2012 IL App (1st) 113199-U

FOURTH DIVISION
August 16, 2012

No. 1-11-3199

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
FIRST JUDICIAL DISTRICT

PANAYIOTIS EVANGELOU	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 11 L 000647
	)	
DIMONTE & LIZAK, LLC,	)	Honorable
	)	Jennifer Duncan-Brice,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's pleading of the proximate cause element of a legal malpractice cause of action was sufficient to withstand a section 2-615 motion to dismiss because he alleged that defendant failed to bring viable claims directly against individuals named as defendants in the underlying litigation before the circuit court entered its final judgment while plaintiff was still represented by defendant.

¶ 2 Plaintiff-appellant Panayiotis Evangelou appeals the dismissal of his legal malpractice complaint against DiMonte & Lizak, LLC (D & L) pursuant to section 2-615 of the Illinois Code

of Civil Procedure (735 ILCS 5/2-615 (West 2010)). In the underlying litigation, the circuit court entered a monetary judgment in Evangelou's favor against KAR Petroleum Group, LLC (KAR), a limited liability company of which he was a member. The circuit court granted D & L's motion to withdraw as Evangelou's counsel after entry of the monetary judgment and Evangelou retained successor counsel to collect the judgment. The monetary judgment entered against KAR was not collected because KAR lacked assets to satisfy the judgment. Evangelou commenced a legal malpractice action against D & L alleging that it failed to pursue claims directly against the other members of KAR in the underlying proceeding. The circuit court granted D & L's section 2-615 motion to dismiss finding that Evangelou failed to plead proximate cause as a matter of law because his successor counsel's failure to pursue claims against the individuals was an intervening, superseding cause of his damages. Evangelou claims on appeal that the doctrine of *res judicata* barred any claim directly against the other members of KAR after the circuit court entered its final judgment on the merits of the counts he raised in the complaint during the underlying proceedings. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Prior to October 15, 2002, Clark Retail Enterprises, Inc. ("CRE") owned a gas station located at 9340 W. Irving Park Road in Schiller Park, Illinois, also known as store 2039. On approximately October 15, 2002, CRE filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code, and offered the gas station for sale, which included the lease on the station and all inventory and personal property. Pursuant to the bankruptcy proceedings, parties interested in

purchasing the gas station were required to submit a sealed bid.

¶ 5 In July 2003, Evangelou, James Karfis, Alex Karfis, Andreas Lappas and Apostolos Lappas (hereinafter collectively referred to as "KAR Members") verbally agreed to become partners for the purpose of acquiring store 2039 and another gas station. According to the verbal agreement, if the KAR Members were successful in acquiring the gas stations, they would then form a formal partnership or corporate entity to own and operate the gas station businesses. The members further agreed that if their bid was successful, they would collectively contribute the funds or arrange for the financing to acquire the assets from CRE. On behalf of the KAR Members, James Karfis submitted a bid, including a deposit of $33,750, to acquire two of the gas stations offered for sale through the bankruptcy proceeding.

¶ 6 On approximately July 9, 2003, James Karfis learned that the bid offered for store 2039 was successful. The bid amount totaled $580,000, which consisted of $500,000 for the lease and $80,000 for the inventory. The KAR Members were required to remit the bid purchase price in a short period of time to prevent losing the deposit submitted with the bid. Evangelou agreed to loan $250,000 (loan) toward the purchase price of the gas station, but to do so, he personally borrowed $250,000 from Ted Spyropoulos, a third party, and agreed to repay the amount within 90 days. On August 14, 2003, KAR was organized as an Illinois limited liability company for the purpose of owing and operating the gas station business. Evangelou owned 30% of KAR, and "until repayment of the personal loan from Mr. Ted Spyropoulos, which is due and payable in 90 days from August 15, 2003, [he] will have controlling interest in the management of the business." These terms were memorialized in the "Agreement" dated August 14, 2003, which

signed by Evangelou, Jimmy Karfis, Alex Karfis, Apostolos Lappas and Andy Lappas.

