

2013 IL App (1st) 121251-U

SIXTH DIVISION
AUGUST 30, 2013

No. 1-12-1251

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 DISTRICT

GREATER CHICAGO UROLOGY,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellant,)	
)	
v.)	2011 L 050504
)	
DOROTHY BROWN, Clerk of the Circuit Court)	
of Cook County, and THE COUNTY OF COOK,)	
a Body Politic,)	Honorable
)	Margaret Ann Brennan,
Defendants-Appellees,)	Judge Presiding.
)	
(Law Bulletin Publishing Company and John Doe)	
1 through 10,)	
)	
Defendants).)	

JUSTICE HALL delivered the judgment of the court.

Justice Reyes concurred in the judgment.

Justice Gordon specially concurred in the judgement.

ORDER

¶ 1 **Held:** Denial of leave to file an amended complaint was not an abuse of discretion where the plaintiff failed to meet all four of the *Loyola* factors.

¶ 2 The plaintiff, Greater Chicago Urology, appeals from orders of the circuit court of Cook County denying it leave to file an amended complaint and dismissing its complaint with prejudice against the defendants, Dorothy Brown, as Clerk of the Circuit Court of Cook County, the County of Cook, the Law Bulletin Publishing Company and John Doe 1 through 10.¹ On appeal, the plaintiff contends the circuit court erred when it denied the plaintiff leave to file an amended complaint. For the reasons set forth below, we affirm the orders of the circuit court.

¶ 3 On May 2, 2011, the plaintiff filed a two-count complaint against the defendants. Count 1 alleged that defendant Brown violated section 16(6) of the Clerks of Courts Act by charging a fee for providing circuit court docket information to defendants Law Bulletin and the John Does. See 705 ILCS 105/16(6) (West 2010). The fees were retained by defendant County rather than remitted to the judicial branch of the State of Illinois. Count 2 alleged that defendants Law Bulletin and the John Does had entered into contracts with defendant Brown to purchase the docket information. The plaintiff sought a declaration that the contracts were void and that the court order that the money previously paid under those contracts be returned to the judicial branch of the State of Illinois.

¶ 4 On August 22, 2011, pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010)), the defendants filed a motion to dismiss the complaint. *Inter alia*, the

¹The Law Bulletin Publishing Company and John Doe, 1 through 10 did not file appearances in this case and are not parties to this appeal.

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motion alleged that the plaintiff lacked standing to bring a taxpayer suit and failed to state a cause of action for violation of the public trust doctrine. On September 6, 2011, the circuit court set a briefing schedule. The order required the plaintiff to respond to the motion to dismiss by October 4, 2011, and the case was continued to November 8, 2011, for status. On November 8, 2011, the circuit court set a second briefing schedule for the motion to dismiss. The plaintiff was given until December 13, 2011, if it wished to file a response, and the case was continued to January 24, 2012, for status. On January 24, 2012, the circuit court set the motion to dismiss for hearing on February 9, 2012. The plaintiff did not respond to the motion to dismiss until February 1, 2012, when it filed a motion seeking leave to file an amended complaint.

¶ 5 In separate orders entered on February 9, 2012, the circuit court denied the plaintiff leave to file an amended complaint without prejudice and granted the defendants' motion to dismiss the complaint with prejudice. The circuit court identified the factors it considered in its decision to dismiss the complaint with prejudice as (1) the plaintiff's failure to file a response to the motion to dismiss, despite the fact that it was given two briefing schedules; (2) the denial of the plaintiff's "untimely and improper motion for leave to file an amended complaint;" and (3) its finding that *People v. Gutierrez*, 2012 IL 111590, was not applicable.²

¶ 6 On April 3, 2012, the circuit court denied the plaintiff's motion to reconsider and vacate

²*Gutierrez* involved a defendant's right to a hearing if he was required to pay the public defender fee. Since the fee was imposed by the circuit court clerk, it was improper, and the fee was vacated. *Gutierrez*, 2012 IL 111590, ¶ 28. Its relevance to the present case is not readily apparent.

the February 9, 2012, orders. The plaintiff filed a timely notice of appeal.

