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

Jerald Gary, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 23 CH 09842
	)	
Alderman Michelle Harris, et al.	)	Hon. Cecelia A. Horan,
Defendants.	)	presiding.
	)	

DEFANDANT MICHELLE HARRIS' MOTION TO DISMISS

NOW COMES, Defendant Michelle Harris, through her attorney Michael J. Kasper, and moves to dismiss Plaintiffs' Complaint pursuant to Section 2-615 of the Code of Civil Procedure:

I. Introduction.

In their Complaint, Plaintiffs, owners of a Chicago property called the Avalon Regal Theatre attempt to blame the City, Eighth Ward Alderperson Michelle Harris, and one of Alderperson Harris' former staff members for various business failures. Plaintiffs' claims, however, are time barred under the Local Government and Employees Tort Immunity Act's one-year statute of limitations the actions complained of occurred more than one year prior to the filing of this lawsuit. Any remaining allegations are so deficient in factual specifics, that they too must be dismissed. Each of Plaintiffs' claims independently fail as well.

Specifically, Plaintiffs allege Defendants interfered with a 2017 Chicago Architecture Foundation event and a 2020 COVID related event related. Compl. ¶¶ 28–35. Plaintiffs also then allege that, in 2022, Defendants interfered with plans to film a movie at their premises. *Id*. ¶ 39. They claim Defendants interfered by telling the moviemaker that there was mold on their property and Plaintiff Gary was not a fit owner. *Id*. ¶¶ 39–40. But the Indoor Air Quality Report attached to the Complaint identified "dampness present on the floor," "suspected fungal growth," "a strong

musty odor present," and elevated chemical levels rendering the air quality unacceptable due to the fungal growth. *Id*. Ex. A at 2, 4–5, 8.

Finally, Plaintiffs allege that in early 2023 Harris interfered with unspecified "business partnerships" by besmirching him. *Id.* ¶¶ 42–45. Plaintiffs' remaining allegations are incredibly vague and lack specific dates or coherent information. Plaintiffs allege that the City denied their grant applications (*id.* ¶¶ 26–27), that Harris has supported a competing "venture" over the Avalon Regal (*id.* ¶ 36–37), and that the City "entered the Avalon Regal" (*d.* ¶ 46).

II. Argument.

A. The Complaint Should Be Dismissed Because All the Acts About Which Plaintiffs Complain Occurred More than One Year Before Plaintiffs Filed Their Complaint.

Plaintiffs have sued the City, Alderperson Michelle Harris, and a former employee. The Local Government and Government Employees Tort Immunity Act provides:

> No civil action other than an action described in subsection (b) may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued.

745 ILCS 10/8-101(a). This one-year statute of limitations applies to Alderperson Harris. Section 1-202 of the Act (745 ILCS 10/1-202) defines "employee" as:

> a present or former officer, member of a board, commission or committee, agent, volunteer, servant or employee, whether or not compensated …

In this case, Plaintiffs make allegations regarding three separate events, each of which happened more that one year prior Plaintiffs filing their complaint. First, Plaintiffs complain about municipal interference with a Chicago Architectural Foundation event that they hoped to host in 2017. Comp. ¶ 28-34.1 Next, Plaintiffs complain that "Harris dispatched the City" to interrupt a

[1] As the Complaint is written in a chronological manner, all allegations set forth in the paragraphs preceding Paragraph 28 must be read to have occurred prior to 2017.

COVID-19 related event in 2020. Comp. ¶ 35-38. Finally, Plaintiffs complain about City interference with their attempts to use their location as a filming site for a movie in "August, 2022." Comp. ¶ 39-40. These allegations are set forth in Paragraphs 1 through 40 of the Complaint. Since none of these events occurred within one year of Plaintiffs filing this Complaint, the claims are time barred.

The allegations set forth in the remaining paragraphs (41 – 47) are so deficient in specifics that they cannot satisfy the pleading standards to state a claim. For example, in Paragraph 42, Plaintiffs claims that Harris "redoubled her efforts to sabotage them." Comp. ¶ 42. However, Plaintiffs offer no factual allegations about how, when, or to whom she redoubled those efforts. In Paragraph 43, Plaintiffs allege that Harris told "outrageous lies" to their "business associates." Comp. ¶ 43. But again, Plaintiffs say nothing about to whom, when or where these alleged lies were told. Paragraph 44 alleges Harris recruited "black business leaders" to spread "baseless rumors" about Plaintiff, again without description of which leaders Harris is alleged to have "recruited", when or where. Comp. ¶ 44.