¶ 7 On August 15, 2003, CRE assigned the gas station lease to James Karfis through an Assignment and Assumption of Lease. CRE also executed and delivered to him a bill of sale for the inventory and personal property for the gas station.

¶ 8 KAR did not repay the $250,000 loan to Evangelou within 90 days of the Agreement's date. On October 31, 2003, Evangelou personally repaid the $250,000 loan to Spyropoulos. KAR submitted intermittent payments to Evangelou and reduced the loan balance to $192,857, before payments ceased. No operating agreement was executed by the KAR Members, and James Karfis failed to transfer to KAR the lease that CRE previously transferred to him.

¶ 9 On June 2, 2005, Evangelou retained D & L. On December 13, 2006, D & L filed a four count complaint for equitable relief on behalf of Evangelou, individually, and derivatively on behalf of KAR. The complaint included the following counts: (1) derivative action for a resulting trust and recovery of costs; (2) derivative action for a constructive trust and recovery of costs; (3) action to dissolve KAR; and (4) action against KAR on the promissory note. The trial date was set for June 2, 2008. In May 2008, the parties attempted to reach a settlement, but negotiations fell through on May 30, 2008. D & L filed an emergency motion to continue the trial, which the circuit court denied. On June 2, 2008, D & L voluntarily dismissed the complaint, and D & L filed a motion to reconsider the denial of the continuance, which the circuit court denied. On June 27, 2008, D & L refiled the complaint, which added a count against KAR to enforce the loan agreement and a count for the loan's repayment pursuant to the member and manager's right to payments and reimbursement section of the Limited Liability Act

(805 ILCS 180/15-7 (West 2010)). On January 16, 2009, the circuit court entered judgment in favor of Evangelou and against KAR in the sum of $192,857, plus $54,128.95 in attorneys fees and $4,955.59 in costs, for a total of $251,941.54. The circuit court also ordered James Karfis to execute an assignment of the gas station's assets, including the lease, to KAR no later than January 28, 2009. The circuit court did not rule on the counts seeking a constructive trust and dissolution of KAR because Evangelou did not present evidence to support those counts and did not seek the relief set forth in the complaint relating to those counts. The circuit court also did not rule upon the count seeking a loan repayment under the Limited Liability Act that was pled in the alternative to the action against KAR on the promissory note. In the order, the circuit court held that "there is no just reason to delay either the enforcement or appeal of the money judgments entered on Counts IV and V of the complaint." The circuit court also held that "The sole remaining unresolved issue after entry of this order is compliance by Jimmy Karfis with the judgment entered on Counts I and II of the Complaint requiring specific performance by him. The legal and factual issues raised in Counts I and II are distinct from the issues raised in the other counts of the complaint."

¶ 10 On May 15, 2009, D & L sent Evangelou a letter responding to his inquiry about whether a lien was imposed against KAR relating to the judgment that was entered against it in the circuit court's January 16, 2009 order. This letter stated that during a meeting to discuss enforcement of the judgment, Evangelou instructed it "not to do anything else on your behalf. We honored your instruction." The letter continued by stating that:

"We did not record a Memorandum of Judgment with the Recorders Office

because you instructed us to do nothing further. In addition, a Memorandum of Judgment acts as a lien against Real Estate owned by the Defendant in that county. We are under the impression that KAR does not hold title to real estate in any county in Illinois. You did not advise us to the contrary. If you are aware that KAR does in fact hold title to property in Cook County or any other County in Illinois, you should take steps to record a Memorandum of Judgment. You should hire another lawyer to do so as we no longer represent you."

