2015 IL App (2d) 140763-U
No. 2-14-0763
Order filed April 10, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LEE DARROW and NANCI PONNE,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiffs-Appellants,	)	
	)	
	)	
v.	)	No. 12-L-990
	)	
NORMAN PHILLIPS and	)	
AMHERST MEDIA, INC.,	)	
	)	
Defendants-Appellees	)	
	)	Honorable
(Norman Phillips of London, Ltd.,	)	Thomas M. Schippers,
and Kobo, Inc., Defendants).	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed plaintiffs' claim for breach of contract: as matter of law, although the settlement agreement whose confidentiality provision was allegedly breached arose from a lawsuit related to a contract for a wedding service, the severe emotional distress for which plaintiffs sought damages was not a sufficiently likely result of the breach; (2) the trial court properly dismissed plaintiffs' claim for false light: as a matter of law, the alleged statements were opinions and were not highly offensive to a reasonable person; in any event, the claim was barred by collateral estoppel, the same issue having been decided in a previous suit by plaintiffs.

¶ 2 Plaintiffs, Lee Darrow and Nanci Ponne, appeal from the judgment of the circuit court of Lake County dismissing their three-count fourth amended complaint against defendants, Norman Phillips, Norman Phillips of London, Ltd. (Phillips of London), Amherst Media, Inc. (Amherst), and Kobo, Inc. Because plaintiffs did not allege a cognizable claim in either count I or count III and do not challenge the dismissal of count II, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs pled in count I a claim for breach of contract (Phillips and Phillips of London), in count II a claim for defamation (all defendants), and in count III a claim for false light invasion of privacy (all defendants). In support of those claims, they alleged that they contracted with Phillips and Phillips of London to photograph their 1996 wedding. The wedding was unique in that the theme was medieval, with the wedding party and guests wearing medieval costumes. One of the highlights of the ceremony was a falcon as ring bearer.

¶ 5 In 1998, plaintiffs sued Phillips and Phillips of London for breach of contract, alleging that they failed to properly photograph their wedding. In September 2000, the parties entered into a written settlement agreement (settlement) disposing of the litigation. The settlement required the parties to keep its terms confidential.

¶ 6 In 2005, Phillips and Amherst published a book entitled "Wedding and Portrait Photographers' Legal Handbook" (the Book). The Book, in the section captioned "Event Photography Contract," refers to a scenario that "should have sounded an alarm for the photographer." Under a subsection captioned "The Makings of a Lawsuit," the Book describes a photographer who was introduced to a couple who was planning a "medieval wedding with all the period trappings" and a promise of "knights in shining armor, *** a falconer and a falcon."

¶ 7 The Book goes on to state that the photographer's fees exceeded the couple's budget and that the photographer accepted partial payment because the couple stated that they did not have the funds to pay the full amount upfront. The photographer eventually received full payment.

¶ 8 According to the Book, neither the groom nor the best man dressed in medieval costume as expected. The groom arrived 15 minutes late, and the bride arrived less than 10 minutes before the start of the wedding. Only 48 of the expected 250 guests attended, the falcon failed to properly perform, and, after the ceremony, the planned photographs of the wedding party and family "[became] an exercise in futility," because "apparently no one [was] very interested in cooperating." Thus, many planned and customary photographs were not taken.

¶ 9 In referring to the resulting lawsuit, the Book states that the defendants' attorney described the suit as "gold digging," a description of a lawsuit lacking in merit that seeks to obtain damages at little risk to the plaintiffs. Ultimately the suit was settled, with the plaintiffs receiving $10,500.

¶ 10 The Book states, in the subsection captioned "Creating an Event Contract," that in the described scenario the couple entered into a contract that was "beyond their means, and they had insufficient funds to meet the required down payment," and that it is better not to work with a client whose "ability to fulfill your contract's terms is in doubt." The Book states that, in the case example, the clients "fail[ed] to keep to an agreed schedule [and] fail[ed] to cooperate in the creation of [the] proposed images." It recommends using a limited-liability clause to address such issues of "misleading or inaccurate information." According to the Book, there were a number of reasons why the photographer was unable to perform under the contract, "none of which were his fault."

¶ 11 In July 2010, plaintiffs filed a petition for a rule to show cause in the original case, asserting that, by writing the Book, Phillips had libeled them and breached the settlement. The trial court dismissed, for lack of jurisdiction, the petition for a rule to show cause.

