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2012 IL App (3d) 120023-U

Order filed December 20, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2012

VILLAGE OF BOLINGBROOK, an Illinois municipal corporation,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
)	Will County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	
)	Appeal No. 3-12-0023
ILLINOIS-AMERICAN WATER COMPANY, an Illinois corporation, and)	Circuit No. 10 CH 6838
AMERICAN LAKE WATER COMPANY, an Illinois corporation,)	
)	Honorable
)	Michael J. Powers,
Defendants-Appellants.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

ORDER

- ¶ 1 *Held:* Because the Village’s lawsuit was not solely based on, related to, or in response to the acts of defendants in furtherance of the rights of petition or speech, the court’s denial of defendants’ motion to dismiss was proper.
- ¶ 2 At issue in this appeal is the applicability of the Citizen Participation Act (Participation Act) (735 ILCS 110/1 *et seq.* (West 2010)), commonly referred to as the anti-SLAPP (Strategic

Section 7.5 of the Bolingbrook Contract. Section 7.5 mandated that the "Initial Customers"¹ under the Bolingbrook Contract would not be charged any more than any future users of the pipeline, *i.e.* "Additional Customers."²

¶ 8 In 1996, IAWC's predecessor-in-interest, Citizens Utilities Company of Illinois (Citizens Utilities), entered into an Asset Purchase and Exchange Agreement (Asset Agreement) with Citizens Water and the Village. Under the Asset Agreement, Citizens Utilities became the sole provider of water to the Village. The water was provided via Citizens Water's pipeline.

¶ 9 The Asset Agreement obligated Citizens Utilities and Citizens Water not to change certain sections of the Bolingbrook Contract without the prior written approval of the Village mayor and board of trustees. Specifically, under Section 13.4 of the Asset Agreement, Citizens and CWRC agreed that they "shall not modify, amend, abrogate, alter, or permit any modifications, amendment, abrogation or alteration, in any fashion whatsoever, to the following sections of the Bolingbrook Lake Michigan Water Contract, without the prior, express written approval of the Mayor and Board of Trustees of the Village." Section 7.5 was one of the enumerated sections.

¶ 10 The Asset Agreement also provided that the Village "shall retain the right to enforce the

¹ " 'Initial Customers' means municipal water systems or investor-owned public utilities which sell water for use and consumption and which have entered into contracts with Citizens [Utilities] on or before August 1, 1996."

² " 'Additional Customer' means a municipal water systems or investor-owned public utilities which sell for and consumption and which enters into a contract with Citizens [Utilities] after August 1, 1996."

aforesaid Sections of the Bolingbrook Contract as a third party beneficiary thereof." It further stated that the Village "shall have the right to enforce or compel performance of any of the covenants identified in Section 13.4 in law or in equity, by suit, action, mandamus, or any other proceeding, including specific performance, until January 1, 2037."

¶ 11 IAWC purchased the assets of Citizens Utilities. ALWC purchased the assets of Citizens Water. Both IAWC and ALWC assumed the obligations and duties provided in the Asset Agreement.

¶ 12 On September 15, 2003, ALWC entered into a water delivery contract (the Plainfield-ALWC Agreement) with the Village of Plainfield (Plainfield) for the period of September 2003 through November 2008. The Plainfield-ALWC Agreement provided water to Plainfield, an "Additional Customer" as defined in the Bolingbrook Contract, at a more favorable rate than to "Initial Customers." Specifically, section 5.1(a) of the Plainfield-ALWC Agreement provides Plainfield a ten-cent rebate for every 1,000 gallons of water delivered. Contrary to the terms of Section 7.5 of the Bolingbrook Contract, the Initial Customers were not granted the same ten-cent rebate.

¶ 13 Factoring in the rebate contained in Section 5.1(a) of the Plainfield-ALWC Agreement, the effective unit charge for water delivered to Plainfield was lower than the unit charge to the "Initial Customers" living in the Village. The Plainfield-ALWC Agreement was eventually amended on November 17, 2008, to eliminate the rebate to the "Additional Customers." The Village alleges it was not aware of the rebate at its outset.

