2015 IL App (1st) 1141886U

Sixth Division
Order Filed: June 19, 2015

No. 1-14-1886

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LEO STOLLER, Plaintiff-Appellant, v. THOMAS DART, Cook County Sheriff, COOK COUNTY DEPARTMENT OF CORRECTIONS, and COOK COUNTY GOVERNMENTAL UNITS, Officer Story, Officer Foran, Officer Black, Officer Cano, Officer Garcia, Defendants-Appellees,	) Appeal from the Circuit Court of) Cook County))) No. 2010 L 002296))) Honorable) John C. Griffin,) Judge Presiding))))

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

Held: The circuit court's order granting the defendants motion to dismiss the plaintiff's claim for malicious prosecution is affirmed, where the court's consideration of the motion was not barred under the doctrine of law of the case, and the complaint fails to state a claim upon which relief can be granted.

¶ 1 The plaintiff, Leo Stoller, appeals from the circuit court's dismissal of his claim for malicious prosecution against the defendants, Cook County Sheriff Tom Dart (Sheriff), the

County Department of Corrections (Department of Corrections), and various Cook County Governmental Units and officers as pled in the 16th count of his amended complaint. For the reasons that follow, we affirm.

¶ 2 On May 22, 2012, the plaintiff filed a twenty-count, amended complaint (complaint) against the defendants, asserting violations of his federal constitutional rights, false imprisonment, malicious prosecution, and other claims, arising from three separate instances in which he was detained in the Cook County Jail. On June 21, 2012, the defendants removed the case to the federal district court, and thereafter, filed a motion to dismiss the complaint under federal Rule 12(b)(6) (Fed. R. Civ. P. 12(b)(6) (West 2012)). On May 17, 2013, and July 11, 2013, the federal district court entered orders which collectively dismissed all of the counts in the complaint with the exception of the claim for malicious prosecution pled in the 16th count. *Stoller v. Dart*, No. 12 C 4928 (N.D. Ill. May 17, 2013, July 11, 2013). The district court denied the motion to dismiss the malicious prosecution claim without further explanation. It did, however, dismiss the Department of Corrections as a defendant, finding that it was not a suable entity. See *Castillo v. Cook County Mail Room Dep't*, 990 F. 2d 304, 307 (1994). The court then exercised its discretion under section 1367(c)(3) of the United States Code (28 U.S.C. 1367(c)(3)) to decline supplemental jurisdiction over the remaining malicious prosecution claim, and remanded this case to the Circuit Court of Cook County for further proceedings.

¶ 3 Following remand of the action to the circuit court, the defendants filed a motion under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)), seeking dismissal of the remaining malicious prosecution claim under sections 2-615 (735 ILCS 5/2-615 (West 2012)) and 2-619 (735 ILCS 5/2-619 (West 2012)) of the Code. In support of a dismissal pursuant to section 2-615, the defendants asserted that the claim failed to state a cause

of action by reason of the plaintiff's failure to allege facts in support of each element necessary to establish a claim for malicious prosecution. In support of a dismissal under section 2-619, the defendants asserted that the Department of Corrections is not a suable entity and that Cook County, the Cook County Sheriff, and the named Cook County deputy sheriffs are immune from liability under the Tort Immunity Act (Act) (745 ILCS 102-109 (West 2012)) and pursuant to the common law doctrine of sovereign immunity.

¶ 4 On June 9, 2014, the circuit court granted the motion on both section 2-615 and 2-619 grounds, and this appeal followed. We first address the issue of whether the plaintiff's claim of malicious prosecution as pled in count 16 of his amended complaint alleged sufficient facts to state a cause of action.

¶ 5 The following facts are asserted in the complaint in support of the malicious prosecution claim at issue. The plaintiff alleged that on February 25, 2009, he was arrested "on a 'false' contempt charge, which was used to incarcerate him at the Cook County Jail." He attached to his complaint a copy of an order entered on that date by Judge Renee G. Goldfarb in the case of *In re the Marriage of Nancy Reich and Leo Stoller*, No. 05 D 7216 which was pending in the Domestic Relations Division of the Circuit Court of Cook County. That order provides as follows:

> "In the case of the Amended Third Petition for Adjudication of Indirect Criminal Contempt, after hearing testimony and argument by counsel, it is hereby ordered that Leo Stoller be remanded to the custody of the Cook County Department of Corrections for an immediate evaluation (BCX) to be performed at Cermak Hospital. Leo Stoller is to be released from the Cook County Department of Corrections immediately upon the

completion of the BCX evaluation. The report is due on the next court date of March 23, 200[9] at 9:30 a.m."

