THIRD DIVISION
March 31, 2011

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).

No. 1-10-0399

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MERDELIN JOHNSON, Plaintiff-Appellant, v. NORTHSHORE UNIVERSITY HEALTHSYSTEM, HEALTHPORT, INC., NORTHSHORE ASSOCIATES IN GYNECOLOGY & OBSTETRICS, JENNER & BLOCK LLP, CARLA ROZYCKI, EMMA SULLIVAN, and SUSAN COURTHEOUX, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County, Illinois No. 09 L 62018 Honorable Jeffrey Lawrence, Judge Presiding

Justice Murphy delivered the judgment of the court.

Neville and Steele, JJ., concurred in the judgment.

ORDER

HELD: Section 13-201 of the Code of Civil Procedure applied to plaintiff's claim for publication of private facts but not to her claim for unreasonable intrusion upon the seclusion of another.

HELD: The plaintiff's complaint alleging invasion of privacy was properly dismissed where her amended complaint failed to state a claim.

HELD: The trial court did not err in dismissing plaintiff's amended complaint with prejudice where she did not seek leave to file a second amended complaint and the record does not reflect the changes she would have made.

Plaintiff, Merdelin Johnson, filed a complaint alleging that defendants violated her right of privacy by seeking and/or producing medical records in a federal employment-discrimination case that exceeded her authorization. The trial court dismissed the complaint, finding that the complaint was time-barred, the claims were waived, and the litigation privilege applied. We affirm.

I. BACKGROUND

Plaintiff filed a federal lawsuit against her former employer, the General Board of Pensions & Health Benefits of the United Methodist Church, and certain General Board employees, alleging employment discrimination claims under Title VII. Defendant Jenner & Block, LLP is defended the General Board in the federal lawsuit.

Jenner & Block and several Jenner & Block attorneys, Carla Rozycki, Emma Sullivan, and Suzanne Courtheoux (Jenner & Block defendants), sought discovery concerning the emotional distress claims that plaintiff made in her federal lawsuit. On March 27 and April 17, 2007, Jenner & Block executed subpoenas to NorthShore University Healthsystem and North Shore Associates in Gynecology & Obstetrics requesting "[a]ll documents in your custody, possession, or control" relating to plaintiff's "mental and emotional health history." Attached to the subpoenas were medical release forms signed by plaintiff with time limitations of June 14,

1999, through the date the consents were signed. Plaintiff was served with the subpoenas, the subpoena rider, the consent forms, and the cover letters that accompanied the subpoenas.

NorthShore University produced *all* of plaintiff's medical records, dating to 1984, to Healthport, Inc., which in turn released them to Jenner & Block. North Shore Associates also released medical records to Jenner & Block that were outside the scope of plaintiff's release. Plaintiff received copies of the medical records sent to Jenner & Block. Plaintiff alleges that on July 16, 2007, she discovered that her medical providers released all of her medical records, instead of those beginning on June 14, 1999. On July 25, 2007, the federal court issued a protective order that prohibited Jenner & Block from making any use of records falling outside the time period covered by plaintiff's consents and required it to return to plaintiff the records that were outside the time parameters specified in plaintiff's releases.

On April 24, 2009, plaintiff filed a complaint in the circuit court of Cook County against the Jenner & Block defendants, Healthport, NorthShore University, and North Shore Associates alleging that they violated her privacy rights by serving the subpoenas and receiving documents that were outside the time period covered by her consent. She alleged that as a result of the unauthorized disclosures, she suffered emotional, psychological, and physical harm, including headaches and stress and anxiety. Count I of plaintiff's amended complaint alleged intrusion into seclusion, and count II alleged publication of private facts based on the Jenner & Block defendants' disclosure of the records to their support staff and copying services.

Defendants filed motions to dismiss arguing that the amended complaint should be dismissed because plaintiff's claims were not filed within the relevant limitations period; that the

amended complaint failed to state a claim; and that plaintiff waived her claims by failing to quash the subpoena until after the medical records were produced. The Jenner & Block defendants also argued that the absolute litigation privilege applied.

