

2011 IL App (2d) 101039-U
No. 2-10-1039
Order filed September 30, 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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

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|----------------------------------|---|-------------------------------|
| CORNELL OVERBEEKE, M.D., |) | Appeal from the Circuit Court |
| |) | of Kane County. |
| Plaintiff-Appellant and |) | |
| Cross-Appellee, |) | |
| |) | |
| v. |) | No. 09-L-183 |
| |) | |
| TRI-CITY RADIOLOGY, S.C., |) | |
| SHARMISHTHA JAYACHANDRAN, M.D., |) | |
| CRAIG NASRALLA, M.D., JOSEPH |) | |
| PERSAK, M.D., BINU PHILIP, M.D., |) | |
| KALYAN PORURI, M.D., and |) | |
| YAMMANURU RAMULU, M.D., |) | |
| |) | Honorable |
| Defendants-Appellees and |) | Stephen Sullivan, |
| Cross-Appellants. |) | Judge, Presiding. |

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's 15-count complaint with prejudice because of the various defects appearing on the face of the complaint, as well as affirmative matters defeating the causes of action. Further, the trial court was within its discretion to deny defendants' motion to strike and motion for sanctions. We affirmed the judgment of the trial court.

¶ 1 In March 2009, plaintiff, Cornell Overbeeke, filed a 15-count complaint against defendants, Tri-City Radiology, S.C. (Tri-City), Sharmishtha Jayachandran, M.D., Craig Nasralla, M.D., Joseph Persak, M.D., Binu Philip, M.D., Kalyan Poruri, M.D., and Yammanuru Ramulu, M.D. (collectively, defendants). Plaintiff's complaint alleged various counts of breach of contract and torts that were related to the termination of his employment with Tri-City. Defendants responded with a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619.1 (West 2008)). Defendants also moved to strike portions of plaintiff's reply to defendants' motion to dismiss and sought sanctions under Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). The trial court denied defendants' motion to strike and request for sanctions. The trial court granted defendants' motion to dismiss plaintiff's entire complaint with prejudice. Plaintiff now appeals, contending that the trial court erred when it dismissed his complaint with prejudice without giving him an opportunity to amend. Defendants cross-appeal, contending that the trial court erred in denying their motion to strike and request for sanctions. For the following reasons, we affirm.

¶ 2 The record reflects that in July 2000, plaintiff was employed by Tri-City to perform radiology services out of Delnor Community Hospital (Delnor). On March 8, 2007, plaintiff tendered a resignation letter to Tri-City that indicated he no longer wished to continue his employment partly because of certain interpersonal conflicts. On March 13, 2007, pursuant to its employment agreement with plaintiff, Tri-City sent him notice about a special meeting that was to be held to discuss his termination. On March 15, Tri-City placed plaintiff on a paid leave of absence. Soon after, on March 23, 2007, the shareholders of Tri-City voted unanimously to terminate plaintiff without cause.

¶ 3 Although the employment agreement provided that, if he was terminated from Tri-City, he must resign his staff privileges at Delnor, plaintiff continued to practice there. Delnor, however, suspended plaintiff's staff privileges because he violated the hospital's bylaws by not finding an equally trained physician to act in his place in the event of an emergency. Plaintiff ultimately resigned his staff privileges at Delnor. Subsequently, he accepted a position with Grundy Radiology S.C. (Grundy) and gained staff privileges at Morris Hospital (Morris). Plaintiff, however, was terminated from Morris' staff and was simultaneously terminated from Grundy. Plaintiff then began work with Illinois Radiology Group, which provided services for MRI Imaging Lincoln Center (Lincoln Center). The Lincoln Center later terminated plaintiff because he did not notify them that he was under investigation at Delnor. In March 2008, plaintiff, through counsel, filed a complaint against defendants, which was voluntarily dismissed in October 2008.

