No. 1-08-3528

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIRST DIVISION
March 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOSEPH N. RATHNAU,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellant,	)	
	)	
	)	
v.	)	No. 07 CH 37527
	)	
	)	
BARBARA DOWNING, KIMBERLY DOWNING,	)	
Individually and as Mother and Next	)	
Friend of MORGAN DOWNING and TRACEY	)	
DOWNING, STEPHANIE K. NATHANSON and	)	
NATHANSON & FIEDLER	)	Honorable
	)	Kathleen M. Pantle,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court.
Justices Hoffman and Rochford concurred in the judgment.

O R D E R

HELD: Defendants' hybrid motion to dismiss was not defective to the point of requiring reversal where plaintiff could not have been surprised or prejudiced by the substance of the motion; and the trial court did not abuse its discretion in granting

defendants' motion dismissing plaintiff's complaint for declaratory and injunctive relief.

This appeal arises out of an underlying legal malpractice action (case no. 04 L 010276) filed by defendants Barbara Downing, individually, and Kimberly Downing, individually and as the mother and next friend of Morgan Downing and Tracey Downing (the "Downings"), against the law firm of Joseph A. Morris, individually, Morris & De La Rosa and Morris, Rathnau & De La Rosa ("Morris & De La Rosa"), alleging the mishandling of the Downings' personal injury lawsuit (case no. 98 L 013983).

The legal malpractice action arose out of Morris & De La Rosa's alleged mishandling of the Downings' personal injury lawsuit against Greyhound Lines, Inc. and its driver for personal injuries resulting after the bus ran off the road and overturned. The Downings obtained a monetary default judgment against Morris & De La Rosa in the legal malpractice action.

Plaintiff, Joseph N. Rathnau, filed a complaint for declaratory and injunctive relief against the Downings and the law firm of "Fiedler & Nathanson," the firm that represents the Downings in the legal malpractice action. Plaintiff sought a declaration that he was not a partner in the law firm of Morris & De La Rosa and was therefore not liable for any judgments entered against the firm. Plaintiff also sought injunctive relief to

enjoin the enforcement of a citation to discover assets directed at him as an alleged judgment debtor.

The Downings and their law firm filed a motion to dismiss plaintiff's complaint for declaratory and injunctive relief, citing sections 2-615, 2-606, 2-619 and 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-606, 2-619, 2-619.1 (West 2006)). After hearing arguments on the motion, the trial court took the matter under advisement and subsequently issued an order dismissing plaintiff's complaint.

In the order, the trial court, *sua sponte*, raised the question as to whether plaintiff's complaint for declaratory and injunctive relief was ripe for adjudication. The court ultimately determined that the issues contained in the complaint were not ripe for declaratory relief because: plaintiff had not been named as an individual defendant in the underlying legal malpractice action; he had not been served with process in his individual capacity nor as a partner of the firm and thus had not been joined as a party defendant except in his capacity as a possible partner; and it did not appear from the prayer of relief that the plaintiffs in the underlying legal malpractice action were seeking a personal judgment against plaintiff. Plaintiff appeals from the order. We affirm.

ANALYSIS

Plaintiff initially challenges the hybrid nature of defendants' motion to dismiss. Defendants' motion to dismiss can be characterized as a hybrid motion since it seeks relief under alternative sections of the Code (sections 2-615, 2-606, and 2-619) without exactly specifying the section under which each request for relief is sought.

Section 2-619.1 of the Code is a procedural statute that allows a litigant to combine alternative sections of the Code for involuntary dismissal in one pleading. *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1046, 700 N.E.2d 202 (1998). This statute, however, does not authorize hybrid motion practice. *Northern Trust Company v. County of Lake*, 353 Ill. App. 3d 268, 278, 818 N.E.2d 389 (2004). Instead, section 2-619.1 "provides that a combined motion shall be divided into parts and each part shall be limited to and specify a single section of the Code under which relief is sought." *Storm & Associates, Ltd.*, 298 Ill. App. 3d at 1046; see also *Downey v. Wood Dale Park District*, 286 Ill. App. 3d 194, 199, 675 N.E.2d 973 (1997) (combined motion to dismiss under section 2-619.1 of the Code is proper if movant indicates under which section of the Code each part of the combined motion to dismiss is brought).