¶ 12 In September 2010, plaintiffs filed a lawsuit against Phillips, Phillips of London, Christopher Nudo (the co-author of the Book), and Amherst. The complaint alleged a claim for breach of contract against Phillips and Phillips of London, and claims for defamation, false light, and unjust enrichment against all of the defendants. The trial court dismissed with prejudice claims against Phillips, Phillip of London, and Nudo. In dismissing the false-light claim, the court ruled, as a matter of law, that the statements in the Book were not highly offensive to a reasonable person. After plaintiffs failed to prosecute the claims against Amherst, the court dismissed the case.

¶ 13 In February 2012, the Book was republished in electronic form through Kobo, Inc. Plaintiffs filed the present case in response to the electronic publication of the Book.

¶ 14 Phillips and Amherst moved to dismiss the fourth amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code). 735 ILCS 5/2-619.1 (West 2012). In doing so, they contended, among other things, that dismissal of count I was proper under section 2-615 of the Code (735 ICLS 5/2-615 (West 2012)) because it failed to allege sufficient facts to establish, as a matter of law, that the statements were likely to result in serious emotional disturbance. As to the false-light claim in count III, relying on section 2-615, they argued, among other things, that the alleged facts were not highly offensive to a reasonable person. They also contended, under section 2-619(a)(4) of the Code (735 ILCS 5/2-619(a)(4) (West 2012)), that count III was barred by collateral estoppel.

¶ 15 On April 22, 2014, the trial court dismissed with prejudice all three counts. On May 21, 2014, plaintiffs filed a notice of appeal. On May 23, 2014, the court entered an order voluntarily dismissing without prejudice Kobo, Inc. On May 27, 2014, plaintiffs filed a motion for leave to file an amended notice of appeal. On May 29, 2014, the court entered an order voluntarily dismissing without prejudice Phillips of London. The court entered another order on May 29, 2014, that dismissed the May 21, 2014, notice of appeal, because, pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), the April 22, 2014, order was not appealable, and granted plaintiffs leave to file a notice of appeal. On May 29, 2014, plaintiffs filed their notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiffs raise the following two contentions: (1) that the trial court erred when it ruled as to count I that, as a matter of law, it was not reasonably foreseeable that the breach of the confidentiality provision of the settlement would cause them serious emotional harm; and (2) that the court erred when it ruled as to count III that, as a matter of law, the alleged statements from the Book were not highly offensive to a reasonable person. Plaintiffs do not challenge the dismissal of count II.

¶ 18 Section 2-619.1 of the Code permits a combined motion to dismiss under sections 2-615 and 2-619. A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. *DeHart v. DeHart*, 2013 IL 114147, ¶ 18. In ruling on a section 2-615 motion, a court must accept as true all well-pleaded facts and any reasonable inferences to be drawn therefrom. *DeHart*, 2013 IL 114147, ¶ 18. A cause of action should not be dismissed under section 2-615 unless no set of facts can be proved entitling the plaintiff to recover. *DeHart*, 2013 IL 114147, ¶ 18. The central inquiry is whether the allegations, when construed in the light most favorable to the plaintiff, sufficiently state a cause of action upon which relief can be granted. *DeHart*,

2013 IL 114147, ¶ 18. We review *de novo* an order granting a section 2-615 motion to dismiss. *Ranjha v. BJBP Properties, Inc.*, 2013 IL App (1st) 122155, ¶ 9.

¶ 19 We first address the dismissal of the contract claim in count I. In that count, plaintiffs claim that they suffered serious emotional disturbance as the foreseeable result of Phillips's breach of the confidentiality provision of the settlement.

¶ 20 Recoverable damages in a breach-of-contract action are those that either: (1) naturally resulted from the breach; or (2) were the consequence of special or unusual circumstances that the parties reasonably contemplated when they contracted. *Midland Hotel Corp. v. Rueben H. Donnelly Corp.*, 118 Ill. 2d 306, 318 (1987). Recovery for mental distress is excluded, unless the contract or its breach is of such a kind that severe emotional disturbance was a particularly likely result. *Hanumadass v. Coffield, Ungeretti & Harris*, 311 Ill. App. 3d 94, 100 (1999); *Doe v. Roe*, 289 Ill. App. 3d 116, 130 (1997). The mere fact that the subject matter of the contract encompasses sensitive issues does not mean that its breach will necessarily result in severe emotional distress. *Doe*, 289 Ill. App. 3d at 130. It is only when the defendant has reason to know that his breach is likely to cause severe emotional distress that damages will be awarded for mental suffering. *Doe*, 289 Ill. App. 3d at 130.