Paragraph 45 is the same. Plaintiffs allege that, at Harris's "direction" (it does not say how she directed them, or even what basis they have to believe she directed them) her "cronies" (it does not say who these cronies are) told "them" (it does not say who "them" are) that Plaintiff Gary was operating a drug ring in Miami and was an untrustworthy collaborator. Comp. ¶ 45. In Paragraph 46, Plaintiffs allege that Harris "has returned to her tactic of dispatching City officials to interfere with Plaintiffs' property." Comp. ¶ 46. Lacking here is a description of which City officials were dispatched, when, or for what purpose. Like the entire Complaint, these allegations are premised on Plaintiffs' assumption that Harris has the authority to dispatch City officials to do anything at all, much less "interfere" with someone's property. But Plaintiff makes no allegations that Harris has such authority. Instead, Plaintiffs make the conclusory allegation that as Alderperson, the City has

"given her unfettered discretion over municipal oversight and support for her ward." Comp. ¶ 15. There is no specific factual allegation as to how, by whom, when or why such "unfettered discretion" was given to her.

"Illinois is a fact-pleading state, and conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted." *Alpha Sch. Bus Co., Inc. v. Wagner*, 391 Ill.App.3d 722, 735 (1st Dist. 2009)(internal citations omitted). Under the fact-pleading requirements, a "plaintiffs' vague, generic, and incomplete description of the alleged injury-producing products fails to provide an adequate factual foundation… The fact-pleading requirements of Illinois require a complaint to apprise a defendant of sufficient facts upon which to base a defense." *Costello v. Unarco Industries, Inc.*, 129 Ill. App. 3d 736, 744-45 (4th Dist., 1984.)

None of the allegations in Paragraphs 41-47 satisfy the fact pleading requirements required by the Illinois Supreme Court. Harris also adopts rather than restates Defendant City of Chicago's additional arguments regarding the statute of limitations and the Immunity Act.

B. Counts I, II, and III should be dismissed because Illinois does Not provide a private cause of action for alleged violations of Constitutional Rights.

The first three counts of Plaintiffs' Complaint allege that the Defendants violated their rights under two provisions of the Illinois Constitution. Count I alleges that the Defendants violated their rights to substantive due process under Article I, Section 2 of the Illinois Constitution. ILL.CONST. 1970, art. I, § 2. Count II alleges that the Defendants violated their equal protection under Article I, Section 2. *Id*. Count III alleges that the Defendants engaged in "retaliation" against the Plaintiffs in violation of their rights under Article I, Section IV. ILL.CONST.1970, art. I, § 4. For these alleged violations, in Counts I and II Plaintiffs seek: (1) a declaration their rights have been violated; (2) a temporary restraining order against Defendants; (3) compensation for lost income; (4)

compensatory damages; (5) punitive damages; and (6) attorney's fees. Comp. p. 9, 11. In Count III, Plaintiffs seek "damages, attorneys fees, and costs. Comp. p. 11.

But Plaintiffs cites no authority affording them a private right of action to seek compensation or damages for these alleged violations. And for good reason: Illinois does not have an equivalent mechanism to Section 1983 to bring an action under the Illinois Constitution. The closest example can be found in Section 29–17 of the Election Code, modeled after Section 1983, which creates a state law private right of action limited to claims involving registration and voting. 10 ILCS 5/29-17; see also *Dempsey v. Johnson*, 2016 IL App (1st) 153377, ¶ 48, 69 N.E.3d 236, 252–53 (1st Dist. 2016). There is no such an enabling mechanism for the constitutional claims Plaintiffs assert here.

The text of the Illinois Constitution makes no mention of a private right to bring this kind of action. There is simply no right, express or implied, to bring a private cause of action for violations of the Illinois Constitution alleged here. See, e.g., *Teverbaugh ex rel. Duncan v. Moore*, 311 Ill. App. 3d 1, 5–6, 724 N.E.2d 225, 229 (1st Dist. 2000) (holding the omission of self-execution language that is found in Article I, Section 17 of the Illinois Constitution, indicated under the rules of statutory construction, that the drafters of Article I, Section 18, did not intend for there to be a private right of action for damages).