¶ 11 On August 9, 2010, the circuit court granted D & L's motion to withdraw as Evangelou's attorney. Evangelou retained Barnes & Thornburg, but that firm filed a motion to withdraw, which the circuit court granted on October 13, 2010. Evangelou was then represented by the Law Office of Peter Stamatis. Because the judgment entered against KAR was not collected, Evangelou filed a two count legal malpractice action against D & L. Evangelou asserted that D & L committed legal malpractice because it did not bring an action against the KAR Members personally and he is now barred from asserting direct claims against them under the principles of *res judicata* since the claims could have been raised in the prior litigation. Evangelou also asserted that had the claims been brought against the KAR Members directly, he would have been able to collect the default judgment because they possess substantial personal assets. Thus, Evangelou claimed that D & L directly and proximately caused him to suffer damages. D & L filed a section 2-615 motion to dismiss asserting that Evangelou cannot plead that it was a proximate cause of his injuries as a matter of law because his successor counsel's failure to pursue claims against the KAR Members directly constitutes an intervening, superseding cause

of any alleged damages. On July 15, 2011, the circuit court granted D & L's motion to dismiss finding that Evangelou's complaint cannot state a cause of action for legal malpractice because the successor counsel's failure to pursue direct claims against the KAR Members constituted an intervening, superseding cause of any claimed damages. Evangelou filed a motion to reconsider on August 15, 2011, which the circuit court denied on October 15, 2011. Evangelou timely appealed.

¶ 12 ANALYSIS

¶ 13 Evangelou claims on appeal that the circuit court erred in dismissing his legal malpractice complaint on the basis that he failed to plead facts establishing that D & L was the proximate cause of his injuries because successor counsel did not pursue claims against the KAR Members directly. Evangelou contends that the doctrine of *res judicata* precluded his subsequent counsel from raising new claims directly against the KAR Members because any claims that he had against the members could have been raised in the prior litigation.

¶ 14 A section 2-615 motion to dismiss attacks "the legal sufficiency of a complaint based on defects apparent on its face." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). A circuit court should grant a section 2-615 motion to dismiss only if "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Id.* When ruling on a section 2-615 motion to dismiss, a circuit court may consider only the "facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record." *Id.* A court must accept as "true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." *Id.* Mere conclusions of law or facts

unsupported by specific factual allegations in a complaint are insufficient to withstand a section 2-615 motion to dismiss. *Id*. This court reviews the circuit court's granting of a section 2-615 motion to dismiss *de novo*. *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 54 (2011).

¶ 15 For a plaintiff to prevail on a legal malpractice claim, he must plead and prove that his counsel owed him a duty of care arising from the attorney-client relationship, that counsel breached that duty, and that as a proximate result of the breach, he suffered an injury. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 225 (2006). The attorney's negligence must have proximately caused damages to the plaintiff for him to prevail on a legal malpractice count. *Id.* The plaintiff's burden is to plead "facts which, if true, establish a proximate causal relationship between the negligence of the attorney and the damages alleged to have been suffered as a consequence thereof." *Metrick v. Chatz*, 266 Ill. App. 3d 649, 654 (1994).

¶ 16 The proximate cause element is in dispute here and we must determine whether Evangelou sufficiently pled that element to withstand a section 2-615 motion to dismiss. In his complaint, Evangelou pled the following:

> "49. Had D & L brought direct claims against the Individual Defendants and prepared for trial, Evangelou would have obtained a collectible judgment against the Individual Defendants.
>
> 50. D & L's negligence has been the direct and proximate cause of the injuries Evangelou has suffered. Evangelou has sustained significant actual damages in that he has been left with an uncollectible judgment in the amount of $251,941.54."

¶ 17 D & L filed a section 2-615 motion to dismiss asserting that its alleged negligence cannot

be the proximate cause of Evangelou's damages as a matter of law because after its discharge, Evangelou's successor counsel failed to pursue viable claims. D & L raises this same assertion on appeal as its response. D & L also responds that Evangelou discharged D & L as his attorneys in May 2009 and retained subsequent counsel while the underlying litigation was still pending. D & L further responds that Evangelou and his subsequent attorney had a duty to pursue claims against the KAR Members directly, and their failure to do so constitutes an intervening, superseding cause of Evangelou's alleged damages as a matter of law.

