



Alerts

Absolute Attorneys' Litigation Privilege Bars Claims By Non-Clients

July 22, 2015

Lawyers for the Profession® Alert

Joseph M. O'Callaghan v. Satherlie, (2015 IL App (1st) 142152, ___ N.E.3d ___ (2015))

Brief Summary

Plaintiffs alleged that defendants, who had represented plaintiffs' adversaries in underlying litigation regarding toxic black mold that had infiltrated plaintiffs' condominium, committed intentional infliction of severe emotional distress and were strictly liable for ultrahazardous activity — specifically the remediation of toxic black mold. The First District Appellate Court affirmed the trial court's dismissal with prejudice of plaintiffs' claims on the basis that they were barred by the absolute litigation privilege, which belongs to attorneys. The court held the absolute attorney litigation privilege extends beyond communications by attorneys to include conduct of attorneys.

Complete Summary

In 2007, plaintiffs (a litigation attorney and his wife) filed a multicount amended complaint against a condominium association, as well as various members of its board of directors (collectively "the Association"). Plaintiffs alleged, in part, that the Association had failed to properly remedy a ceiling leak, causing toxic black mold to infiltrate plaintiffs' condominium. The Association retained counsel — defendants in this case — to defend against plaintiffs' claims related to the condominium. Plaintiffs amended their complaint in the underlying litigation to include claims against the Association's defense counsel, *i.e.*, defendants. The trial court in 2008 dismissed the majority of the counts with prejudice, including plaintiffs' claims against defendants here.

Plaintiffs filed a second amended complaint in 2011, omitting defense counsel as defendants but adding several parties involved with the installation of heating, ventilating and air conditioning equipment in the condominium building. Plaintiffs essentially alleged that improper installation led to the precipitation of moisture onto plaintiffs' drywall drop ceiling. Plaintiffs also alleged that while attempting remedial measures, certain defendants removed a containment barrier and allowed a large opening to remain unsealed for 1.5 hours. Plaintiffs alleged that this and other activities permitted the toxic mold to spread throughout their condominium.

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On May 14, 2013, the trial court entered an agreed order dismissing the underlying case with prejudice as to the Association defendants. The case against certain contractors, however, remained pending. It appeared from the circuit court website that the rest of the case was voluntarily dismissed by agreement on October 22, 2013, but neither the record nor the parties' briefs revealed the fate of the remaining claims.

In October 2013, plaintiffs filed this action against defendants, purporting to state causes of action for: (1) intentional infliction of severe emotional distress and (2) strict liability for ultrahazardous activity, and seeking punitive damages. Plaintiffs alleged that in the underlying litigation, defendants failed to disclose an expert's recommendations for remediating the mold in 2007, a report allegedly not discovered by plaintiffs until sometime later. Plaintiffs asserted that in light of the report, defendants knew there were no meritorious defenses in the underlying litigation, but nonetheless contrived a defense that plaintiffs had caused the toxic mold to form due to the unapproved modification of their condominium. Plaintiffs also alleged that defendants engaged in the following wrongful conduct: concealed evidence; unnecessarily prolonged the underlying litigation; filed baseless motions and discovery; refused to produce discovery; contested plaintiffs' motions; and concealed documents. Plaintiffs also alleged that: defendants refused to negotiate terms for inspecting plaintiffs' condo; did not participate in settlement conferences or mediation in good faith; and obtained an improper court order prohibiting plaintiffs from meeting with Association members to resolve the issues themselves. Plaintiffs further alleged that when experts hired by defendants did not find that plaintiffs' actions were the source of the water leaks, defendants attempted to have the experts amend their reports and fired them when they would not do so.

As in the underlying action, plaintiffs alleged that defendants directed the inspectors to open or remove containment barriers that had been erected to prevent the spread of mold, thereby allowing the toxic black mold to spread. There was also ill will between plaintiffs and other condominium unit owners in the building because the underlying action prevented other unit owners from selling or refinancing their properties, and defendants allegedly told various owners that plaintiffs were prolonging the litigation. Plaintiffs further alleged that defendants were motivated by economic benefit to them in the form of attorneys' fees and engaged in the alleged conduct without their clients' knowledge. Defendants denied plaintiffs' allegations of wrongful conduct and the court did not enter any sanctions against defendants in the underlying litigation.

Defendants moved to dismiss, arguing that plaintiffs' claims were barred by an attorney's absolute litigation privilege, *res judicata*, and a policy against claim-splitting. They also argued that plaintiffs could not state a claim for intentional infliction of emotional distress or strict liability and that punitive damages were not recoverable in claims against attorneys arising out of the rendition of professional legal services. The trial court granted the motion.

The appellate court affirmed the dismissal. Contrary to plaintiffs' arguments, the court found that the absolute attorney litigation privilege extends beyond communications by attorneys and defamation claims. The court noted that because conduct may be performed in the practice of law, counsel may engage in conduct to secure justice for their clients. The court held that limiting the privilege to communications, as opposed to conduct, would undermine the policies behind the privilege. In the underlying litigation, defendants defended their clients against plaintiffs. The court noted that the alleged improprieties clearly pertained to the role of defendants as defense counsel in the underlying litigation and were done in furtherance of representing their clients. The court concluded the trial court properly dismissed plaintiffs' alleged claims because the absolute attorney litigation privilege barred them.

Significance of Opinion

This decision is significant because the court held that the absolute attorneys' litigation privilege is not limited to communications in a defamation context, but should also bar claims by nonclients based on the attorneys' conduct pertaining to litigation.

For more information, please contact [Terrence P. McAvoy](#).