¶ 4 On March 23, 2009, plaintiff, *pro se*, filed a 15-count verified complaint against defendants. Count I alleged breach of contract and of an implied covenant of good faith and fair dealing, urging that defendants improperly terminated him pursuant to the employment agreement. Count II alleged a breach of fiduciary duty. Count III alleged that defendants engaged in a conspiracy to commit fraud and interfere with his business relationships at Delnor. Count IV alleged defendants tortiously interfered with his prospective economic relationship with Delnor. Counts V and VI alleged he was defamed by defendants. Count VII alleged fraud and deceit because defendants made allegedly false representations that resulted in the suspension of plaintiff's clinical privileges. Count VIII alleged that defendants failed to follow the Occupational Safety and Health Administration standards, negligently exposing him to radiation. Count IX alleged intentional infliction of emotional distress. Count X alleged that the shareholders of Tri-City interfered with his employment agreement with

Tri-City. In counts XI and XII, plaintiff alleged that defendants interfered with his contractual relationship with Grundy and Morris. Count XIII alleged intentional interference of contractual relations with Illinois Radiology Group. Count XIV alleged defendants committed intentional interference of economic advantage with the Lincoln Center. Finally, Count XV alleged wrongful termination in violation of public policy.

¶ 5 In June 2009, defendants filed a section 2-619.1 motion to dismiss pursuant to the Code. Defendants argued that plaintiff was properly terminated pursuant to the employment agreement because he was given notice, the receipt of which was acknowledged by his previous counsel. Defendants also urged that plaintiff failed to properly state a claim for continuing benefits or breach of any covenant of good faith because the claim was directly contradicted by the employment agreement. Defendants argued that plaintiff's fiduciary duty claim was insufficient because he did not properly allege the existence of the duty.

¶ 6 Defendants further argued plaintiff's conspiracy claim was insufficient because it was a contract claim disguised as a tort and was therefore barred by the *Moorman* doctrine. Defendants argued that there was no intentional interference with plaintiff's business at Delnor. Defendants further argued that neither Tri-City nor its shareholders could interfere with the business relationships between plaintiff and his patients since those were actually Tri-City's patients and simply assigned to plaintiff.

¶ 7 As to plaintiff's defamation claims, defendants argued that plaintiff's defamation claim *per se* was barred by a one-year statute of limitations. Defendants also urged that the allegations were insufficient at law because plaintiff failed to specifically plead what was said and who said it.

Similarly, defendants argued plaintiff's defamation *per quod* claim failed to plead facts with sufficient specificity.

¶ 8 Defendants argued that plaintiff's fraud allegation was also insufficient because he did not adequately allege actionable conduct. Additionally, defendants urged that plaintiff's negligence claim was barred by the statute of limitations and was insufficient at law because plaintiff failed to allege any duty defendants owed to protect him from radiation. Defendants sought dismissal of plaintiff's intentional infliction of emotional distress count for the failure to state a cause of action.

¶ 9 Furthermore, according to defendants, plaintiff's allegation that defendants interfered with his Tri-City contract was insufficient at law because defendants could not interfere with the corporation's contract as a matter of law. Defendants also urged that plaintiff's contradictory allegations in the "Morris Case," plaintiff's lawsuit against another previous employer, were fatal to his objection that defendants interfered with his contract with Grundy, because they led to the opposite conclusion from what he pleaded in Count XII. Similarly, defendants argued plaintiff's allegation they interfered with his economic interests at Morris should be dismissed for failure to plead sufficient facts to establish the count. Likewise, plaintiff also failed to allege specifically how defendants interfered with his relationship with Illinois Radiology. Defendants further objected that plaintiff did not allege that they directed any conduct or communications with the Lincoln Center that would have interfered with his prospective economic advantage. Lastly, defendants asserted that plaintiff's count XV was insufficient because he did not specify which public policy was violated and also because he had not exhausted his administrative remedies.

