Sections 2-106 and 2-107

TIA sections 2-106 and 2-107 provide absolute immunity to local entities for libel or slander by their employees, as well as oral promises

or misrepresentations, even if intentional. *See Village of Bloomingdale v. CDG Entrps.*, 196 Ill. 2d 484, 498 (2001). The sections' language makes plain, however, that immunity is not extended to the governmental employees who make the offending statements. Torres may not, therefore, rely on sections 2-106 and 2-107 to immunize himself from Sheehy's defamation and false light claims.

B. Section 2-210

TIA section 2-210 provides that, "[a] public employee acting in the scope of his employment is not liable for an injury caused by his negligent misrepresentation or the provision of information either orally, in writing, by computer or any other electronic transmission, or in a book or other form of library material." 745 ILCS 10/2-210. In this instance, Sheehy has neither pleaded negligent misrepresentation nor does the record reflect Torres made his statements about Sheehy for the purpose of providing information to board members, viewers, or listeners. Absent either predicate, section 2-210 is inapplicable and cannot immunize Torres from liability.

C. Section 2-102

TIA section 2-102 states that "no public official is liable to pay punitive or exemplary damages in any action arising out of an act or omission made by the public official while serving in an official executive, legislative, quasi-legislative or quasi-judicial capacity." 745 ILCS 10/2-102. The school board's policy manual has allowed this court to take judicial notice of Torres's election to the school board, yet there remains a lack of evidence at present to determine whether Torres was a public official within the meaning of section 2-102. Similarly, the complaint fails to present sufficient facts for this court to determine whether Torres served in an official executive, legislative, quasi-legislative, or quasi-judicial capacity when he commented about Sheehy. Once again, at this time, Torres's motion to strike Sheehy's claims for punitive damages must be denied without prejudice.

3. Open Meetings Act

Although not part of Torres's motion to dismiss, the parties have raised issues arising under the Open Meetings Act. 5 ILCS 120/2. This court feels compelled to address these issues now to provide direction for future pleading and discovery. In essence, Sheehy argues the board could not rightfully comment about him since the August 13, 2019 agenda did not provide for any such discussion. It is evident, however, that neither the Open Meetings Act nor the school district's policy manual support Sheehy's assertion. Section 2.02 of the Open Meetings Act provides that "[t]he requirement of a regular meeting agenda shall not preclude the consideration of items not specifically set forth in the agenda." 5 ILCS 120/2.02. Section 2:220 of the board's policy manual, "Board of Education Meeting Procedure," states that, though "[t]he Board will take final action only on items contained in the posted agenda[,] items not on the agenda may still be discussed." *See* Lyons Sch. Dist. 103 Policy Manual, § 2:220, *available at* https://boardpolicyonline.com/?b=lyons_103 (last visited February 3, 2021).

In support of his argument, Sheehy offers two affidavits of school board members. The affiants aver that it was inappropriate for the board to have discussed Sheehy at the meeting because "[d]iscussions regarding employment related issues, settlements, and potential litigation are supposed to be conducted in closed Executive Session [sic]." *See* affidavits of Shannon Johnson and Marge Hubacek. Both the statute and the school district's policy manual contradict these claims. The Open Meetings Act provides that all meetings of public bodies shall be open to the public unless one of the exceptions enumerated in section 120/2(c) applies. Even if an exception applies, "[t]he exceptions authorize but do not require the holding of a closed meeting to discuss a subject included within an enumerated exception." 5 ILCS 120/2. The school board's policy manual section 2:200, "Types of Board of Education Meetings," enumerates certain subjects for which "[t]he Board and Board committees may meet in a closed meeting to consider." The policy manual does not, however, require those subjects be discussed in closed meetings. This court notes that the subjects from the policy manual are identical to those contained in section 120/2(c).

The only possible conclusion is that, even if the topic of Sheehy's previous employment falls into the exceptions enumerated in the school district's policy manual section 2:220 or Open Meetings Act section 120/2(c), the school board had the authority to discuss Sheehy at the August 13, 2019 meeting. This explanation of the statute's and the policy manual's scope should assist the parties in future pleadings and discovery.

Conclusion

For the reasons presented above, it is ordered that:

1. Torres's motion to dismiss pursuant to the doctrine of absolute privilege is denied without prejudice;
2. Torres's affirmative defenses based on TIA sections 2-106, 2-107, and 2-210 are stricken with prejudice;
3. Torres's motion to dismiss the punitive damages claim is denied without prejudice; and
4. Torres shall answer the complaint by March 5, 2021.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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