¶ 14 On August 2, 2010, defendants filed a petition before the Illinois Commerce Commission (the ICC) seeking the ICC's approval to consolidate all of their water delivery agreements into

one agreement. The Village believed this petition ran afoul of defendants' contractual obligation under section 13.4 of the Asset Agreement to obtain the Village's written consent, through its mayor and board of trustees, prior to amending the Bolingbrook Contract.

¶ 15 On November 2, 2010, the Village filed a complaint against defendants to recover damages for defendants' past contractual violations and to protect its existing contractual rights. The complaint contained three counts: (1) breach of contract, (2) declaratory relief, and (3) injunctive relief. Count I sought contractual damages from defendants for improperly overcharging the "Initial Customers" from 2003 to 2008 in breach of the Bolingbrook Contract. Count II sought a declaration of whether defendants' proposed consolidated water agreement violated its contractual rights under the Bolingbrook Contract and Asset Agreement. Count III sought to enjoin defendants from unilaterally changing the contract terms without the written consent of the Village.

¶ 16 Defendants filed a motion to dismiss pursuant to the Participation Act. Defendants alleged that the Village's complaint constitutes a SLAPP lawsuit in that it is aimed at preventing defendants from exercising their political rights under the First Amendment by impeding their right to petition the ICC. After hearing argument, the trial court denied defendants' motion to dismiss. The court's denial order states, in pertinent part:

"Whereas, This Cause Having Come Before the Court On
[Defendants' Motion To Dismiss Pursuant To The Citizen
Participation Act,] 735 ILCS 110, Written Briefs and Oral
Arguments Having Been Considered By The Court[,] The Motion
is Denied[,] The Court Determining That The Plaintiff's Filing Of

This Lawsuit To Not Be A Retaliatory Claim."

¶ 17

ANALYSIS

¶ 18 On appeal, defendants argue that the trial court erred in finding that the Village's complaint did not constitute a retaliatory claim to their petition before the ICC.³ Specifically, defendants assert that the Village's complaint constitutes a SLAPP lawsuit and therefore is barred under the Participation Act. Because the Village's lawsuit was not solely based on, related to, or in response to the acts of defendants in furtherance of the rights of petition or speech, the court's denial of defendants' motion to dismiss was proper.

¶ 19 Statutory Overview

¶ 20 Recently, the supreme court in *Sandholm v. Kuecker*, 2012 IL 111443, set out the legislative history and principles involving the Participation Act. Because SLAPP litigation and the corresponding Participation Act are still developing areas of the law, we quote the supreme court's extensive overview.

"In August 2007, Illinois joined more than 20 other states in enacting anti-SLAPP legislation, in the form of the Citizen Participation Act [Citation.] The term 'SLAPP' was coined by two professors at the University of Denver, George W. Pring and Penelope Canan, who conducted the seminal study on this type of lawsuit. [Citations.] "SLAPPs are lawsuits aimed at preventing citizens from exercising their political rights or punishing those

³ Defendants do not challenge the trial court's order with respect to Count I of the Village's complaint. Instead, defendants' focus solely on Counts II and III.

who have done so." [Citations.] "SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation." [Citations.] The paradigm SLAPP suit is 'one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development.' [Citation.] A SLAPP is 'based upon nothing more than defendants' exercise of their right, under the first amendment, to petition the government for a redress of grievances.' [Citation.]

SLAPPs are, by definition, meritless. [Citation.] 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. [Citation.] 'In fact, defendants win eighty to ninety percent of all SLAPP suits litigated on the merits.' [Citation.] 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. [Citation.]

'The idea is that the SLAPP plaintiff's goals are achieved through the ancillary effects of the lawsuit itself on the defendant, not through an adjudication on the merits. Therefore, the plaintiff's choice of what cause of action to plead matters little.' [Citation.]

SLAPPs 'masquerade as ordinary lawsuits' and may include myriad causes of action, including defamation, interference with contractual rights or prospective economic advantage, and malicious prosecution. [Citation.] Because winning is not a SLAPP plaintiff's primary motivation, the existing safeguards to prevent meritless claims from prevailing were seen as inadequate, prompting many states to enact anti-SLAPP legislation. [Citation.] These statutory schemes commonly provide for expedited judicial review, summary dismissal, and recovery of attorney fees for the party who has been 'SLAPPed.' [Citation.]

