

FIFTH DIVISION
June 28, 2013

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

ALEXANDER HERGAN,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 11 L 5226
)	
PAWLAN LAW, LLC, MITCHELL D. PAWLAN,)	
and GLENNA MO,)	Honorable
)	Raymond Mitchell,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *HELD:* The trial court's order granting defendants' section 2-619(a)(3) motions to dismiss is affirmed because the same parties and same causes are currently at issue in four other lawsuits.

¶ 2 Plaintiff Alexander Hergan appeals from a circuit court order granting motions to dismiss the complaint filed against

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defendants Pawlan Law, LLC, Mitchell D. Pawlan and Glenna Mo. The trial court found Hergan's lawsuit duplicative on the basis that the same parties and same causes are at issue in other lawsuits (735 ILCS 5/2-619 (a) (3) (West 2010)).

¶ 3 Hergan argues that the trial court improperly granted defendants' section 2-619(a) (3) motions to dismiss because: (1) the defendants failed to establish the pending lawsuits consist of the same cause and the same parties as the instant action and (2) the *Kellerman* factors favored denial of the section 2-619(a) (3) motions to dismiss. Hergan also claims the trial court committed reversible error when it denied his motion to reconsider its order granting the defendants' section 2-619(a) (3) motions to dismiss.

¶ 4 For the reasons set forth below, we affirm the decision of the circuit court.

¶ 5 BACKGROUND

¶ 6 The pleadings disclose plaintiff Alexander Hergan, defendant Glenna Mo, and other investors formed Rhombus Asset Management, Inc. (Rhombus), in 1998 for the purpose of developing real estate in Central Europe, primarily in Romania. To facilitate their business in Romania, the group created additional European corporations, including Central and Eastern European Investment, Ltd. (CEEIF), and others known as the

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Romanian Group of Companies. Hergan, Mo and the other investors contributed their own money to fund these ventures.

¶ 7 The investors held a series of meetings between June 6 and June 10, 2006, in Romania to determine if Mo's interest in those entities should be increased and if so, how much. Mo hired defendant Mitchell Pawlan, an attorney, to attend the meetings as her consultant. In his complaint, Hergan alleged Pawlan made representations to the group of investors that he was a neutral participant in the meetings and would not act as Mo's attorney. Pawlan presented the investors with an agreement he drafted authorizing greater equity and participation for Mo in the various real estate investment firms.

¶ 8 During the formation of Rhombus in 1998, Mo made a series of loans to Hergan allegedly to enable him to participate in the venture. On June 9, 2006, Pawlan met separately with Hergan to negotiate the repayment of Hergan's outstanding debt to Mo. During the negotiations, a dispute arose about which loans were paid and which were unpaid.

¶ 9 Pawlan allegedly told Hergan that he would send him documents to substantiate the loan debts that were unpaid and after reviewing the documents, Hergan could dispute the nine loans scheduled in the loan agreement. Hergan alleged that Pawlan stated he had documentation to prove that the nine loans

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were unpaid but Pawlan did not have the documents in Romania. Pawlan drafted a loan agreement/promissary note where Hergan agreed to pay Mo for nine outstanding loan debts and Pawlan allegedly told Hergan he would be credited for the loans which could not be documented. Hergan signed the document on June 10, 2006, allegedly with the understanding that he would be later credited for any undocumented outstanding loans.

¶ 10 Subsequent to the meetings in Romania, several disputes arose over the terms of both the investor agreement and the Hergan/Mo loan agreement.

¶ 11 On February 13, 2007, Rhombus and CEEIF filed a lawsuit in the Circuit Court of Cook County, case number 07 CH 3966, against Mo and her company, Eastern Pioneer Capital Group, Inc., seeking a declaratory judgment to determine the extent of Mo's ownership interest in Rhombus and CEEIF and Mo and Eastern Pioneer's obligation to repay loans made by third-party investors to Mo and/or Eastern Pioneer. In the complaint, the plaintiffs allege they attempted to resolve their dispute with Mo at the meeting of investors in Romania. The plaintiffs allege Hergan and Pawlan attended the meetings and participated in negotiations. The plaintiffs alleged they believed an agreement among the investors had been reached and that after the meetings in Romania, Mo repudiated the agreement.

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¶ 12 Mo filed a lawsuit in the Circuit Court of Cook County, case number 07 L 8592, on August 15, 2007, against Hergan alleging breach of contract and unjust enrichment. Mo alleged Hergan breached their June 10, 2006, loan agreement formed in Romania, by only partially repaying her for the nine loans. Hergan responded to Mo's complaint, claiming he does not owe on four of the loans and previously paid another.