¶ 7

ANALYSIS

¶ 8 The plaintiff contends that the circuit court erred in denying its motion for leave to file an amended complaint.³ The plaintiff maintains that the circumstances in this case did not justify the denial of leave to amend its complaint. It points out that the case was still in the initial pleading stage. The plaintiff explains that a certain amount of confusion arose because Eugene Brown, who sought to intervene in the case, filed an excessive amount of pleadings, which required responses from the plaintiff.⁴ The fact that defendant Dorothy Brown and he shared the same last name, created difficulties with the plaintiff's attorneys' internal docketing system. The plaintiff asserts that in denying leave to file an amended complaint, the circuit court disregarded established case law favoring amendments to pleadings and allowing amendments to further the ends of justice.

¶ 9

I. Standard of Review

¶ 10 The abuse of discretion standard applies to a circuit court's ruling on a motion to amend

³ The plaintiff's appellant's brief states that the issue on appeal is whether the circuit court abused its discretion when it denied the motion for leave to amend on the grounds that the motion was filed one day late. The lateness issue was not addressed in the argument portion of the plaintiff's brief.

⁴The circuit court entered a third order on February 9, 2012, barring Mr. Brown from filing any more pleadings in this case. Mr. Brown is not a party to this appeal.

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pleadings. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351 (2002). "A trial court abuses its discretion only where no reasonable person would take the view adopted by the trial court." *In re Marriage of Schneider*, 214 Ill. 2d 152, 173 (2005).

¶ 11

II. Discussion

¶ 12 At any time before final judgment, the court may permit amendments on just and reasonable terms to enable a plaintiff to sustain the claim brought in the suit. *Compton v. County Mutual Insurance Co.*, 382 Ill. App. 3d 323, 332 (2008); 735 ILCS 5/2-616(a) (West 2010).

Section 2-616 is to be liberally construed so that cases are decided on their merits and not on procedural technicalities. *Deming v. Montgomery*, 180 Ill. App. 3d 527, 532 (1989). The court's power to allow an amendment should be fully exercised in order that a plaintiff can completely present his cause of action. *Senese v. Climatemp, Inc.*, 222 Ill. App. 3d 302, 320 (1991). While the right to amend is "neither absolute nor unlimited" (*I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219 (2010)), the denial of leave to amend is an abuse of discretion if allowing the amendment would further the ends of justice (*W.E. Erickson Construction, Inc. v. Chicago Title Insurance Co.*, 266 Ill. App. 3d 905, 911 (1994)).

¶ 13 In considering whether an amendment furthers the ends of justice, our supreme court has set out four questions to ask: "(1) does the proposed amendment cure the defective pleading? (2) are other parties prejudiced? (3) is the proposed amendment timely? and (4) were there previous opportunities to amend?" *W.E. Erickson Construction, Inc.*, 266 Ill. App. 3d at 911 (citing *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992)). "A party must meet all four of the [*Loyola*] factors." *I.C.S. Illinois, Inc.*, 403 Ill. App. 3d at 220. In order to

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find that the circuit court abused its discretion in denying a party leave to amend, it must be clear from the record that sufficient reasons or facts were presented to the court and that its exercise of discretion was clearly contrary to the facts. *Senese*, 222 Ill. App. 3d at 321.

¶ 14 In this case, the plaintiff sought leave to amend its complaint after the defendants filed their section 2-615 motion to dismiss. The purpose of a section 2-615 motion is to point out defects in a complaint and allow the plaintiff the opportunity to amend and present a valid complaint. *Village of South Elgin v. Waste Management of Illinois, Inc.*, 348 Ill. App. 3d 929, 939-40 (2004). While the granting of a motion to amend is within the court's discretion, "the usual course is to grant the plaintiff liberal leave to amend" and "[u]nless it clearly appears that no set of facts exist that would entitle the plaintiff to relief, the dismissal should not be with prejudice." *Village of South Elgin*, 348 Ill. App. 3d at 940.

¶ 15 On appeal, the plaintiff does not contend that the complaint stated valid causes of action. Rather, the plaintiff argues that the circuit court erred by denying it the opportunity to correct the defects in the complaint. In its motion for leave to amend, the plaintiff stated that the reason for the amendment was to dismiss the Law Bulletin and the John Does as party defendants. However, the amended complaint named the Law Bulletin and the John Does as defendants and again directed count 2 against them. The amended complaint sets forth the same causes of action and alleges virtually the same facts.