These characteristics of SLAPPs are reflected in the language of the Act, particularly section 5, which sets forth the public policy considerations underlying the legislation:

'§ 5. Public Policy. Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence. The information, reports, opinions, claims, arguments, and other expressions

provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.

Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government. There has been a disturbing increase in lawsuits termed 'Strategic Lawsuits Against Public Participation' in government or 'SLAPPs' as they are popularly called.

The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the

judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.

It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants.' [Citation.]

Section 15 of the Act describes the type of motion to which the Act applies:

'This Act applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech,

association, or to otherwise participate in government.

Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome.' [Citation.]

* * *

The procedure set forth in the Act provides the proper framework for our analysis. Section 15 requires the moving party to demonstrate that the plaintiff's complaint is 'based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.' [Citations.] If the moving party has met his or her burden of proof, the burden then shifts to the responding party to produce 'clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability' under the Act. [Citation.] Thus, defendants had the initial burden of proving that plaintiff's lawsuit was solely 'based on, related to, or in response to' their acts in furtherance of their rights of petition,

speech or association, or to participate in government. Only if defendants have met their burden does the plaintiff have to provide clear and convincing evidence that defendants' acts are not immunized from liability under the Act." *Sandholm*, 2012 IL 111443, 33-56.

¶ 21 Merits

¶ 22 We conclude, based on the parties' pleadings, that the Village's lawsuit was not solely based on, related to, or in response to the acts of defendants in furtherance of the rights of petition and speech. See *Sandholm*, 2012 IL 111443, 57. The Village's suit does not resemble in any way a strategic lawsuit intended to chill participation in government or to stifle political expression. See *Sandholm*, 2012 IL 111443, 57. It is apparent that the true goal of plaintiff's claims is not to interfere with and burden defendants' free speech and petition rights, but to seek enforcement of its alleged rights under the Bolingbrook Contract and the Asset Agreement through judicial and quasi-judicial procedures created by the legislature and already in place at the time plaintiffs sought their protection.

¶ 23 There is no showing that, in filing their petition with the ICC, defendants were "exercising their political rights;" "exercis[ing] their right, under the first amendment, to petition the government for a redress of grievances;" engaging in "protest activities;" "participat[ing] in the process of or communicating with government" as those activities were discussed by the supreme court in *Sandholm*, 2012 IL 111443. Consequently, defendants have not met their burden of showing that plaintiff's suit was based solely (or at all) on their "petitioning" activities. See *Sandholm*, 2012 IL 111443, 57.

¶ 24 We reject defendants' assertion that their "acts before the ICC are precisely the sort of activity the CPA was intended to protect." This is not a situation where a developer files a lawsuit for damages against residents after the residents spoke out in a manner that resulted in an unfavorable zoning decision for the developer. See *Westfield Partners, Ltd. v. Hogan*, 740 F. Supp. 523 (1990). Or where a homeowner's association files a lawsuit for harassment against a resident after that resident filed numerous religious discrimination complaints against the association for barring her display of a mezuzah on her doorpost. See *Shoreline Towers Condo. Ass'n v. Gassman*, 404 Ill. App. 3d 1013 (2010). Such lawsuits clearly are intended to chill participation in government or stifle political/religious expression. Instead, the present lawsuit arises from the parties' mutual agreements, the Bolingbrook Contract and the Asset Agreement. These agreements themselves govern the rights of the parties and their liabilities to each other. Plaintiff's lawsuit now seeks enforcement of its alleged rights. Defendants, however, request that we bar plaintiff from seeking enforcement of the very rights it voluntarily agreed to. Such a request falls well beyond the scope of the Participation Act.

¶ 25 We emphasize that we express no opinion on the actual merits of plaintiff's causes of action. See *Sandholm*, 2012 IL 111443, 58. We simply hold that plaintiff's lawsuit is not a SLAPP within the meaning of the Participation Act and, thus, is not subject to dismissal on that basis. See *Sandholm*, 2012 IL 111443, 58.

¶ 26 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 27 Affirmed.