¶ 13 On May 29, 2008, Mo filed a \$50 million lawsuit in the Circuit Court of Cook County, case number 08 L 5888, against Hergan and other investors associated with Rhombus, CEEIF, and the Romanian Group of Companies, specifically stakeholders Mark Proskine, Edwin Warmerdam and PricewaterhouseCoopers. Mo alleged fraud, conversion and breach of fiduciary duty.

¶ 14 The three-count complaint at issue here was filed by Hergan in the Circuit Court of Cook County, as case number 11 L 5226, on May 20, 2011. Hergan alleged fraud in count I, breach of contract in count II and breach of fiduciary duty in count III. Specifically, Hergan alleged that in May of 2006, Mo retained Pawlan to help increase her ownership percentage in Rhombus and the Romanian Group of Companies based on her purported contributions to the companies. Hergan alleged Mo also retained Pawlan to help in obtaining repayment of loans Mo made to Hergan both before and after the Romanian companies were

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formed.

¶ 15 Hergan disputes four of the purported loans claimed by Mo. Hergan alleged that on June 30, 2006, relying on Pawlan's representations that he could reject loans that were actually repaid, Hergan rejected certain items reflected in the loan agreement and paid the rest by wiring the sum of \$862,098.63 to Mo as full and final payment of his outstanding loan obligations. At that time, Hergan did not realize that debt reflected as item 8 on the loan agreement had been paid pursuant to agreements dated June 26, 2001, and June 9, 2006. Hergan alleged he erroneously included it in the payment made on June 30, 2006. Hergan alleged he not only satisfied his obligations to Mo but overpaid by at least \$237,208.22 for item 8. Mo accepted Hergan's wire of \$862,098.63 but failed to return Hergan's property that served as security.

¶ 16 Hergan alleged that Mo and Pawlan committed fraud and breached their contract and fiduciary duties when they devised this loan agreement.

¶ 17 Hergan and Rhombus then filed another lawsuit, case number 11 CH 18495, on August 22, 2011, against Mo and Pawlan, making essentially the same allegations as in the instant case.

¶ 18 Pawlan and Mo filed section 2-619(a)(3) motions to dismiss the instant complaint. Under section 2-619(a)(3), a

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defendant may file a motion for dismissal of the action when "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2010).

¶ 19 The trial court considered the facts and allegations from the aforementioned lawsuits, except case number 11 CH 18495, in granting Pawlan's and Mo's section 2-619(a)(3) motions to dismiss the instant lawsuit on October 26, 2011. The trial court found:

"Three cases are currently pending in other courtrooms involving facts and transactions related to those alleged in Plaintiff's verified complaint before the Court. ***. The matter in Chancery is between Rhombus and Glenna Mo, and involves issues relating to loans made by Mo as well as her alleged ownership interest in Rhombus. ***. The 2007 matter in Law Division is solely between Mo and Hergan, and relates to the loans made by Mo. ***. The 2008 Law Division matter is between Mo and various defendants, including Hergan, and involves Mo's ownership interests in Rhombus and its related companies. ***. These matters clearly involve claims that

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arise out of the same facts and series of transactions between Mo, Hergan, and related parties to the matter before this Court, and contain common issues surrounding their joint venture, Rhombus and its related companies. Accordingly, dismissal under 2-619(a)(3) is proper."

¶ 20 On November 18, 2011, Hergan filed a motion to reconsider the trial court's grant of Pawlan's and Mo's motions to dismiss, arguing the trial court denied him an opportunity to respond to Mo's motion to dismiss. Further, Hergan claimed that Pawlan and Mo failed to establish that the other pending cases involve the same parties or the same causes. Hergan sought a clarification as to whether the trial court's order was meant to have a preclusive effect on Hergan bringing claims in other cases.

¶ 21 On November 29, 2011, the trial court issued an order clarifying that its October 26, 2011, order was not to have a preclusive effect on Hergan's claims in other forums and was not a judgment on the merits, but denied Hergan's motion to reconsider.

¶ 22 Hergan filed this timely appeal of the trial court's order from October 26, 2011, granting Pawlan's and Mo's section 2-619(a)(3) motions to dismiss.

¶ 23 ANALYSIS

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¶ 24 In this appeal, Hergan claims the trial court committed reversible error when it granted Pawlan's and Mo's section 2-619(a)(3) motions to dismiss because: (1) the defendants failed to establish the pending lawsuits constitute the same cause and involved the same parties as the instant action, and (2) the *Kellerman* factors favored denial of the section 2-619(a)(3) motions to dismiss; and (3) the trial court committed reversible error when it denied his motion to reconsider the court's order granting the defendants' section 2-619(a)(3) motions to dismiss.

¶ 25 We review a trial court's grant of a section 2-619(a)(3) motion to dismiss for an abuse of discretion. *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 852 (2010). An abuse of discretion occurs when the ruling is "arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Performance Network Solutions, Inc. v. Cyberklix U.S., Inc.*, 2012 IL App (1st) 110137, ¶27 (quoting *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815 (2008)).