¶ 21 Damages for breach of contract must be proved with reasonable certainty and cannot be based on conjecture or speculation. *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 130 (2008). A settlement agreement is akin to a contract, and its enforcement is governed by contract law. *Solar v. Weinberg*, 274 Ill. App. 3d 726, 731 (1995).

¶ 22 In this case, plaintiffs failed to allege in count I a claim sufficient to satisfy the narrow exception to the general rule that damages for emotional distress are not available for a breach of contract. A breach of the confidentiality provision was not the kind for which severe emotional

distress was particularly likely to result. To the contrary, the settlement was the product of a run-of-the-mill contract action. There was nothing about it that would have alerted Phillips that if he breached its confidentiality provision it was particularly likely that plaintiffs would suffer severe emotional distress.

¶ 23 Moreover, a breach of a confidentiality agreement is not inherently likely to cause severe emotional distress. Although it would be reasonable to expect a party to be unhappy about an opposing party revealing the particulars of a settlement, that alone does not provide the breaching party with reason to know that his breach is likely to cause severe emotional distress. To hold otherwise would be to open the door to claims for emotional distress whenever the confidentiality of a settlement agreement is breached. That would run counter to the general rule barring such damages in a contract action.

¶ 24 Plaintiffs attempt to amplify the significance of the breach by emphasizing that the settlement was related to their wedding. Although we do not downplay the emotional importance of a wedding, the settlement was, at best, remotely connected to the wedding. Indeed, its only connection to the wedding was via the lawsuit between the parties. Therefore, it was not reasonably foreseeable that breaching the confidentiality provision would result in severe emotional distress related to the wedding itself.

¶ 25 Plaintiffs rely heavily on *Doe* in contending that they alleged a claim for severe emotional distress. That reliance is misplaced, however, as the plaintiff in *Doe* alleged that her divorce attorney breached a fiduciary duty when he took advantage of her weak emotional state by pressuring her to have sex with him. *Doe*, 289 Ill. App. 3d at 130-31. It was certainly foreseeable that the plaintiff in *Doe* would suffer severe emotional distress resulting from the conduct of her attorney. Thus, the facts in *Doe* presented a unique situation that justified

damages for emotional distress. The facts alleged in our case, however, come nowhere close to the egregious conduct in *Doe*.

¶ 26 Plaintiffs' reliance on *Pena v. Freedom Mortgage Team, Inc.*, No. 07 C 552, 2007 WL 3223394 (N.D. Ill. Oct. 24, 2007), and *Dahlin v. Evangelical Child & Family Agency*, 252 F. Supp. 2d 666 (N.D. Ill. 2002), is unavailing for two reasons. First, we are not required to follow cases from a federal district court. *Wilson v. County of Cook*, 2012 IL 112026, ¶ 30. Second, and more importantly, both cases involved unique fiduciary relationships not present in this case.

¶ 27 When viewed in the light most favorable to plaintiffs, the allegations in count I, as a matter of law, do not set forth a claim for severe emotional distress arising out of the alleged breach of the settlement. Therefore, the trial court properly dismissed count I.

¶ 28 We turn next to the dismissal of the false-light claim in count III. There are three elements of a false-light claim: (1) the plaintiff was placed in a false light before the public as a result of the defendant's conduct; (2) the false light must be highly offensive to a reasonable person; and (3) the defendant acted with actual malice. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 17-18 (1992) (citing *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 419-23 (1989)).

¶ 29 In this case, plaintiffs contend that the Book cast them in a false light by describing them as "unscrupulous, disorganized, and untrustworthy," as "gold diggers," as "bizarre," and as having pursued a meritless lawsuit. According to plaintiffs, such comments are highly offensive to a reasonable person and were "definitely not so innocuous as to justify the trial court's finding that such allegations fail as a matter of law."

¶ 30 We begin our analysis by noting that we may affirm on any basis in the record. See *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 282 (2006). Opinions that allegedly place

a plaintiff in a false light are not actionable. *Brennan v. Kadner*, 351 Ill. App. 3d 963, 971 (2004); *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 764 (2002). In deciding whether a statement is an opinion for purposes of a false-light claim, we apply the following four factors: (1) the precision of the statement; (2) the verifiability of the statement; (3) the literary context of the statement; and (4) the public and social contexts of the statement. *Moriarty v. Greene*, 315 Ill. App. 3d 225, 235 (2000) (applying opinion analysis in defamation case to false-light claim).

