2016 IL App (1st) 151683-U

FIRST DIVISION
May 16, 2016

No. 1-15-1683

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Counterdefendant-Appellee, v. EXELPOL MANAGEMENT & CONSULTING, INC., an involuntarily dissolved corporation; ALICIA K. LAPINKSI, individually and as president, secretary, director, and sole officer of Exelpol Management & Consulting, Inc.; SAM LAPINSKI, individually and as employee, agent, or other representative of Exelpol Management & Consulting, Inc., Defendants, and ANTHONY P. MONTEGNA, and ROBERT PHILLIP WARD, Defendants-Counterplaintiffs-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 11 CH 33663 Honorable Kathleen G. Kennedy, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's order granting plaintiff's motion to dismiss defendants' counterclaim for injunctive relief is affirmed where defendants did not allege sufficient facts to support their request for injunctive relief.

¶ 2 Defendants Anthony P. Montegna and Robert Phillip Ward, filed their interlocutory appeal of the circuit court's order granting the plaintiff's motion to dismiss defendants' counterclaim requesting injunctive relief. On appeal, defendants contend that the court erred in granting the motion to dismiss with prejudice their counterclaim for declaratory judgment and injunctive relief, and to strike defendants' affirmative defenses. In support, defendants argue that (1) section 5 of the Mortgage Rescue Fraud Act (MRFA) (765 ILCS 940/5 (West 2014)) explicitly exempts licensed attorneys from its definition of "distressed property consultants"; (2) the Attorney General lacks standing to regulate the practice of law through purported violations of the MRFA or the Consumer Fraud and Deceptive Business Practices Act (CFA) (815 ILCS 505/1 (West 2014)); (3) the purpose of the MRFA and CFA is not to regulate licensed attorneys and the legal profession; and (4) whether the trial court's findings of February 28, 2012, or its order of July 30, 2014, is the law of the case. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court granted plaintiff's motion to dismiss on June 4, 2015. Defendants filed their notice of interlocutory appeal on June 12, 2015. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Jan. 1, 2016), governing interlocutory appeals as of right.

¶ 5 BACKGROUND

¶ 6 In 2011, plaintiff, by the attorney general, filed a two-count complaint against all of the defendants, alleging that they operated as "distressed property consultants" in violation of the MRFA. The complaint alleged that defendants violated the MRFA by failing to provide

customers with a written contract containing statutorily required notices of their rights, inducing customers to waive their statutory rights, charging a fee before performing any services, and charging fees in excess of that allowed by statute. The complaint also alleged that defendants made numerous misrepresentations and false promises in providing services. Plaintiff sought the imposition of civil penalties and injunctive relief.

¶ 7 Montegna and Ward (hereinafter "defendants") filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), arguing that they are exempt from the MRFA and CFA because they are licensed attorneys. They pointed to section 5 of the MRFA which states that a "distressed property consultant" does not include "licensed attorneys engaged in the practice of law." 765 ILCS 940/5 (West 2014). Plaintiff, however, contended that the exemption does not apply unless the attorneys were engaged in the practice of law when the challenged conduct occurred.

¶ 8 On February 28, 2012, the trial court held a hearing on defendants' motion. Plaintiff's counsel argued that the exemption should apply only if the attorney is engaged in the practice of law as to a particular client. Defense counsel argued that the exemption should apply to all licensed attorneys generally engaged in the practice of law, as were defendants here, and that the proper body for regulating attorney conduct is the Attorney Registration and Disciplinary Commission (ARDC), not the State. Following the hearing, the trial court granted the motion to dismiss without prejudice, finding that plaintiff failed to allege facts showing that defendants did not provide legal services to their customers. The trial court, however, granted plaintiff leave to file an amended complaint.

¶ 9 In the amended complaint, plaintiff alleged that defendants did not engage in the practice of law because they did not file bankruptcy, foreclosure or other affirmative action against the

lender on behalf of their clients. The amended complaint also specified that defendants performed loan modification services, such as filling out and faxing forms to the servicer, that did not require exercise of legal knowledge or skill. Defendants filed a motion to dismiss the amended complaint pursuant to section 2-619.1 of the Code, arguing that the amended complaint merely restated the allegations of the original complaint, the attorney general has no authority to regulate the practice of law by pursuing violations of the MRFA and CFA, and that the MRFA and CFA are not applicable to defendants because they are licensed attorneys engaged in the practice of law. Defendants also asked the trial court to certify two questions for immediate appeal should it deny the motion to dismiss.