¶ 26 Section 2-619(a)(3) is a procedural device designed to avoid duplicative litigation. *Whittmanhart*, 402 Ill. App. at 852. It is the burden of a section 2-619(a)(3) movant to demonstrate through clear and convincing evidence that the multiple actions involve the same parties and the same cause. *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶29.

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¶ 27 In defining whether the parties are the same, the parties need not be identical. *Kapoor v. Fujisawa Pharmaceutical Co., Ltd.*, 298 Ill. App. 3d 780, 786 (1998). The "same parties" requirement is satisfied where the litigants' interests are sufficiently similar, even if the litigants differ in name or number. *Id.*

¶ 28 In evaluating whether the multiple actions are for the same cause, a crucial inquiry is "whether the two actions arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof or relief sought materially differ between the two actions." *Id.* (quoting *Terracom Development Group v. Village of Westhaven*, 209 Ill. App. 3d 758, 762 (1991)).

¶ 29 Even if the "same parties" and the "same cause" requirements are met, section 2-619(a) (3) does not mandate automatic dismissal. *Performance Network Solutions*, 2012 IL App (1st) 110137, ¶33. The court should consider the four additional "Kellerman factors," which include: (1) comity, (2) the prevention of multiplicity, vexation, and harassment, (3) the likelihood of obtaining complete relief in a foreign jurisdiction, and (4) the *res judicata* effect of a foreign judgment in the local forum. *Id.* (citing *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447-48 (1986)).

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Courts are not required to apply all four *Kellerman* factors. *Id.*

¶ 30 Hergan argues that the instant action and the three other lawsuits are not comprised of the "same claim." However, under the "same cause" element of a section 2-619(a)(3) analysis, the trial court is required to determine whether the multiple actions arise out of the same transaction or occurrence, not whether each lawsuit is for the same exact claim. *Kapoor*, 298 Ill. App. 3d at 786. The record shows that the multiple actions here all arose out of the same transaction or occurrence - the investments entered into by a group of investors, including Hergan and Mo, the investor meetings in Romania, and the investor/loan agreements Pawlan drafted at the meetings in Romania.

¶ 31 Hergan argues case number 07 CH 3966 does not involve the same cause as the instant action. In 07 CH 3966, the plaintiffs alleged Pawlan served as Mo's counsel at the meetings in Romania and that the parties came to an agreement concerning ownership of the various investment firms. The plaintiffs alleged Mo repudiated the agreement formulated in Romania and in response, the plaintiffs sought a declaration as to Mo's ownership interests. The trial court is required to determine whether the multiple actions arise out of the same transaction or occurrence, not whether each lawsuit is for the same exact claim.

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Kapoor, 298 Ill. App. 3d at 786. The record shows that all the lawsuits involve disputes that relate back to the meetings in Romania. Accordingly, we cannot say the trial court's finding, that all the lawsuits involve the same cause as the instant action, is "arbitrary, fanciful, or unreasonable, or that no reasonable person would take the same view." *Performance Network Solutions, Inc.*, 2012 IL App (1st) 110137, ¶27.

¶ 32 We now turn to the four *Kellerman* factors. The first factor, comity, has been defined as "giving respect to the laws and judicial decisions of other jurisdictions out of deference." *Hapag-Lloyd (America) Inc. v. Home Insurance Co.*, 312 Ill. App. 3d 1087, 1096 (2000) (quoting *May v. SmithKline Beecham Clinical Laboratories, Inc.*, 304 Ill. App. 3d 242, 248 (1999)). Since all four lawsuits at issue here were filed in the Circuit Court of Cook County, the comity factor is not applicable.

¶ 33 The second *Kellerman* factor is the prevention of multiplicity, vexation, and harassment. The multiplicity factor is implicated because each of the four cases involves a dispute over the operation of the Romanian investments and the related loans. There is no evidence the lawsuits were filed for the purpose of vexation and harassment.

¶ 34 Hergan argues that a finding of multiplicity would force him to file counterclaims to get the relief he seeks in the

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other lawsuits. Hergan argues that Illinois' policy of avoiding duplicative litigation does not require the filing of a counterclaim.

¶ 35 Hergan's argument is not persuasive because the ultimate issue in Hergan's complaint is whether he owes Mo for all nine loan debts listed on the schedule from the loan agreement he signed in Romania. This is the same issue from Mo's lawsuit numbered 07 L 8592. In Hergan's answer to that lawsuit, Hergan made the same claims as he has made here. Therefore, we cannot say the trial court's ruling here forces Hergan to file a counterclaim to resolve the issues presented here. There is nothing in the record that shows Hergan will be unable to obtain complete relief through full adjudication of the other complaints. The record supports the trial court's finding of multiplicity.