¶ 18 Illinois law establishes that an attorney's negligence is not the proximate cause of a client's damages where a cause of action remained viable after the attorney's discharge. *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 622 (2002). To determine the sufficiency of the proximate cause element set forth in Evangelou's complaint, we must analyze whether viable claims directly against the KAR Members existed when Evangelou retained subsequent counsel after D & L ceased representing him or whether any potential claims were barred by the doctrine of *res judicata*.

¶ 19 The doctrine of *res judicata* bars a subsequent suit between the same parties involving the same cause of action when a final judgment on the merits of a claim was rendered by a court of competent jurisdiction. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶56. *Res judicata* bars not only what was actually decided in the prior litigation, but also matters that could have been decided in the prior suit. *Id.*; *Altair Corp. v. Grand Premier Trust & Investment*, 318 Ill. App. 3d 57, 61 (2000). The following three requirements must be established for *res judicata* to apply: "(1) a final judgment on the merits rendered by a court of

competent jurisdiction; (2) an identity of cause of action; and (3) an identity of parties, or their privies." *Crossroads Ford Truck Sales, Inc.*, 2011 IL 111611, ¶56.

¶ 20 Turning to the first element of *res judicata*, we agree with Evangelou that the circuit court's January 16, 2009 order was a final judgment. The term "judgment" is defined as "[t]he final decision of the court resolving the dispute and determining the rights and obligations of the parties." *McDonald v. Health Care Service Corp.*, 2012 IL App (2d) 110779, ¶21. The parties do not dispute that the circuit court's January 16, 2009 order was final regarding counts IV and V because the circuit court expressly stated in its order that "there is no just reason to delay either the enforcement or appeal of the money judgments entered on Counts IV and V of the Complaint." In its motion to dismiss, D & L further acknowledged that "judgment was entered in favor of plaintiff on counts I, II, IV and V" and that count III was voluntarily dismissed without prejudice. However, D & L claims that the January 16, 2009 order was not a final judgment because count VI of the complaint was not ruled upon by the circuit court. D & L maintains that count VI set forth a statutory claim for relief whereas counts IV and V set forth a common law claim for relief and this difference required the circuit court to enter a ruling regarding count VI, which was pled in the alternative to counts IV and V. We disagree.

¶ 21 Count VI of Evangelou's complaint raised a claim for the loan's repayment pursuant to the member and manager's right to payments and reimbursement section of the Limited Liability Company Act. D & L correctly classifies this count as a statutory count, but Evangelou stated in his complaint that he was bringing this cause of action "as an alternative to the causes of action alleged in Counts IV and V." The circuit court's entry of judgment in Evangelou's favor as to

counts IV and V eliminated the need for it to rule upon the alternative theory of recovery to those counts, which was set forth in count VI. Thus, the lack of a ruling as to count VI, which was pled in the alternative, does not preclude the order from being considered a final judgment.

¶ 22 Also, Evangelou withdrew count III of the complaint as he did not present evidence relating to that claim. Because the circuit court's order adjudicated the merits of Evangelou's claims and entered judgment on counts I, II, IV and V, it was a final judgment. The circuit court set for a status hearing compliance with its order of specific performance as to count I, but, it, nonetheless, adjudicated the merits of that count when it stated that "as to Count I of the Complaint, judgment is entered in favor of KAR Petroleum Group, LLC, acting derivatively through Panayiotis Evangelou." The circuit court also directed James Karfis to "execute an assignment of the Store 2039 Assets, including the Lease, to KAR Petroleum Group, LLC no later than January 28, 2009." Even though the circuit court set a date for a status hearing "to determine the status of compliance by Defendant James Karfis with Paragraph 3 of this judgment order," the fact remains that it entered an order adjudicating the merits of the claims in Evangelou's complaint. Moreover, the ability for KAR and the KAR Members to move to vacate the order or file a section 2-1401 petition does not preclude the circuit court's January 16, 2009 order from being final as those pleadings seek to vacate the judgment that was entered by the circuit court. Accordingly, we conclude that the circuit court's January 16, 2009 order was a final judgment.