¶ 6 According to the complaint, the defendants "instituted a 'phony' contempt charge against the plaintiff with malice on February 25, 2009, in order to have Leo Stoller unlawfully locked up in the Cook County Jail." The complaint goes on to allege that the defendants: "played an active role in the initiation of the 'phony' contempt proceedings *** which led to Plaintiff's unlawful incarceration"; "suborned the perjurious statement of Defendant, Reich, before Judge Goldfarb in the court hearing on February 25, 2009"; "had a duty to ascertain whether there was reasonable and probable cause for contempt"; and, "knew that the Cook County Cermak Hospital did not perform BCX Examinations." The complaint alleges that defendant Garcia misinformed Judge Goldfarb that Cermak Hospital performs BCX examinations. The plaintiff was incarcerated in the Cook County Jail from February 25, 2009, until March 6, 2009.

¶ 7 The plaintiff raises several challenges to the order dismissing his complaint. We need only consider two of his arguments, however, as we find them to be dispositive. The plaintiff initially asserts, without any citation to authority, that the circuit court erred in even considering the motion to dismiss his claim for malicious prosecution, because that motion had already been denied by the federal district court, and that court's decision constitutes the law of the case. Alternatively, he contends the court erred in determining that he failed to sufficiently plead the requisite elements of the tort of malicious prosecution. We address each argument in turn.

¶ 8 The plaintiff failed to cite any authority in support of his law-of-the-case argument. Therefore, the issue has been forfeited. *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010).

¶ 9 Forfeiture aside, we reject the argument on its merits. The law-of-the-case doctrine precludes relitigation on remand from a reviewing court of any issue that was decided on review.

Long v. Elborno, 397 Ill. App. 3d 982, 989 (2010). It does not preclude a trial judge from revisiting an issue which was the subject of a prior order in the same case that was never appealed. Prior to the entry of a final judgment, courts have the authority to modify or revise interlocutory orders at any time, regardless of whether the order was entered by another judge. *Balciunas v. Duff*, 94 Ill. 2d 176, 185 (1983); *Brandon v. Bonell*, 368 Ill.App.3d 492, 502, (2006). It is well-established that the denial of a motion to dismiss is a nonfinal order, and therefore subject to reconsideration by a subsequent judge. See *Catlett v. Novak*, 116 Ill. 2d 63, 67 (1987); *Commonwealth Edison*, 368 Ill. App. 3d at 742; *Bailey v. Allstate Development Corp*., 316 Ill. App. 3d 949, 956 (2000); *Pearson v. Partee*, 218 Ill. App. 3d 178, 182 (1991). We, therefore, reject the argument that the federal district court's denial of the defendant's motion to dismiss the malicious prosecution claim pled in count 16 of the complaint constituted the law of the case.

¶ 10 We now turn to the circuit court's dismissal of the complaint for failure to state a claim for malicious prosecution. A motion to dismiss under section 2-615 should not be granted unless it clearly appears that no set of facts could be proven under the pleadings which would entitle the plaintiff to relief. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 488 (1994). All well-pleaded facts in the complaint are taken as true, and are construed in the light most favorable to the plaintiff. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). Facts apparent from the face of the complaint, along with any attached exhibits, must be considered. *Beahringer v. Page*, 204 Ill. 2d 363, 365 (2003). In the event of a conflict between an exhibit to a complaint and a factual allegation in the complaint, the exhibit will control and the complaint's conflicting factual allegation negated. *Outboard Marine v. Chisholm & Sons*, 133 Ill.App.3d 238, 245 (1985). Although we will accept as true all well-pleaded facts and inferences to be drawn from those

facts (*Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 499, (1991)), we will not accept mere conclusions of law or fact which are unsupported by specific factual allegations. *Groenings v. City of St. Charles*, 215 Ill. App. 3d 295, 299 (1991). On appeal, the standard of review from an order granting a section 2-615 motion to dismiss a complaint is *de novo*. *Vitro*, 209 Ill. 2d at 81.

¶ 11 In order to state a claim for malicious prosecution, a plaintiff must allege (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the lack of probable cause for such proceeding; (4) the presence of malice in the pursuit of the proceeding; and (5) resulting damages to the plaintiff. *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 473 (1990).

¶ 12 In this case, the complaint fails to allege that the defendants either commenced or continued the proceeding of February 25, 2009, during which the court entered the order that resulted in his incarceration. The plaintiff does allege that the defendants instituted a "phony" contempt charge, but he fails to allege facts supporting the conclusion. Additionally, the order of February 25, 2009, which the plaintiff attached to his complaint affirmatively shows that it was entered in a proceeding in which Nancy Reich was the petitioner.

¶ 13 Absent factual allegations that the defendants commenced or continued an original criminal or civil judicial proceeding against the plaintiff, count 16 of the complaint fails to state a cause of action for malicious prosecution (see *Meerbrey*, 139 Ill. 2d at 473-74), and it was properly dismissed pursuant to section 2-615 of the Code.

¶ 14 Having determined that the plaintiff's malicious prosecution claim was properly dismissed for failure to state a cause of action, we need not address the additional section 2-619 grounds upon which the circuit court based the dismissal.

¶ 15 Affirmed.