Numerous courts have relied on *Teverbaugh* and its reasoning to dismiss claims brought under the Illinois Constitution for this reason. See, *Bourbeau v. Pierce*, 02-CV-1207-MJR, 2008 WL 370677, at *6–7 (S.D. Ill. Feb. 11, 2008); *Coleman v. Illinois*, 19-CV-03789, 2020 WL 6717341, at *6 (N.D. Ill. Nov. 16, 2020); *Bonnstetter v. City of Chicago*, 13 C 4834, 2014 WL 3687539, at *6 (N.D. Ill. July 24, 2014). Because Illinois law does not provide for a private right of action seeking damages for alleged violations of Article I, Sections 2 or 4 of the Illinois Constitution, Counts I, II and III of Plaintiffs' Complaint should be dismissed.

Additionally, Plaintiffs' request for attorneys' fees is unavailable because a plaintiff can recover their attorneys' fees only where there is an "express statutory or contractual provision." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 64. Neither the Local Government Immunity Act nor any other statute provides such relief. Plaintiffs' request for punitive damages from Alderperson Harris should be denied because it is expressly prohibited by Section 2-102 of the Local Government Immunity Act. 745 ILCS 10/2-102 ("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…"). Harris also adopts rather than restates Defendant City of Chicago's additional arguments regarding the statute of limitations and the Immunity Act.

C. Count II Fails to State an Equal Protection Claim Against Harris.

Because Plaintiffs do not allege membership in a class or group, their equal protection claims are postured as a class-of-one complaint. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To state a class-of-one claim, a plaintiff must allege (1) it was treated differently from similarly situated others, and (2) there is no rational basis for the different treatment. *Kaczka v. Ret. Bd. of Policemen's Annuity & Ben. Fund of Chicago*, 398 Ill. App. 3d 702, 707 (1st Dist. 2010) (citing *Vill. of Willowbrook*, 528 U.S. at 564). Count II's boilerplate allegations are that: "[t]he City, through its agent Harris, has subjected Plaintiffs to unequal treatment under the law" (Comp. ¶ 57); CCI was treated differently from "similarly situated establishments, including, but not limited to, ID8, without rational basis" simply state the elements of the claim but provide no independent factual allegations.

Setting aside the vague and conclusory allegations in Paragraph 57, the gist of Count II is that Defendant Harris "instructed the City to deny" their applications for municipal funding (Comp., ¶ 27); that the Chicago Building Department sent Plaintiffs a violation notice "at Harris's direction"

(Comp., ¶ 27); that Harris "called the police on" Plaintiff Gary ((Comp., ¶ 32); that Harris "dispatched" the City to shut down one of Plaintiffs' events (Comp., ¶ 35); and that Harris has a pattern of "dispatching" City officials to Plaintiffs' property. (Comp., ¶ 46). Plaintiffs, however, fail to allege that Harris (even if these allegations were true) treated any other entity differently. *See, Kaczka v. Ret. Bd. of Policemen's Annuity & Ben. Fund of Chicago*, 398 Ill. App. 3d 702, 707 (1st Dist. 2010).

In addition, a class-of-one plaintiff must "negat[e] any reasonably conceivable state of facts that could provide a rational basis for the classification." *Scherr v. City of Chicago*, 757 F.3d 593, 598 (7th Cir. 2014). This standard is highly deferential; if any conceivable basis exists for a government's action, it is rational. *See Pro-Eco, Inc. v. Bd. of Comm'rs of Jay Cnty.*, 57 F.3d 505, 514 (7th Cir. 1995

Here, the Complaint (and its exhibit) show a rational basis for the City' and Harris's alleged conduct of issuing a notice, closing down an event and imposing penalties—namely, the health, safety, and welfare of the residents in Harris's ward. *See, e.g., McGee v. Wiedmeyer*, 2021 WL 5326582, *1–2, 5 (E.D. Wis. Nov. 16, 2021) (revocation of business license warranted due to "flagrant noncompliance generated an avalanche of complaints"); *Lovette-Cephus v. Village of Park Forest*, 30 F. Supp. 3d 754, 764 (N.D. Ill. March 25, 2014) (ensuring health and safety standards are met by regulated businesses was a rational reason). Because the Court can glean a rational basis for the City's and Harris's alleged actions, Count II must be dismissed. Harris also adopts rather than restates Defendant City of Chicago's additional arguments regarding the equal protection claim.