¶ 10 In addition to their motion to dismiss, defendants moved for sanctions under Rule 137, arguing that plaintiff filed numerous frivolous and false pleadings. Defendants also sought to strike portions of plaintiff's reply to defendants' motion to dismiss.

¶ 11 After considering the arguments in the matter, the trial court denied defendants' request for sanctions and their motion to strike portions of plaintiff's reply. The trial court granted defendants' motion to dismiss all counts of plaintiff's complaint with prejudice, finding that there was no possible manner in which a viable cause of action could be pleaded. Plaintiff now appeals, contending that the trial court erred in dismissing his complaint with prejudice. Defendants cross-appeal, contending the trial court abused its discretion for failing to strike plaintiff's reply and to award sanctions.

¶ 12 Initially, we must dispose of an outstanding motion. Defendants filed a motion to strike certain arguments from plaintiff's reply brief. Specifically, defendants request that this court strike all new and waived arguments raised in plaintiff's reply brief, including all arguments relating to counts V and VI and all arguments relating to his new claim that he resigned under duress. Plaintiff filed a response; and we ordered the motion and the response taken with the case. Under Illinois Supreme Court Rule 341(j) (eff. Sept. 1, 2006), it is improper to raise an issue for the first time in a reply brief. We have reviewed the motion and the response, and we find no need to strike the arguments in plaintiff's reply brief that correspond to defendants' arguments in their brief. See *Spangenberg v. Verner*, 321 Ill. App 3d 429, 432 (2001) (refusing to strike a reply brief for nonflagrant violations of supreme court rules). Accordingly, we deny defendants' motion to strike such portions of plaintiff's reply brief. However, we will disregard any inappropriate statements or arguments made therein.

¶ 13 Next, we must determine precisely which issues plaintiff is challenging on appeal. It is clear that he has not raised arguments addressing each count that the trial court dismissed. Illinois Supreme Court Rule 341(h)(7) (eff Sept. 1, 2006) provides in pertinent part that “[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.” Therefore, we agree with defendants that, because plaintiff’s brief directly challenges only counts II, IV, VII, X, XI, XII, XIII, XIV, and XV, he has forfeited all arguments he did not raise on counts I, III, V, VI, VIII, and IX. Accordingly, we affirm the trial court’s dismissal with prejudice as to counts I, III, V, VI, VIII, and IX.

¶ 14 Plaintiff first argues that defendants’ motion under section 2-619.1 impermissibly commingled motions under sections 2-615 and 2-619 related to counts VII, X, XI, XII, XIII, and XIV. We note that plaintiff’s challenges to the trial court’s dismissal are directed at defendants’ alleged commingling of motions as the basis for reversal. This approach contrasts with making a legal argument supported by authority stating there is, in fact, a proper allegation of a cause of action or a specific legal defect in the trial court’s ruling, as opposed to a response to a party’s position. We agree, therefore, with defendants that plaintiff has waived arguments contesting the substance of the dismissal of these counts. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006).

¶ 15 A section 2-615 motion to dismiss admits all well-pleaded facts and attacks the legal sufficiency of the complaint. *Burton v. Airborne Express, Inc.*, 376 Ill. App. 3d 1026, 1029 (2006). By contrast, a section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matters, appearing on the face of the complaint or established by external submissions, that defeat the action. *Kedzie & 103rd Currency Exchange, Inc., v. Hodge*, 156 Ill. 2d 112, 115 (1993). Section 2-619.1 of the Code permits litigants to combine

both motions into one pleading. See 735 ILCS 5/2-619.1 (West 2010). However, the statute does not authorize hybrid motion practice. *Jenkins v. Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674 (2003). A defendant's failure to specifically designate whether a motion to dismiss is brought pursuant to section 2-615 or section 2-619 is not always fatal, but reversal is required if prejudice results to the nonmovant. *Northern Trust Co. v. County of Lake*, 356 Ill. App. 3d 268, 278 (2004). Moreover, a court should not dismiss cause of action with prejudice unless it is clear that no set of facts can be proved under the pleadings that would entitle a plaintiff to relief. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008).