¶ 23 Next, we must determine whether there is an "identity of parties." Reviewing the complaint, we note that the following are listed as defendants: KAR Petroleum Group, LLC;

James Karfis; Alex Karfis; Andreas Lappas; and Apostolos Lappas. We also note that under section A entitled "Parties" of the common allegations section of the complaint, the following are identified as parties to the complaint: KAR; Evangelou; James Karfis; Alex Karfis; Andreas Lappas; and Apostolos Lappas. We further note that in the circuit court's January 16, 2009 order, it entered judgment "against all defendants" as to counts I and II of the complaint. Based on these facts, the parties in the circuit court's January 16, 2009 order would be the same as those in a cause of action that Evangelou would have brought against the KAR Members directly.

¶ 24 Finally, we must consider whether an "identity of cause of action" exists. We apply the transactional test to determine this element, which states that "separate claims will be considered the same cause of action for purposes of *res judicata* if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). Here, the KAR Members, including Evangelou, agreed to submit a bid to purchase the assets of a gas station in a bankruptcy proceeding. The KAR Members also agreed that Evangelou owned 30% of the business relating to the purchase of the gas station's assets. The KAR Members further agreed that "Until repayment of the personal loan from Mr. Ted Spyropoulos, which is due and payable in 90 days from August 15th 2003, Panayiotis Evangelou will have controlling interest in the management of the business." Evangelou commenced the underlying legal proceeding because the personal loan was not repaid and the lease relating to the gas station was not formally transferred to KAR. The basis of Evangelou's legal malpractice claim is that D & L failed to bring a cause of action directly against the KAR Members, who failed to: (1) ensure that the personal loan was repaid;

(2) follow any corporate formalities and dominated the business operating it as their own; (3) execute the operating agreement; and (4) assign the gas station's lease to KAR. Thus, the facts surrounding the purchase of the gas station, the failure to comply with the Agreement's terms and the failure to repay the loan comprise the same group of operative facts forming the basis of the claims brought against KAR and the KAR Members individually, if any claims against them had been filed. See *AGOLF, LLC v. Village of Arlington Heights*, 409 Ill. App. 3d 211, 219 (2011) (finding a suit by different parties raising identical allegations against a defendant challenging the defendant's enactment of a tax increment financing district and a redevelopment project amounted to an "identity of cause of action"); (*Goodman v. Hanson*, 408 Ill. App. 3d 285, 300 (2011) (finding that a lawsuit for legal malpractice based on an attorney's failure to file an Illinois estate and generation-skipping transfer tax return and a second suit filed based on the attorney's failure to take allowable deductions on the federal estate tax return were considered the same cause of action because the lawsuits concerned the administration of the decedent's estate and trust). Accordingly, an "identity of cause of action" relating to the purchase of the gas station exists regarding Evangelou's claims against KAR and the KAR Members directly.

¶ 25 In sum, any new claims that a successor attorney would have filed against the KAR Members directly would have likely been barred by the doctrine of *res judicata* because the circuit court's January 16, 2009 order was a final judgment, the other members of KAR were named in the underlying complaint as defendants, and the purchase of the gas station, the failure to comply with the Agreement's terms and the failure to repay the loan comprise the common set of operative facts between the claims raised in the complaint and those that could have been

raised against the KAR Members directly.

¶ 26 We, nonetheless, must still address whether a viable claim existed when D & L withdrew and Evangelou obtained successor counsel. Evangelou contends that no viable claims existed because any claim would have been barred by *res judicata*. D & L responds that successor counsel should have amended the complaint to add claims directly against the KAR Members. After the entry of a final judgment, pleadings may be amended only to conform the pleadings to the proofs pursuant to section 2-616(c) of the Code of Civil Procedure (735 ILCS 5/2-616(c) (West 2010)). *Mandel v. Hernandez*, 404 Ill. App. 3d 701, 707 (2010). A party, however, may not add claims or causes of action under section 2-616(c) after judgment was entered that were available at the time of the original complaint. *Id.* at 708.