D. Count III Fails to State a Claim for Retaliation Against Harris.

The Illinois Constitution guarantees that "[a]ll persons may speak, write and publish freely, being responsible for the abuse of that liberty." ILL.CONST.1970, art I, § 4. To establish a prima facie case of First Amendment retaliation, [a plaintiff] must establish that (1) it engaged in activity

protected by the First Amendment, (2) it suffered a deprivation that would likely deter First Amendment activity in the future, and (3) the First Amendment activity was a "at least motivating factor" in the Defendant's decision to take the retaliatory action. *Woodruff v. Mason*, 542 F.3d 545, 551 (7th Cir. 2008). A plaintiff must specify the nature of the purported First Amendment activities for which it seeks future protection. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

Plaintiff alleges that his criticisms of Harris about "her penchant for giving platforms to wealthy benefactors who were not Chicago natives and her collaborations with then-mayor Lori Lightfoot" constitute constitutionally protected activity. Comp. ¶¶ 25, 67. Plaintiff also alleges that "Harris is besmirching his name and capabilities, in part because he has publicly criticized her." Compl. ¶ 42. Plaintiffs fail to identify specific statements, when they were made, to whom, etc.

Plaintiff also failed to allege facts showing that any possible deprivation would likely deter its First Amendment activity in the future. *Woodruff*, 542 F.3d at 551. "An 'adverse action' is one capable of deterring a person of ordinary firmness from exercising his or her constitutional right." *Kucinsky v. Pfister*, 162 N.E.3d 426 (Ill. App. Ct. 2020). Because the Complaint contains no allegations of how Plaintiffs would be deterred from future activity it fails to meet its pleading burden under this element.

Finally, Plaintiff failed to allege facts demonstrating that any First Amendment activity was "at least a motivating factor" in Harris's decision to take any alleged retaliatory action. *Woodruff*, 542 F.3d at 551. The third prong of a First Amendment retaliation claim "is about cause, not intent." *Whitfield v. Spiller*, 76 F.4th 698, 711 (7th Cir. 2023). "A decisionmaker cannot retaliate on account of the protected activity if he is unaware of the protected activity," *Anderson v. Iacullo*, 963 F. Supp. 2d 818, 835 (N.D. Ill. 2013). To show this but-for causation, a complaint's "factual allegations must raise the claim above a mere 'speculative level' . . . a plaintiff's obligation to

provide the grounds of his entitlement to relief requires more than labels and conclusions." *Bell v. City of Country Club Hills*, 841 F.3d 713, 716–17 (7th Cir. 2016); *see also Hernandez v. Dart*, 635 F. Supp. 2d 798, 807 (N.D. Ill. 2009) (dismissing retaliation claim "[b]ecause Plaintiff has not sufficiently alleged that Defendants were motivated by his First Amendment activity").

Other than Plaintiff's conclusory statement that any alleged retaliatory action was "at least in part, motivated by their engagement in protected activity," (Compl. ¶ 69), the Complaint contains no facts allowing an inference of causation. There is no allegation that Harris knew of Plaintiff's alleged "criticism," nor any facts alleged suggesting a reasonable basis for causation such as close timing of statements to actions. Further, any inference of causation is undermined by the non-retaliatory bases for Harris's actions: the enforcement of the law in her ward to protect the public health, safety, and welfare, as well as its economic vitality. These "non-retaliatory grounds are "sufficient to provoke the adverse consequences," defeating any retaliation claim. *Hartman v. Moore*, 547 U.S. 250, 256 (2006).

E. Count IV Should be Dismissed Because Harris's Alleged Acts Were Privileged and Plaintiff Has Not Adequately Pled the Elements of Tortious Interference with Economic Advantage.

The allegations in Count IV are barred by the statute of limitations as set forth in Section A above. However, even if not barred, Count IV, where Plaintiffs claim the tort of interference with prospective economic advantage, should be dismissed. The tort has four elements: (1) plaintiff must have a reasonable expectancy of a valid business relationship; (2) defendant must know about it; (3) defendant must intentionally interfere with the expectancy, and so prevent it from ripening into a valid business relationship; and (4) intentional interference must injure the plaintiff. *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 510 (1991). In addition, "it has been long held that the defendant's interference must be directed toward a third party." *Douglas Theater Corp. v. Chicago Title & Trust Co.*, 266 Ill.App.3d 1067, 1047 (1st Dist., 1994)

In Count IV, Plaintiffs allege:

> 72. At all relevant times, Plaintiffs had reasonable expectations of entering into valid business relationships.
> 73. Defendants Harris and Rider knew of those expectations.
> 74. Defendants Harris and Rider purposefully interfered with those expectations.
> 75. As a result of Defendants' interference, Plaintiffs have suffered damages.