¶ 16 We review *de novo* a trial court's dismissal of a complaint under section 2-619.1 of the Code. *Morris v. Harvey Cycle and Camper, Inc.*, 392 Ill. App. 3d 399, 402 (2009). We review a trial court's decision to dismiss a complaint with prejudice for an abuse of discretion. *Bruss v. Przybylo*, 385 Ill. App. 3d 399, 405 (2008). A trial court abuses its discretion where no reasonable person could take the view it has adopted. *Krawczyk v. Livaditis*, 366 Ill. App. 3d 375, 379 (2006).

¶ 17 With respect to counts VII, X, XI, XII, XIII, and XIV, plaintiff's commingling arguments are baseless. For example, concerning count X, plaintiff argues that defendant argued an issue of contractual interpretation, a section 2-619 matter, while also arguing that plaintiff failed to state a cause of action under Illinois law, a matter to be considered under section 2-615. It is clear, however, from defendants' memorandum in support of the motion that the challenge to count X was brought under section 2-615 of the Code. The trial court's dismissal order readily reflects that it also understood it was dismissing count X pursuant to section 2-615 of the Code.

¶ 18 As to count XII, plaintiff states defendants' motion to dismiss improperly references the "Morris Lawsuit," another one of plaintiff's pending cases. He urges that defendants asserted the

existence of the other lawsuit, but did not properly argue estoppel, *res judicata*, or other preclusive effect of any other lawsuit, and thereby confused the basis of the motion. It is readily apparent, however, that defendants did not raise the “Morris Lawsuit” for its preclusive effect. Instead, defendants’ argument with respect to the “Morris Lawsuit” indicated that defendants were not those responsible for the economic interference plaintiff alleged, undermining his factual allegations in Count XII. At the very least, defendants correctly argue that the complaint failed make any affirmative allegations that defendants interfered with his economic relations with Grundy and Morris.

¶ 19 Plaintiff argues that defendants’ objection to count VII was improper because defendants improperly argued evidentiary matters under section 2-615 rather than section 2-619. In count VII, plaintiff alleged that defendants committed fraud because they misrepresented to Delnor that a backup doctor plaintiff suggested would not serve as his alternate on Delnor’s medical staff. We believe that plaintiff’s argument on review is misguided because, as defendants note, it was still plaintiff’s duty to secure his backup and that was the ultimate reason he lost his privileges at Delnor.

¶ 20 Nevertheless, even if we were to grant that impermissible commingling occurred on any of these counts, we need not reverse the trial court’s decision absent prejudice to the nonmovant. See *Northern Trust Co.*, 356 Ill. App. 3d at 278. Plaintiff’s brief omits any discussion concerning prejudice other than the bald assertion that it “should be inferred *a fortiori* in the case at bar since the appellant in the lower court appeared *pro se* in this law suit.” It is not exactly clear what plaintiff is arguing here. An argument *a fortiori* moves from the premise that the property existing in one thing provides a greater basis for concluding that the same property exists in another thing. See *Black’s Law Dictionary* 65 (8th ed. 2004) (“by even greater force of logic; even more so”). For the

argument to make sense, however, being *pro se* must be the greater or lesser of some comparison. Plaintiff does not provide it nor imply a proposition which allows an *a fortiori* inference to be drawn.

¶ 21 Despite its logical flaws, plaintiff's claim remains unsubstantiated by any legal argument or authority. It is well-established that a reviewing court must have pertinent authority cited to it, and "is not simply a depository into which an appealing party may dump the burden of argument and research." *In re Estate of Thorp*, 282 Ill. App. 3d 612, 616 (1996). Plaintiff's argument that he was prejudiced by commingled counts, therefore, is forfeited for not appropriately setting forth appropriate argument and authorities in support of his proposition. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); see also *Byrd v. Hamer*, 408 Ill. App. 3d 467, 487 (2011).