¶ 27 In the case *sub judice*, any meritorious claims against the KAR Members directly would have been available at the time of the original complaint, or before the circuit court entered judgment on the merits of Evangelou's claims while D & L was his counsel. The existence of potential claims against the KAR Members directly is revealed in Evangelou's legal malpractice complaint. There, Evangelou alleges that Alex Karfis, in his deposition taken in the underlying litigation, stated, with regards to the execution of an operating agreement, that "James Antonopoulos had asked – I was at his office one day – and he says, 'Look what Peter is trying to do. He's trying to prepare that document.' I said, 'Well, it's good for him. I'm not signing nothing. Nobody else is.' " Also, during James Karfis' deposition, he stated that when Evangelou asked him to assign the gas station lease to KAR, he responded that "You have to talk with everybody else. And the other parties didn't want to do it." James Karfis further stated that he

wanted to leave the lease as it was and that "Everyone wanted to stay the same way as it was, as when we first got it." Alex Karfis testified during his deposition that he had all of the control of the business as of its commencement date. Based on these statements, viable claims against the KAR Members directly regarding the operation of the business that Evangelou was to have controlling interest of and the failure to assign the lease appear to have existed prior to the circuit court's entry of judgment on Evangelou's complaint. Moreover, Evangelou asserted in his legal malpractice complaint that D & L was negligent because it failed to bring claims directly against the KAR Members relating to their breach of an oral loan agreement. Specifically, he asserted that in exchange for the $250,000 loan that he agreed to make, the KAR Members promised him that they would repay the loan within 90 days, and assign the lease back to an LLC that would be formed to include all of the individuals as members. He also alleged that despite the oral and written agreements between him and the other KAR Members, they did not repay the $250,000 loan that he made to KAR. Thus, viable breach of contract claims against the KAR Members directly existed before the circuit court's entry of judgment on the claims in Evangelou's complaint and during D & L's representation of Evangelou. Because potential claims against the KAR Members existed at the time of the complaint or before the circuit court entered judgment disposing of the merits of Evangelou's claims, successor counsel's failure to file a motion pursuant to section 2-616(c) to amend the complaint to bring claims against the KAR Members directly was not an intervening, superseding cause of the alleged damages suffered by Evangelou.

¶ 28 D & L further claims that because the underlying litigation was pending when it withdrew its representation of Evangelou, his successor counsel had the duty to pursue claims against the

KAR Members directly. The record supports D& L's assertion that the matter was still pending when Evangelou retained successive counsel because it was not yet determined whether the specific performance that the circuit court ordered relating to count I was performed. However, compliance with an order of specific performance does not preclude a finding that the trial court entered judgment as to that count. A circuit court's judgment "is final if it determines the litigation on the merits so that the only step remaining is proceeding with the execution of the judgment." *Catlett v. Novak*, 116 Ill. 2d 63, 68 (1987). A circuit court's order for specific performance generally "becomes final and appealable immediately following its issuance by the court." *Djikas v. Grafft*, 344 Ill. App. 3d 1, 8 (2003).

¶ 29 Here, the circuit court entered a monetary judgment in Evangelou's favor in the amount of $251,941.54 and it also ordered James Karfis to transfer the gas station's lease to KAR. The circuit court set a hearing date to determine James Karfis' compliance with its order for specific performance, but no issues raised in the pleadings were left open or were held over by the circuit court. Nothing remained pending except the execution of the circuit court's judgment. See *Id.* at 9 (stating that "there is ample precedent demonstrating that the requisite finality for purposes of filing a notice of appeal is achieved when the order for specific performance is granted and not on the arrival date set for its enforcement or execution.") Although the circuit court stated that the only issue remaining was compliance with its order of specific performance and it set a hearing date to determine that compliance, a circuit court always implicitly retains jurisdiction to enforce its orders, which does not affect the finality of the order. *Id.* at 11. Thus, merely because the execution of the circuit court's specific performance order was pending, that does not

preclude the circuit court's January 16, 2009 order from being a final judgment on the merits of Evangelou's claims.