The trial court dismissed the amended complaint with prejudice, concluding that: (1) the complaint was time-barred; (2) the claims were waived; and (3) the claims against the Jenner & Block defendants were barred by the litigation privilege. This appeal followed.

II. ANALYSIS

A. Parties' Briefs

We first note that plaintiff's and North Shore Associates' briefs violate Supreme Court Rule 341(h) (210 Ill. 2d R. 341(h)(6)). Supreme Court Rule 341(h)(6) requires that the statement of facts be "stated accurately and fairly and without argument or comment, and with appropriate reference to the pages of the record on appeal." 210 Ill. 2d R. 341(h)(6). Plaintiff's and North Shore Associates' fact sections include facts with no corresponding record citations and others that constitute argument. We will disregard the portions of the briefs that do not comply with Rule 341(h)(6). *Merrifield v. Illinois State Police Merit Board*, 294 Ill. App. 3d 520, 527 (1998).

B. Statute of Limitations

The trial court found, *inter alia*, that plaintiff's complaint is time-barred pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2006)). On appeal, plaintiff contends that the trial court erred when it dismissed count I, intrusion upon the seclusion of another, because the five-year "catch-all" statute of limitations found in section 13-205 of the Code of Civil Procedure (735 ILCS 5/13-205 (West 2006)) applies.

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the claims. 735 ILCS 5/2-619(a) (West 2006); *Duncan v. Church of the Living God*, 278 Ill. App. 3d 588, 594 (1996). When reviewing a motion to dismiss, this court must accept all well-pled facts as true and view them in the light most favorable to the plaintiff. *Gonnella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003). We may consider all facts presented in the pleadings, affidavits, and depositions found in the record. *Gonnella Baking Co.*, 337 Ill. App. 3d at 388. We will review a trial court's determination of a section 2-619 motion to dismiss *de novo*. *Woods v. Cole*, 181 Ill. 2d 512, 516 (1988).

Section 13-201 of the Code of Civil Procedure provides, "Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued." 735 ILCS 5/13-201 (West 2006). Section 13-205 provides that "all civil actions not otherwise provided for shall be commended within 5 years next after the cause of action accrued." 735 ILCS 5/13-205 (West 2006).

Plaintiff's argument is unclear as to which limitations period applies to her claim for publication of private facts; however, section 13-201 provides that actions for "publication of matter involving the right of privacy" must be filed within one year after the cause of action accrues. 735 ILCS 5/13-201 (West 2006). See also *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 745-46 (1986) (claims for public disclosure of private facts were barred by section 13-201); *Benitez v. KFC National Management Co.*, 305 Ill. App. 3d 1027, 1034 (1999). Plaintiff alleged that she discovered the unauthorized release on July 16, 2007. She filed her

complaint more than 1 ½ years later, on April 24, 2009. Therefore, her claim based on publication of private facts is time-barred by section 13-201.

Plaintiff also argues that the trial court applied the wrong limitations period to her claim for intrusion upon seclusion. In *Benitez*, the Second District held that the one-year statute of limitations in section 13-201 does not apply to the tort of intrusion upon seclusion. *Benitez*, 305 Ill. App. 3d at 1034. The court noted that publication is an element of the torts of public disclosure of private facts, appropriation of another's name or likeness, and false-light publicity but is not an element of unreasonable intrusion upon the seclusion of another. *Benitez*, 305 Ill. App. 3d at 1034. "The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication." *Benitez*, 305 Ill. App. 3d at 1034. Accordingly, the court concluded that section 13-201 did not apply to the tort of intrusion upon seclusion. *Benitez*, 305 Ill. App. 3d at 1035.

Benitez declined to follow the federal court in *Hrubec v. National R.R. Passenger Corp.*, 778 F. Supp. 1431 (N.D. Ill. 1991), *rev'd on other grounds*, 981 F.2d 962 (7th Cir. 1992), and *Juarez v. Ameritech Mobile Communications*, 746 F. Supp. 798 (N.D. Ill. 1990). *Benitez*, 305 Ill. App. 3d at 1035. In those cases, the Northern District of Illinois held that claims of intrusion upon seclusion and sexual harassment, respectively, were time-barred by section 13-201. The *Benitez* court disagreed because "neither case provides any explanation whatsoever of why section 13-201 applies to a cause of action for intrusion upon seclusion." *Benitez*, 305 Ill. App. 3d at 1035.