¶ 36 The third *Kellerman* factor, the likelihood of obtaining complete relief in a foreign jurisdiction, and the fourth factor, the *res judicata* effect of a foreign judgment in the local forum, are not applicable because all four lawsuits were filed in the same forum.

¶ 37 Based on the record, we cannot say the trial court's ruling granting the defendants' section 2-619(a)(3) motions to dismiss was "arbitrary, fanciful, or unreasonable, or where no

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reasonable person would take the same view." *Favia*, 381 Ill. App. 3d at 815.

¶ 38 Hergan claims the trial court abused its discretion because the "same parties" requirement of section 2-619(a)(3) was not met because the Pawlan defendants are not a party defendant to the three lawsuits relied upon by the trial court in granting the defendants' motions to dismiss.

¶ 39 We acknowledge the trial court did not cite case number 11 CH 18495 in its order granting defendants' motions to dismiss. However, Pawlan referenced 11 CH 18495 in his motion to dismiss, attached a copy of the 11 CH 18495 complaint to his motion, and both are contained in the record in this case. We note that in case number 11 CH 18495, the Pawlan defendants are named as party defendants and the allegations in that case are essentially the same as in this case.

¶ 40 As a reviewing court, we can sustain the decision of the circuit court on any grounds which are called for by the record regardless of whether the circuit court relied on the grounds. *The Canada Life Assurance Co. v. Salwan*, 353 Ill. App. 3d 74, 79 (2004). Here, the defendants argued case number 11 CH 18495 was one of the duplicate cases and, therefore, this case should be dismissed pursuant to 2-619(a)(3). The issue of whether case number 11 CH 18495 involved the same parties and

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controversy was before the trial court, as it was named in Pawlan's motion to dismiss. The record shows that the allegations in 11 CH 18495 are essentially the same as the allegations in this case and involve the same parties, specifically the Pawlan defendants. Therefore, because the record supports the trial court's finding that the "same parties" requirement was satisfied, we affirm the finding of the circuit court.

¶ 41 Next, Hergan claims the trial court abused its discretion in denying his motion to reconsider. Hergan claims the trial court granted Mo's 2-619(a)(3) motion to dismiss before he had a chance to respond to the motion. Hergan responded to Pawlan's section 2-619(a)(3) motion to dismiss but did not respond to Mo's motion.

¶ 42 In support of his claim, Hergan relies on *Peterson v. Randhava*, 313 Ill. App. 3d 1 (2000). In *Peterson*, the defendant filed a motion requesting sanctions pursuant to supreme court rule 137. The trial court *sua sponte* found the motion in effect presented grounds for summary judgment and ordered judgment in favor of the defendant, though no motion for summary judgment was pending at the time. *Peterson*, 313 Ill. App. 3d at 9. The appellate court reversed, finding the trial court failed to follow its own local court rule requiring a 10-day period before

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the motion can be heard and notice given to the non-moving party.

¶ 43 The appellate court also found that the trial court failed to follow section 2-1005 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005 (West 1998)), allowing the nonmoving party time to respond to the motion. *Id.* at 11-12.

¶ 44 Here, unlike *Peterson*, the trial court did not *sua sponte* change one motion into another or *sua sponte* grant the motions to dismiss. The record shows that Hergan had notice of both motions and responded to Pawlan's motion. The trial court did indeed grant Mo's motion without affording Hergan the opportunity to respond. However, both Pawlan's and Mo's section 2-619(a)(3) motions present nearly identical arguments, claiming another action is pending between the same parties for the same cause. As a result, we cannot say Hergan was prejudiced by the trial court's failure to allow a response to Mo's motion to dismiss. We also note that the record shows that Hergan addressed the issues in Mo's motion to dismiss in his motion to reconsider. Therefore, we cannot say the case here is analogous to *Peterson* where the plaintiff was afforded no opportunity to respond to the court's *sua sponte* summary judgment order. Most significantly, the record supports the trial court's findings in regard to its order granting Mo's motion to dismiss.

¶ 45 In Hergan's reply brief, he claims that documents

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attached to Mo's appellate brief titled "Supplemental Appendix" are an improper supplement to the record on appeal. Hergan argues the supplemental documents and arguments arising therefrom should be stricken. We find it unnecessary to strike the supplemental documents and arguments because all improper appended documents are ignored by this court. *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826 (2001).

¶ 46 Also in Hergan's reply brief, he claims case number 08 L 5888 cannot be the basis for dismissal because just prior to Hergan's filing of his notice of appeal in this case, the trial court in case number 08 L 5888 granted summary judgment in favor of Hergan. However, that fact does not change the outcome of this case as the record shows that the same allegations made in the other pending cases involve the same cause and parties as in this case and warrant dismissal under section 2-619(a)(3).

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 49 Affirmed.