Count IV should be dismissed for failing to provide adequate specificity for Harris to prepare a defense. For example, Plaintiffs claim that they had "reasonable expectations of entering into valid business relationships" but fails to allege with whom, about what, or over what period. "Conclusory factual allegations unsupported by specific facts are not deemed admitted." *Alpha Sch. Bus Co., Inc.*, 391 Ill.App.3d at 735. Under the fact-pleading requirements of Illinois, a plaintiff's "vague, generic, and incomplete description of the alleged injury-producing products fails to … apprise a defendant of sufficient facts upon which to base a defense." *Costello*, 129 Ill. App. 3d at 744-45.

Even if the allegations provided sufficient details, they will still be barred because they are a privileged exercise of the constitutional right to petition to the government. *Heider v. Leeward Creative Crafts*, 245 Ill.App.2d 258, 273 (2nd Dist. 1993)("The constitutional right to petition the government for redress of grievances justifies interference and bars a claim for tortious interference."); citing *Arlington Heights National Bank v. Arlington Heights Federal Savings & Loan Association*, 37 Ill. 2d 546 (1967). "Where such a privilege exists, an action for tortious interference will prevail where plaintiff can plead malice." *Heider*, 245 Ill.App.2d at 273. "It is plaintiff's burden to plead, through setting forth specific facts, that defendant's actions were unjustified or malicious." *Id*.

In pleading actual malice, "ill-will alone is not enough to establish actual malice and there must be a desire to harm … which is not reasonably related to the defense of a recognized property or social interest. *Arlington Heights*, 37 Ill.2d at 551, citing *Kemp* v. *Division No.*

241, Amalgamated Ass'n of Street and Ry. Employees, 255 Ill. 213. A legally sufficient complaint sets forth factual allegations from which actual malice may reasonably be said to exist as opposed to the bare assertion of actual malice. *Segall* v. *Lindsay-Schaub Newspapers, Inc.*, 68 Ill. App. 2d 209.

In *Heider*, the Court affirmed dismissal of a tortuous interference with economic opportunity claim where the plaintiff alleged that the president of the defendant company utilized his wife, who was an elected member of the local city council (just as Harris is here) to create opposition to plaintiff's zoning request. *Heider*, 245 Ill.App.3d at 274. The Court found both that the defendant's actions were privileged, and that plaintiff failed to plead actual malice. *Id*.

In this case, there can be no doubt Harris' alleged acts, even if true, were privileged exercise of the right to petition the government. *See Arlington Heights*, 37 Ill.2d at 550 (the privilege attaches "to the passage or enforcement of laws"). Plaintiffs allege that Harris contacted city officials to take official action – a clear example of petitioning for enforcement of laws. Plaintiffs have not overcome this privilege by even attempting to plead actual malice. Indeed, the word "malice" appears nowhere in the Complaint. A complaint that fails to allege "actual malice" must be dismissed. *Phillip I. Mappa Interests, Ltd. v. Kendle*, 196 Ill.App.3d 703 (1st Dist., 1990)("the trial court properly dismissed" plaintiff's complaint for tortious interference for "failure to sufficiently allege that defendants had acted with actual malice."). At best, the Complaint alleges that Harris has "enmity" toward Plaintiff, but "ill will" is insufficient to establish actual malice. *Arlington Heights*, 37 Ill.2d at 551. Harris also adopts rather than restates Defendant City of Chicago's additional arguments regarding the statute of tortuous interference.

F. Count V Fails to Allege that Harris Trespassed their Property.

"A defendant commits the tort of trespass by entering onto a plaintiff's land without permission, invitation, or other right." *Schweihs v. Chase Home Fin. LLC*, 2021 IL App (1st) 191779, ¶ 30. In Count V, Plaintiffs allege that "the City" took intentional acts that "invaded" the

Avalon Regal. Comp. ¶ 78. Plaintiffs do not allege that Harris "invaded" the Avalon Regal. Because the Complaint does not allege that Harris ever entered their premises at all, either with or without permission, Count V should be dismissed. In addition, Harris adopts, rather than restates, the City's arguments in regarding Count V of the Complaint.