¶ 31 Here, when analyzed under the four factors, the statements are opinions. First, none of the statements are particularly precise, but instead are general characterizations of plaintiffs and their conduct. Second, the statements are not of verifiable fact but mere subjective descriptions. Third, as to their literary context, the Book was written, in part, to advise professional photographers of the need to protect themselves during the contracting process. The references to the scenario involving Phillips's relationship with plaintiffs and the resulting lawsuit were clearly intended to emphasize the need to carefully craft a contract. In that vein, the characterizations of plaintiffs as manipulative, dishonest, disorganized, and gold diggers are classic forms of opinion. The same can be said for the description of the scenario with plaintiffs as bizarre. Likewise, the statements that plaintiffs could not live up to their legal and financial obligations and engaged in a meritless lawsuit would be reasonably viewed as nothing more than hyperbole designed to reinforce the ideas espoused by the author. Fourth, the public and social contexts of the statements, a commentary on legal issues related to wedding photography, would suggest to a reasonable reader that such statements would be offered as opinions as opposed to matters of fact. Because the various statements relied on by plaintiffs to support their false-light claim are nonactionable opinions, we affirm the dismissal of count III on that basis.

¶ 32 Even if the statements were not opinion, as a matter of law, they are not highly offensive to a reasonable person. For his statements to be highly offensive, a defendant must have known that a plaintiff, as a reasonable person, would have been justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity. *Lovgren*, 126 Ill. 2d at 419-20. The statements here were part of a discussion about the need for proper contracting by wedding photographers. Therefore, the statements were not so much offensive criticisms of plaintiffs, but rather were persuasive characterizations designed to motivate the reader to consider seriously the advice being given in the Book. Moreover, the comments were related to a prior lawsuit between the author and a former customer. A reasonable person, who had been involved in litigation, would not find highly offensive critical comments related to the lawsuit. Rather, such comments would be viewed as nothing more than the typical criticisms often made by opposing parties to litigation. Therefore, plaintiffs were not reasonably justified in the eyes of the community in feeling seriously offended and aggrieved by any of the statements in the Book. Thus, because the trial court did not err in finding that, as a matter of law, the alleged statements were not highly offensive and therefore did not, , support the false-light claim, we affirm the dismissal of count III on that alternative basis.

¶ 33 Finally, defendants contend that, because the trial court ruled in the 2010 case that the same statements from the Book were not highly offensive to a reasonable person, the claim is barred by collateral estoppel. Collateral estoppel applies when a party participates in two separate and consecutive cases based on different causes of action and some controlling fact or material issue has been adjudicated against that party in the former suit by a court of competent jurisdiction. *Schandelmeier-Bartels v. Chicago Park District*, 2015 IL App (1st) 133356, ¶ 35. The adjudication of the fact or question in the first cause, if properly presented, will be

conclusive of the same issue in the later suit. *Schandelmeier-Bartels*, 2015 IL App (1st) 133356, ¶ 35.

¶ 34 The threshold requirements of collateral estoppel are: (1) the issue decided in the prior adjudication is identical to the one presented in the current case; (2) there was a final judgment on the merits in the prior case; and (3) the party against whom estoppel is asserted was a party in the prior adjudication. *Schandelmeier-Bartels*, 2015 IL App (1st) 133356, ¶ 36. Collateral estoppel must be narrowly applied to fit the precise facts and issues that were decided in the prior judgment. *Schandelmeier-Bartels*, 2015 IL App (1st) 133356, ¶ 36. Even where the threshold requirements are satisfied and an identical common issue is found to exist, collateral estoppel must not be applied to preclude a party from presenting a claim, unless it is clear that no unfairness will result to the party being estopped. *Schandelmeier-Bartels*, 2015 IL App (1st) 133356, ¶ 36.

¶ 35 Here, plaintiffs alleged in their 2010 case that the Book contained statements that cast them in a false light because those statements were highly offensive to a reasonable person. Those statements are essentially the same as those relied upon by plaintiffs to support their false-light claim in the present case. The trial court in the 2010 case ruled that, as a matter of law, those statements were not highly offensive to a reasonable person. Further, there was a final judgment in the 2010 case, as the court dismissed the false-light claim with prejudice. Additionally, plaintiffs were parties to the 2010 case. Therefore, all of the threshold elements of collateral estoppel have been satisfied. Finally, there is no indication that the application of collateral estoppel will be unfair, as plaintiffs had ample opportunity in the 2010 case to challenge the ruling regarding their false-light claim. Thus, we also affirm the dismissal of count III based on collateral estoppel.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the judgment of the circuit court of Lake County dismissing with prejudice plaintiffs' fourth amended complaint.

¶ 38 Affirmed.