Defendants urge this court to reject *Benitez* and follow *Hrubec* and *Juarez*. They contend that intrusion upon seclusion is a "privacy tort," and section 13-201 is labeled "Defamation--Privacy." However, the "Privacy" half of section 13-201's title can also be explained by the statute's reference to "publication of *matter violating the right of privacy*." (Emphasis added.) 735 ILCS 5/13-201 (West 2006). See also *McDonald's Corp. v. Levine*, 108 Ill. App. 3d 732, 737 (1982) (refusing to apply one-year limitations period to claims of intrusion upon seclusion since the statute "applies only to actions for slander or libel arising out of a publication of matters violating the right of privacy"). Defendants do not make a compelling argument as to why this court should reject *Benitez*. Therefore, we find that plaintiff's claim for publication of private facts was barred by section 13-201, while her claim for intrusion upon seclusion was not.

C. Sufficiency of the Amended Complaint

Although we conclude that section 13-201 does not apply to plaintiff's claim for intrusion upon seclusion, we find that the trial court did not err in dismissing both counts of the amended complaint because plaintiff failed to state a claim upon which relief can be granted. This court reviews dismissal under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2006)) *de novo*. *Shaper v. Bryan*, 371 Ill. App. 3d 1079, 1086 (2007). "A section 2-615 motion attacks the legal sufficiency of a complaint, and this court's inquiry is limited to whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Kopka v. Kamensky & Rubenstein*, 354 Ill. App. 3d 930, 933 (2004). "This court must accept as true all well-pled factual allegations contained in the complaint and construe all reasonable inferences therefrom in

favor of plaintiff. [Citation.] However, a plaintiff cannot rely simply on conclusions of law or fact unsupported by specific factual allegations." *Kopka*, 354 Ill. App. 3d at 933-34.

Illinois courts recognize four ways that a plaintiff may state a cause of action for invasion of privacy: (1) intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) publicity placing another in a false light. *Busse v. Motorola*, 351 Ill. App. 3d 67, 71 (2004). Plaintiff alleges the first and third theories: intrusion upon seclusion and public disclosure of private facts.

A plaintiff must allege the following elements to establish the tort of intrusion upon seclusion: (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) an intrusion that is highly offensive to a reasonable person; (3) the matter upon which the intrusion occurs is private; (4) the intrusion causes anguish and suffering. *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1030-31 (2002). Plaintiff alleges that the intrusion was unauthorized, since defendants disclosed medical information that went beyond the time restraints of her release. Further, medical information that one has not consented to release can only be seen as private.

In *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 417 (1989), however, our supreme court noted that "the core of this tort is the offensive prying into the private domain of another." The court listed the following as examples of acts forming the basis of the tort: invading someone's home, an illegal search of someone's shopping bag in a store, eavesdropping by wiretapping, peering into the windows of a private home, and persistent and unwanted phone calls. *Lovgren*, 126 Ill. 2d at 417. Similarly, in *Johnson v. K Mart Corp.*, 311 Ill. App. 3d 573 (2000), the defendant hired undercover investigators posing as employees to

investigate theft, sabotage, safety, and drug use in its distribution center. The reports submitted to the defendant contained information on employee family matters, romantic interests and sex lives, future employment plans, and complaints about the defendant. On appeal, this court held that the defendant intruded upon the employees' seclusion, even though they willingly provided the personal details to the investigators, because "the means used by defendant to induce plaintiffs to reveal this information was deceptive." *Johnson*, 311 Ill. App. 3d at 595. See also *Burns v. Masterbrand Cabinets, Inc.*, 369 Ill. App. 3d 1006 (2007) (private investigator investigating the plaintiff's workers compensation claim entered his home under false pretenses and used a hidden camera to record him).