¶ 22 We hold, therefore, that the trial court's dismissal of counts VII, X, XI, XII, XIII, and XIV was proper and it was not an abuse of discretion to dismiss them with prejudice.

¶ 23 Next, plaintiff argues that, even if some of his counts were insufficient, he should have been allowed leave to amend. Plaintiff concedes he failed to adequately plead in count II that he was owed a fiduciary duty, but urges he should have been granted leave to amend. He also urges that the trial court should have granted him leave to amend counts XIII and XIV, which concerned allegations of interference with his business relationships with Illinois Radiology Group and the Lincoln Center. We are not persuaded.

¶ 24 While courts are encouraged to liberally allow amendments to pleadings, the right to amend is not absolute. *Lake County Grading Co. of Libertyville, Inc. v. Advance Medical Contactors, Inc.*, 275 Ill. App. 3d 452, 460 (1995). The decision to allow a party to amend a pleading rests within the sound discretion of the trial court, and we will not disturb its decision absent an abuse of discretion. *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992).

¶ 25 In this case, plaintiff does not develop any substantive argument that the trial court abused its discretion other than citing the general legal principles of when leave to amend should be granted. He offers no alternative set of facts which would substantiate how defendants interfered with the business relationships, nor does he explain how the causes of action could be established under the facts of this case. Given the entire context, we cannot agree that no reasonable person could take the view the trial court adopted. Therefore, the trial court did not abuse its discretion when it determined that no viable cause of action could be pleaded on counts II, XIII, and XIV.

¶ 26 Plaintiff argues that count XV should have been dismissed without prejudice so he could exhaust his administrative remedies. He argues the trial court abused its discretion for this reason. We agree with defendants, however, that plaintiff lacked a viable cause of action for wrongful termination in violation of public policy, because he never alleged that he was discharged in opposition of a clearly mandated public policy. See *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 503 (2009) (citing *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 505 (1991)). The trial court, therefore did not err when it dismissed count XV with prejudice.

¶ 27 Lastly, plaintiff makes some argument concerning Count IV, but it is unclear whether he is urging that it was sufficient at law, improperly commingled, or whether he should have been granted leave to amend. In any case, the record reflects that plaintiff should not have had any reasonable expectation of continuing his relationship with Delnor because the employment agreement required him to resign his staff privileges. The trial court therefore did not err when it dismissed count IV with prejudice.

¶ 28 Turning now to defendants' contentions on cross-appeal, defendants first argue that the trial court should have granted their motion to strike for the purposes of consistency and to send a

message that there was not a set of facts under which plaintiff could prevail. We review the decision to strike portions of plaintiff's reply for an abuse of discretion. *Filliung v. Adams*, 387 Ill. App. 3d 40, 50 (2008). Defendants have presented no case law or other legal authority in support of their contention. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006). Based on our review of the record and defendant's arguments in their cross-appeal, defendants do not give us any substantive or persuasive reasons to believe the trial court abused its discretion when it denied defendants' motion to strike. We decline to hold otherwise.

¶ 29 Second, defendants contend that the trial court abused its discretion in failing to sanction plaintiff. Rule 137 permits the trial court to award sanctions against parties who file frivolous pleadings that have no basis in fact or law. Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). The trial court's decision to impose, or not to impose, sanctions under Rule 137 is entitled to great weight on appeal and will not be disturbed absent an abuse of discretion. *Benson v. Stafford*, 407 Ill. App. 3d 902, 928 (2010). In this case, notwithstanding plaintiff's other pending lawsuits which may have contradicted allegations in this complaint, plaintiff's claims were unsuccessful, but not frivolous. The facts do not support a finding that plaintiff's grievances were not made in good faith or were interposed for an improper purpose. Based on our review of the record, we see no basis to conclude that the trial court abused its discretion when it declined defendants' request for sanctions.

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 31 Affirmed.