Our courts have determined that although hybrid motion practice is improper, reversal is appropriate only where the

nonmoving party is prejudiced. *Burton v. Airborne Express, Inc.*, 367 Ill. App. 3d 1026, 1029, 857 N.E.2d 707 (2006). In the instant case, plaintiff suffered no prejudice in this regard.

In their motion to dismiss, defendants cited two cases for the proposition that a trial court should not grant a declaratory judgment when there is another action pending between the same parties involving the same issues. The "prior pending action" defense is set forth in section 2-619(a)(3) of the Code. See *Crane Inc. v. Admiral Insurance Company*, 391 Ill. App. 3d 693, 698, 910 N.E.2d 1168 (2009) (section 2-619(a)(3) of the Code provides that a defendant may move for dismissal whenever there is another action pending between the same parties for the same cause). In this case, plaintiff could not have been surprised or prejudiced by the hybrid nature of defendants' motion to dismiss because it was clearly predicated on section 2-619 of the Code.

Plaintiff next contends the trial court abused its discretion in granting defendants' motion dismissing his complaint for declaratory and injunctive relief. We must disagree.

One of the primary purposes of a declaratory judgment action "is to obtain a judicial resolution of an actual controversy without requiring the disputants to irrevocably jeopardize their rights." *Richards v. Liquid Controls Corporation*, 26 Ill. App. 3d

111, 130, 325 N.E.2d 775 (1975). The decision to grant or deny a request for declaratory relief rests within the sound discretion of the trial court, whose ruling will not be disturbed absent an abuse of that discretion. *Lihosit v. State Farm Mutual Automobile Insurance Co.*, 264 Ill. App. 3d 576, 580, 636 N.E.2d 625 (1993).

Section 2-701(a) of the Code authorizes the entry of a declaratory judgment "in cases of actual controversy" where the judgment would terminate the controversy or some part thereof, giving rise to the proceeding. 735 ILCS 5/2-701(a) (West 2006). Although the statute is to be liberally construed, its provisions must be strictly complied with. *Beahringer v. Page*, 204 Ill. 2d 363, 373, 789 N.E.2d 1216 (2003).

To be entitled to declaratory relief: (1) the plaintiff must have a tangible interest; (2) the defendant must have an adverse interest; and (3) an actual controversy must exist over that interest. *Alicea v. Snyder*, 321 Ill. App. 3d 248, 253, 748 N.E.2d 285 (2001). Here, the trial court dismissed plaintiff's complaint for declaratory relief for lack of an actual controversy.

The requirement that an actual controversy exist, does not mean that a party must have been wronged and suffered an injury. "Rather, it requires a showing that the underlying facts and issues of the case are not moot or premature, so as to require

the court to pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events." *Underground Contractors Association v. City of Chicago*, 66 Ill. 2d 371, 375, 362 N.E.2d 298 (1977).

In the instant case, there was no actual controversy regarding whether plaintiff was a partner in the law firm of "Morris & De La Rosa," because the issue was not yet ripe for declaratory relief. The possibility that plaintiff might be deemed a partner of the firm and therefore liable for any judgments entered against the firm, was speculative since plaintiff: had not been named as an individual defendant in the underlying legal malpractice action; he had not been served with process in his individual capacity nor as a partner of the firm; and it did not appear from the prayer for relief that the plaintiffs in the underlying legal malpractice action were seeking a personal judgment against plaintiff.

Plaintiff argues that on March 11, 2009, the trial court in case no. 04 L 010276 reinstated the judgment against the law firm of "Morris & De La Rosa," and therefore he is again subject to another possible citation proceeding. This is not sufficient to maintain a claim for declaratory relief.

"If the harm that a plaintiff claims is merely speculative or contingent, the claim is unripe and a court should not decide

it." *Smart Growth Sugar Grove, LLC v. Village of Sugar Grove*, 375 Ill. App. 3d 780, 789, 873 N.E.2d 20 (2007). The trial court did not abuse its discretion in granting defendants' motion dismissing plaintiff's complaint for declaratory and injunctive relief.

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

Affirmed.