¶ 16 The plaintiff fails to explain how the amended complaint resolved the defects in the complaint identified in the motion to dismiss. Only after the defendants asserted in their appellees' brief that the defects were not remedied by the amended complaint did the plaintiff

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address that point. Even then, its reply brief presented a defense of the original complaint rather than demonstrating how the amended complaint remedied the defects. Since the plaintiff failed to establish that the proposed amended pleading cured the defects in the complaint, the plaintiff failed to satisfy the first *Loyola* factor.

¶ 17 Even if the amended complaint cured the defects in the complaint, the plaintiff also failed to meet the fourth *Loyola* factor by failing to avail itself of prior opportunities to amend the complaint. The defendants filed their motion to dismiss on August 22, 2011. The plaintiff did not seek leave to file an amended complaint until February 1, 2012. In the intervening months, the circuit court set two briefing schedules to allow the plaintiff to respond to the motion to dismiss. The plaintiff failed to respond by either date. It was only after the status hearing on January 24, 2012, when the court set the motion to dismiss for hearing on February 9, 2012, that the plaintiff sought leave to amend.

¶ 18 Since the plaintiff failed to meet two of the *Loyola* factors, granting it leave to file an amended complaint would not serve the ends of justice. The circuit court did not abuse its discretion when it denied the plaintiff's motion to file an amended complaint.

¶ 19 The plaintiff challenged the dismissal of the complaint with prejudice only on the ground that the denial of its motion for leave to amend was an abuse of discretion. Since we have determined that no abuse of discretion occurred, the circuit court's dismissal of the complaint with prejudice is affirmed.

¶ 20 The judgment of the circuit court is affirmed.

¶ 21 Affirmed.

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¶ 22 Justice Gordon, specially concurring:

¶ 23 I must specially concur because, although the majority observes that the trial court denied plaintiff leave to amend "without prejudice," the majority considers the order as though it were entered "with prejudice," because the parties treat it that way on appeal. Since I believe that we must decide the case exclusively on the record as it appears before us, I must write separately. *People v. Davis*, 278 Ill. App. 3d 532, 544 (1996) ("We must decide cases on proof in the record").

¶ 24 However, I still concur for the following reason. As I explain below, I cannot find that the trial court abused its discretion by denying plaintiff leave to file a first amended complaint, where the proposed complaint was virtually identical to the filed one, and where the order was "without prejudice" to plaintiff's ability to further amend the complaint and to move for leave to file another amended complaint.

¶ 25 On appeal, plaintiff argues only that the trial court erred in not allowing it to file its proposed first amended complaint, as it appeared in the form attached to its February 1, 2011, motion. Plaintiff does not argue that the trial court erred in dismissing its filed complaint; so the underlying merits of the claims presented in the filed complaint are not at issue before us.

¶ 26 Although the facts are stated in the majority's order, I restate here the facts needed for my analysis. On August 22, 2011, defendants filed a "motion to dismiss [plaintiff's] amended complaint." Although the motion itself and the scheduling orders concerning it all refer to plaintiff's "amended complaint," the record shows that plaintiff had not yet even *proposed* filing an amended complaint at that time and the arguments in the motion concern the allegations and

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counts in the original complaint. Thus, this motion is directed solely to plaintiff's original complaint.

¶ 27 On February 1, 2012, plaintiff filed a motion for leave to file an amended complaint, which was attached to its motion. The first amended complaint was virtually identical to the complaint originally filed on May 2, 2011. Both complaints named the same defendants and contained the same two counts, based on the same set of alleged facts. In both complaints, count I alleged a "taxpayers' action" against defendants Brown and Cook County; and count II alleged a "violation of the public trust" doctrine against defendants Law Bulletin and John Does 1 through 10. Except for a few changes in wording, the primary change to the proposed complaint was the addition of ¶ 15 in Count II against defendant Law Bulletin and the John Doe defendants.

Paragraph 15 stated in full:

¶15 Moreover, with regard to Defendant Law Bulletin, Judicial Branch personnel are utilized to transmit and assist in the transmittal of the collection and submission to this Defendant of public information, which Defendant utilizes not only in its daily publication but as a basis for its electronic database which it sells to the public and from which it derives a profit and is based entirely upon this submission by public employees to Defendant Law Bulletin, and without which this Defendant could not publish the paper copy of its daily newspaper, which is sold for a price utilizing what should be public information, as well as maintain its

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on-going electronic database for which it charges the public a monthly service fee."