¶ 30 Lastly, D & L relies on *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618 (2002) and *Land v. Greenwood,* 133 Ill. App. 3d 537 (1985), as support for the proposition that discharged counsel is not the proximate cause of a plaintiff's damages if a viable claim exists when the former client retains subsequent counsel. Those cases, however, are distinguishable.

¶ 31 In *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill. App. 3d 618, 619 (2002), the plaintiff's case was dismissed for want of prosecution. Upon learning of the dismissal, the plaintiff retained subsequent counsel who filed a legal malpractice cause of action against the prior counsel. *Id.* This court held that the plaintiff had an absolute right to refile the case within one year of the dismissal, and successor counsel had from January 1992 to 1994 to refile the cause of action. *Id.* at 622. Because the plaintiff's case could have been refiled after successor counsel was retained, this court held that the plaintiff's cause of action was viable, as a matter of law, after the defendants were discharged. *Id.* This court stated that prior counsel's alleged negligence did not cause plaintiff's damages, which was the loss of a viable cause of action. *Id.*

¶ 32 In *Land,* after the plaintiff discharged his attorney and retained subsequent counsel, that counsel obtained service of process on the defendants in the plaintiff's personal injury suit. *Land*, 133 Ill. App. 3d at 539. The circuit court, however, dismissed the plaintiff's suit with prejudice because he failed to obtain a summons on the defendants within a reasonable time. *Id.* The plaintiff's subsequent attorney commenced a legal malpractice action against the first attorney, who responded by filing a motion to dismiss pursuant to section 2-619(a)(9), which the circuit

court granted. *Id.* at 538. This court stated that "successor counsel had the duty to preserve his client's cause of action. It was viable when he received it; it was not when he got through with it." *Id.* at 540.

¶ 33 Unlike in *Mitchell* and *Land* where the circuit court had not entered a judgment on the merits of the plaintiff's cause of action when the plaintiff retained subsequent counsel, the circuit court, here, rendered its judgment on Evangelou's claims before D & L was discharged. Thus, when Evangelou's subsequent attorney was retained, he was charged with the responsibility of collecting the judgment entered in Evangelou's favor and against KAR, but not to litigate the merits of his claims, which were already ruled upon by the circuit court when he was retained.

¶ 34 A section 2-615 motion to dismiss should be granted "only where the plaintiff can prove no set of facts to support the cause of action asserted." *Herrera-Corral v. Hyman*, 408 Ill. App. 3d 672, 674 (2011). Accepting as true all well-pled facts and all reasonable inferences that may be drawn from those facts, we conclude that Evangelou sufficiently pled the elements of a legal malpractice cause of action in his complaint sufficient to withstand a section 2-615 motion to dismiss. Specifically, Evangelou pled in the legal malpractice complaint that but for D & L's failure to bring claims directly against the KAR Members, he would have obtained a collectible judgment against them, which was supported by Evangelou's allegation that James Karfis listed his net worth as $3,386,000 on the gas station bid offer form. Moreover, Evangelou's subsequent counsel's failure to pursue claims directly against the KAR Members was not an intervening, superseding cause of Evangelou's alleged damages because claims against the KAR Members were barred by *res judicata* after the circuit court's January 16, 2009 order entering final

judgment on the claims in his complaint. Accordingly, the circuit court erred in granting D & L's section 2-615 motion to dismiss on the basis that Evangelou failed to plead proximate cause as a matter of law. We, however, render no opinion regarding the likelihood of success on the merits of Evangelou's legal malpractice claims. Instead, we limit our conclusion to a finding that he has stated the elements of a legal malpractice cause of action sufficient to withstand D & L's section 2-615 motion to dismiss.

¶ 35 CONCLUSION

¶ 36 For the reasons stated, we reverse the circuit court's grant of D & L's section 2-615 motion to dismiss Evangelou's complaint, and remand for further proceedings consistent with this order.

¶ 37 Reversed; cause remanded.