G. Count VI Fails to State a Civil Conspiracy Claim.

"Civil conspiracy is defined as a combination of two or more persons for the purpose of accomplishing by concerted action either an unlawful purpose or a lawful purpose by unlawful means." *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 23 (1998). To state a claim, a plaintiff must allege an agreement and a tortious act committed in furtherance of that agreement. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 133 (1999). Count VI, however, fails to allege specific facts constituting a cognizable claim for conspiracy. *See Buckner*, 182 Ill. 2d at 23–24 (affirming dismissal of conspiracy claim for failure to plead sufficient factual allegations).

In addition, a party's "agreement" is "a necessary and important" element of civil conspiracy. *McClure*, 188 Ill. 2d at 133. To become liable as a conspirator, a person must have "understood the general objectives of the conspiratorial scheme, accept[ed] them, and agree[d], either explicitly or implicitly[,] to do its part to further those objectives . . . ." *Id.* Here, Plaintiffs allege the Defendants "conspired to commit" the torts of trespass and interference with its contracts and business prospective. Comp. ¶ 82.

But Plaintiffs fail to make any such allegations against Harris. Plaintiffs allege that Harris conspired with "the City" but offers no facts supporting this claim, such as which City employees were allegedly involved, when this occurred, etc. *See Alpha School Bus Co., Inc. v. Wagner*, 391 Ill. App .3d 722, 737 (2009) (dismissing a conspiracy claim where plaintiff failed to allege facts "either specific or factual in nature" explaining the defendant's role in the alleged conspiracy). Plaintiffs' conspiracy claim therefore fails.

Finally, a conspiracy claim is predicated on pleading an independent cause of action underlying the conspiracy allegations. *Ill. State Bar Ass'n Mut. Ins. Co. v. Cavenagh*, 2012 IL App (1st) 111810, ¶ 37. Because each of the other claims in the Complaint are time barred and also fail to state a claim, Plaintiffs' conspiracy claim must also be dismissed. Harris also adopts rather than restates Defendant City of Chicago's additional arguments regarding civil conspiracy.

H. Count VII Fails to Allege a Claim of Slander of Title.

A claim for slander of title requires a showing that (1) the defendant made a false and malicious publication, (2) the publication disparaged the plaintiff's title to property, and (3) the publication damaged the plaintiff. *Bozek v. Bank of America, N.A.*, 2021 IL App (1st) 191978. To survive a motion to dismiss, a plaintiff must allege 'specific and coherent factual allegations that any publication by [the defendant] was false or malicious." *O'Malley as Tr. Under Tr. Agreement Dated Jan. 1, 2006 v. Adams as Tr. of Almyra M. Prather Revocable Tr. Agreement dated Dec. 15, 1967*, 2023 IL App (5th) 210381, ¶¶ 43–44. Here, Plaintiffs allege only that Harris "publicly misstat[ed] that the City owns the Avalon Regal." *Id.* ¶¶ 37, 89. These vague allegations are factually inadequate because they fail to allege when Harris made this statement, to whom, or where. How can Harris be expected to prepare a defense against such a vague and unspecific claim?

Plaintiffs also fail to allege that Harris's alleged statement was "malicious" or that it damaged Plaintiffs. As a consequence of these pleading defects, Count VI should be dismissed. Harris also adopts rather than restates Defendant City of Chicago's additional arguments regarding slander of title.

I. Plaintiffs' Do Not Adequately Plead Defamation Per Se.

In Count VIII, Plaintiffs allege defamation per se against Harris based upon:

> 92. Defendant Harris made a series of false statements about Plaintiffs including, without limitation: (1) that Plaintiffs did not own the Avalon Regal; (2) that Plaintiffs had been stealing money from the Avalon Regal; and (3) that Plaintiffs had stolen money from investors.

Comp. ¶ 92. The allegations should be dismissed because they fail to allege defamation per se.