We find no indication, based on the allegations of plaintiff's complaint, that any defendant engaged in "offensive prying" analogous to the intentional acts described by *Lovgren*, nor did defendants engage in deception to obtain plaintiff's medical information beyond the scope of her release. Rather, each defendant made an inadvertent error. Indeed, that Jenner & Block provided plaintiff with copies of the subpoenas requesting all of her medical records compels the conclusion that it was not "offensively prying." Further, NorthShore University and North Shore Associates, as the custodian of the records, were presumably, already aware of the contents of the medical records they maintained. Therefore, we conclude that plaintiff failed to state a claim for intrusion upon the seclusion of another.

Next, an action for public disclosure of private facts provides a remedy for the dissemination of true, but highly offensive or embarrassing, private facts. *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739 (2000). To recover under such an

action, a plaintiff must allege that: (1) the defendant gave publicity to a private fact; (2) such a fact would be highly offensive to a reasonable person; (3) such a fact was not of legitimate public concern. *Poulos*, 312 Ill. App. 3d at 739-40.

"The publicity element in an action for public disclosure of private facts has been generally defined as communication of a private fact 'to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.' " *Poulos*, 312 Ill. App. 3d at 740, quoting Restatement (Second) of Torts § 652D (1977). " 'Thus it is not an invasion of the right of privacy ***, to communicate a fact concerning the plaintiff's private lie to a single person or even to a small group of person.' " *Miller v. Motorola*, 202 Ill. App. 3d 976, 980 (1990), quoting Restatement (Second) of Torts § 652D, comment a, at 384-85 (1977).

The publicity requirement may also be satisfied by establishing that the defendant disclosed highly offensive private facts to a person or persons with whom the plaintiff has a special relationship. *Poulos*, 312 Ill. App. 3d at 740. " 'An invasion of a plaintiff's right to privacy is important if it exposes private facts to a public whose knowledge of those facts would be embarrassing to the plaintiff. Such a public might be the general public, if the plaintiff were a public figure, or a particular public such as fellow employees, club members, family, or neighbors, if the person were not a public figure.' " *Miller*, 202 Ill. App. 3d at 980-81, quoting *Beaumont v. Brown*, 401 Mich. 80, 104-05 (1977), *overruled on other grounds by Bradley v. Saranac Community Schools Board of Education*, 455 Mich. 285 (1997). This exception "is both justified and appropriate in that a disclosure to a limited number of persons may be just as

devastating to a plaintiff as a disclosure to the general public." *Poulos*, 312 Ill. App. 3d at 740.

Plaintiff did not allege that her medical records were disclosed "to the public at large," nor did she allege that she had a "special relationship" with "various members"of Jenner & Block's "legal and support staff" and "copying services." Accordingly, we conclude that the count of plaintiff's complaint alleging publication of private facts was also properly dismissed.

D. Amendment

Finally, plaintiff contends that the trial court erred by denying her leave to amend her complaint. Section 2-616(a) of the Code of Civil Procedure permits amendments to pleadings before final judgment. 735 ILCS 5/2-616(a) (West 2006). A party's right to amend is not absolute, and the decision whether to grant leave to amend a pleading is within the sound discretion of the trial court. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992). Among the factors to be considered in determining whether to permit an amendment to the pleadings are the following: (1) whether the amendment would cure a defect in the pleadings; (2) whether the other party would be prejudiced or surprised by the proposed amendment; (3) the timeliness of the proposed amendment; and (4) whether there were previous opportunities to amend the pleadings. *Lee*, 152 Ill. 2d at 467-68.

Plaintiff never formally sought leave to file a second amended complaint, and nothing in the record shows what changes plaintiff would have made to show that defendants invaded her privacy. By failing to include a proposed second amended complaint in the record on appeal, she waived the issue of whether the trial court abused its discretion in denying her leave to amend. *Morris v. Ameritech Illinois*, 337 Ill. App. 3d 40, 51 (2003).

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's order dismissing plaintiff's amended complaint with prejudice. In light of our conclusion, we need not address defendants' arguments that the absolute litigation privilege applies or that plaintiff waived her claims.

Affirmed.