Although the above paragraph provides more detail about the benefit received by defendant Law Bulletin, count II in the original complaint still contested the fees paid to obtain access to the docket, including electronic access.

¶ 28 On February 9, 2012, the trial court issued a written order stating: "Plaintiff's Motion to Leave is denied without prejudice." Thus, plaintiff was denied leave to file the attached complaint, but the order was "without prejudice" to plaintiff's moving for leave to file a different, further amended complaint. *Dewan v. Ford Motor Co.*, 343 Ill. App. 3d 1062, 1069 (2003) (an appellate court must construe a trial court's orders "in a reasonable manner so as to give effect to the apparent intention of the trial court" (citing *P&A Floor Co. v. Burch*, 289 Ill. App. 3d 81, 88-89 (1997))).

¶ 29 The handwriting on the February 9, 2012, order is crystal clear, and I agree with the majority that it says "without prejudice." However, the parties on appeal treat the order as though it says "with prejudice." As stated above, I cannot agree with this rewriting of the record and, for this reason, I write separately.

¶ 30 Since the order states "without prejudice," plaintiff had the opportunity to further amend his complaint and he chose not to do so by attaching substantially the same complaint as before and by telling us that he is not appealing the question as to whether the original complaint states a valid cause of action.

¶ 31 On the same day that the trial court issued the above order concerning leave to amend, the

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trial court issued a second written order stating that defendants' "Motion to Dismiss is granted with prejudice." Defendant's motion to dismiss plaintiff's original complaint was thus granted with prejudice. Plaintiff failed to file either a transcript or a bystander's report for the hearing on February 9, 2013; so, if the trial court offered any explanation of its rulings, other than what the written orders explicitly state, we do not have the benefit of knowing what it is. *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001) ("the appellant has the burden to present a sufficiently complete record" and "absent a record 'it [is] presumed that the order entered by the trial court [is] in conformity with the law and had a sufficient factual basis.'" (quoting *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984))).

¶ 32 Instead of attempting to further amend its complaint as the trial court's "without prejudice" order permitted it to do, plaintiff filed a motion asking the trial court only to reconsider its denial for leave to file plaintiff's previously proposed complaint, and the trial court once again denied that request.

¶ 33 On appeal, plaintiff argues only that the trial court erred in not allowing it to file its proposed first amended complaint, as it appeared in the form attached to its February 1, 2011, motion. Plaintiff does not argue that the trial court erred in dismissing its original complaint; so that issue is not before us. Plaintiff's only reference in its initial appellate brief to the merits of its original complaint occurs in the following one line: "The issue before this Court is therefore whether under the circumstances, *perhaps even under any circumstances*, causes of action should be dismissed at the initial pleading stage ***." (Emphasis added.) This brief contains no argument or citation to authority about the merits of the filed complaint. Points not argued or

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supported with citation are waived for our consideration. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 824 (2008). In their response, defendants did discuss the merits of the filed complaint, and plaintiff stated in its reply brief that these arguments were "outside the scope of this appeal." As a result, these issues are simply not before us, and we will never know whether plaintiff's original complaint stated a cause of action or not. Plaintiff's original complaint may have had merit but we have not been asked to review the merits of the original complaint or the amended complaint.

¶ 34 Before concluding, I must observe that plaintiff's appellate brief states the "Issue for Review," in full, as: "Whether the Circuit Court abused its discretion when it denied Plaintiff's Motion for Leave to File [Its] First Amended Complaint pursuant to 735 ILCS 5/2-616 due to its being filed one day late." Defendants state that they have no idea what the phrase "one day late" refers to, and neither do I. As defendants observe, plaintiff did not previously seek to file this first amended complaint, and thus there was no deadline for which plaintiff could have been "one day late." The majority observes that plaintiff fails to address this "one day late" issue in the argument portion of its brief, and thus does not find this issue worthy of discussion. I concur in that conclusion.

¶ 35 In sum, I cannot find that the trial court abused its discretion by denying plaintiff leave to file a first amended complaint, where the proposed complaint was virtually identical to the prior one, and where the order was "without prejudice" to plaintiff's ability to further amend the complaint and to move for leave to file a more amended complaint. For this reason, I concur in the majority's order affirming the order below.

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