To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that the publication caused damages. *Krasinski v. United Parcel Service, Inc.,*124 Ill.2d 483, 490 (1988). Illinois recognizes five categories of defamation per se: words imputing a person (1) has committed a crime; (2) is infected with a loathsome communicable disease; (3) is unable to perform or lacks integrity in performing employment duties; (4) lacks ability or otherwise prejudices that person in her or his profession; or (5) has engaged in adultery or fornication. *Van Horne v. Muller*, 185 Ill.2d 299, 307 (1998). A claim alleging defamation per se must be plead with a "heightened level of precision and particularity" because it relieves the plaintiff of the burden of proving damages. *Doe v. Catholic Diocese of Rockford*, 2015 IL App (2nd) 140618, ¶ 19.

In this case, the first allegation – that Plaintiffs did not own the theatre – is simply a restatement of their slander of title claim. For the reasons set forth in Section F above, Plaintiffs' slander of title claim should be dismissed. As a result, this statement cannot be defamatory, and the defamation claim should likewise be dismissed. In addition, Plaintiffs fail to allege how the statement, even if made, damaged them.

Plaintiffs' remaining defamation claims are that Harris said that "plaintiffs had been stealing money from the Avalon Regal" and that Plaintiffs had "stolen money from investors." Although a complaint for "defamation *per se* need not set forth the allegedly defamatory words *in haec verba*, the substance of the statement must be pled with sufficient precision and particularity so as to permit initial judicial review of its defamatory content. *Green v. Rogers*, 234 Ill.2d 478, 492 (2009).

Additionally, allegations must also be sufficient so that "the defendant may properly formulate an answer and identify any potential affirmative defenses." *Id*.

In *Green*, the plaintiff alleged that the defendant stated that the plaintiff "'exhibited a long pattern of misconduct with children'" and "'abused players, coaches, and umpires'" in the local little league. *Id.* at 493. The Supreme Court held that the complaint did not "set forth a precise and particular account of the statements that [the] defendant allegedly made" but only "set forth only a summary of the types of statements that [the] plaintiff may or may not have a reason to believe [the] defendant made." *Id*. The Court noted that the allegations were "completely devoid of any specifics, such as what type of misconduct [the] plaintiff exhibited; the nature of any alleged 'abuse'; or how that abuse manifested itself in relation to players, coaches and umpires." *Id.* Because the complaint "left many questions unaddressed—like whether the alleged abuse was verbal, physical, or a combination" the court had "no way of assessing whether [the] defendant's words were defamatory *per se*." *Id.* at 493-94.

The allegations here do not satisfy the pleading requirement set forth in *Green*. Plaintiffs do not allege to whom these allegedly defamatory statements were made, when, where or in what context. This is unfair to Harris. For example, depending on the context, as an elected official, Harris might assert that the comments were privileged as an affirmative defense. *Krueger v. Lewis*, 342 Ill.App.3d 467, 473 (1st Dist. 2003)("absolute privilege bars defamation actions for statements made by public officials during legislative proceedings"). But without specifics as to when, where or to whom the comments were made, Harris cannot know.

Even if the defamation claims are adequately pleaded, which they are not, the alleged statements could be non-defamatory because they are subject to an innocent construction. *Bryson v. News America Publications, Inc.,* 174 Ill.2d 77, 90 (1996). Innocent construction turns on how a

reasonable reader would interpret the statements in context. *Id*. As the rule was discussed in *Lott v. Levitt,* 469 F.Supp.2d 575 (N.D. Ill. 2007):

> [A] statement 'reasonably' capable of a nondefamatory interpretation, given its verbal or literary context, should be so interpreted. There is no balancing of reasonable constructions. In other words, if a statement is capable of two reasonable constructions, one defamatory and one innocent, the innocent one will prevail. If the complained-of statement "may reasonably be innocently interpreted, it cannot be actionable *per se.*" *Id.* at 580 (citations omitted).

In this case, Plaintiff has failed to allege anything about the context in which the alleged statements were made. Depending on the circumstances, it is possible a reasonable reader would interpret the statements as non-defamatory. Without any specifics about when, where, and to whom the statements were allegedly made, Harris cannot prepare an adequate innocent construction defense.

III. Conclusion.

WHEREFORE, for the foregoing reasons, Defendant Michelle Harris respectfully prays that this Court enters an order dismissing Plaintiffs' Complaint with prejudice, and grants such other relief as is just and proper.

Respectfully submitted,
Defendant Michelle Harris

By: /s/ Michael J. Kasper
One of her Attorneys

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