



## Alerts

### Defendants Failed to Meet Burden to Show That Citizens Participation Act Warranted Dismissal of Plaintiff's Claim

August 14, 2013

*Lawyers for the Profession® Alert*

*John Garrido v. John Arena*, 2013 IL APP (1st) 120466, 2013 WL 3048629 (2013)

#### Brief Summary

Defendants failed to demonstrate that plaintiff's claim was meritless and to meet their burden to warrant dismissal based on Illinois' anti-SLAPP (strategic lawsuit against public participation) statute, the Citizens Participation Act.

#### Complete Summary

Plaintiff candidate and defendant opponent participated in a runoff election to become alderman for the 45th Ward in Chicago. The opponent won by a slim margin. The opponent and his supporters had run television advertisements and sent out direct mailings to the electorate in the hope of winning voters to their side. Those advertisements alleged that the candidate had received money from a parking meter company that was involved in a highly publicized and much-debated privatization deal with the city in early 2009. The ads alleged that the candidate had taken money from the company and insinuated that he had profited from the deal. In addition, the ads alleged that if elected, the candidate would draw two municipal pension checks and that he was "double dipping." The ads alleged that this was corrupt.

The primary question the appellate court was faced with was whether the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (2010)) barred the candidate's claim. In effect, the Act is designed to protect defendants from SLAPP suits that are "meritless lawsuits utilized to retaliate against a party for attempting to participate in government by exercising first amendment rights such as the right to free speech or the right to petition" *Chicago Regional Council of Carpenters v. Jurisch*, 2013 IL App (1st) 113279 at 15.

The court noted that SLAPP lawsuits are hard to distinguish from ordinary suits. There is a three-step test for determining whether a claim is in fact a SLAPP and should be dismissed: (1) the movant's act were in furtherance of his right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the nonmovant's claims are solely based on, related to, or in response to the movant's acts in furtherance of his constitutional rights; and (3) the nonmovant fails to produce clear and

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convincing evidence that the movant's acts were not genuinely aimed at solely prosecuting favorable government action.

The movant has the burden of proof under the first two elements, and the burden switches to the nonmovant for the final step. Merely because the defendant's activity is protected by the Act does not automatically mean that the claim must be dismissed. The court held that the opponent's acts were protected activity. In determining whether the claim is "meritless" or "retaliatory," the court noted that the term "meritless" is used loosely to describe any unsuccessful legal claim or theory. In the context of a SLAPP suit, however, it is a term of art and means something more. A SLAPP is not used to make an injured person whole, but instead meant only to hurt the defendant through "delay, expense and distraction."

Here, the opponent's arguments that the candidate's claim was meritless was based upon perceived pleading deficiencies in the complaint. The opponent conceded that the statements regarding double dipping were not true. The record also provided no support for the opponent's contention that the statements about the parking meter deal were true. The court noted that a real injury that the law provides a legal remedy for cannot be considered meritless, so it could not presume that a successful affirmative defense rendered a claim for such an injury "meritless" within the meaning of the Act itself.

The candidate pled both defamation *per se* and *per quod*. The opponent offered no affirmative evidence showing that the statements were either actually true or did not damage the candidate's reputation. In terms of the false light claim, the opponent did not offer any evidence showing that any of the elements could not be met by the candidate. The opponent asserted that the claim must fail because the candidate's defamation claim was insufficient. This was insufficient in order to meet the evidentiary burden under the Act.

The opponent did not therefore demonstrate that the candidate's claim was meritless and did not meet their burden of proving that the lawsuit was a SLAPP. The court reversed the circuit court's order dismissing the complaint as barred by the Citizen Participation Act.

### **Significance of Opinion**

The decision is significant because it emphasizes that the opponent must demonstrate that the candidate's alleged claim was without merit or show that the candidate could not prevail on such a claim.

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