¶ 10 At the July 30, 2014, hearing, the parties argued the meaning of the phrase "engaged in the practice of law" contained in section 5 of the MRFA (765 ILCS 940/5 (West 2014)). Plaintiff argued that defendants did not engage in the practice of law because they acted with the other defendants as "a unified loan modification operation" and "never discussed legal issues about the delinquency" or "any other legal right or defense that the consumer may have." Defendants argued that even if they did not discuss legal issues with their clients they still used their legal skills developed by their 30 years of combined experience as attorneys. The trial court responded that it was only concerned with "whether the facts are sufficient to go forward on the case." It considered "the facts in the light most favorable to the Plaintiff, and the reasonable inferences from those facts" as well as "the arguments of the parties," and denied defendants' motion to dismiss. The trial court also denied defendants' certification request and gave defendants 28 days to respond to plaintiff's complaint.

¶ 11 On December 4, 2014, defendants filed their answer to plaintiff's amended complaint, and also filed 46 affirmative defenses and a two-count counterclaim. Count I of the

counterclaim sought a declaration that the exemption provision of the MRFA applies to all licensed attorneys. Count II sought to enjoin the attorney general from "unilaterally attempting to eliminate the Illinois bar from representing clients in loan modifications" and interfering with defendants' law practice of representing clients in their loan modifications by charging them with statutory fraud claims. It alleged that defendants "would be irreparably harmed if the [attorney general] is allowed to arbitrarily continue to interfere with" their law practices, and that "[t]here is no adequate remedy at law."

¶ 12 Plaintiff filed a section 2-615 motion to strike defendants' affirmative defenses and to dismiss their counterclaim. On June 4, 2015, the trial court granted the motion to strike the affirmative defenses and to dismiss defendants' counterclaim with prejudice. It found that in their counterclaim, defendants pled that they were licensed attorneys in good standing, they engaged in the practice of law by providing loan modification services, and they have incurred fees and costs. It determined that "[t]he remaining allegations of their counterclaim are conclusions of fact or law" and the allegations do "not expressly incorporate any other facts." The trial court, on its own motion, clarified that in denying defendants' motion to dismiss on July 30, 2014, it rejected the argument that attorneys were completely exempt from the MRFA and CFA, and found that defendants' standing defense was not applicable.

¶ 13 Defendants filed a notice of interlocutory appeal, seeking review of the trial court's orders dismissing their counterclaim with prejudice, denying their motions to dismiss plaintiff's amended complaint, and denying their request to certify two questions for immediate appeal. Plaintiff filed a motion to dismiss for lack of jurisdiction. On July 8, 2015, this court entered an order stating that "Appellee's motion to dismiss is DENIED in part as to defendants' appeal of the

dismissal of their counterclaim for injunctive relief and GRANTED in part as to the remainder of issues appealed by defendants."

¶ 14 ANALYSIS

¶ 15 Plaintiff requests that this court reconsider whether we have jurisdiction to consider this appeal, arguing that dismissal of a claim for permanent injunctive relief is a final order requiring a Rule 304(a) finding that there is no just reason to delay an appeal, and the trial court made no such ruling. However, it is unclear from the allegations in defendants' counterclaim and briefs whether they are seeking a temporary or a permanent injunction. Therefore we will consider defendants' appeal in accordance with our July 8, 2015, order.

¶ 16 On appeal, defendants allege that the trial court erred in dismissing with prejudice their counterclaim for declaratory judgment and injunctive relief, and in granting plaintiff's motion to strike their affirmative defenses. They argue that the MRFA exempts licensed attorneys who are generally engaged in the practice of law, challenge the finding that the attorney general lacks standing to regulate the practice of law through violations of the act, and contend that the trial court's findings in its February 28, 2012, order dismissing plaintiff's original complaint is the law-of-the-case.

¶ 17 However, we note that in our order of July 8, 2015, we denied plaintiff's motion to dismiss defendants' appeal only as to their counterclaim for injunctive relief. Appellate court review "is limited by supreme court rule to final orders and certain interlocutory orders specified in those rules." *Getto v. City of Chicago*, 92 Ill. App. 3d 1045, 1048 (1981). The supreme court rules "dictate the limits of our jurisdiction." *Lewis v. NL Industries, Inc.*, 2013 IL App (1st) 122080, ¶ 5. Illinois Supreme Court Rule 307 (eff. Jan. 1, 2016) authorizes this court to take an appeal from an interlocutory order "granting, modifying, refusing, dissolving, or refusing

to dissolve or modify an injunction." Therefore, we limit our review to the issue of whether the trial court properly granted plaintiff's section 2-615 motion to dismiss defendants' counterclaim for injunctive relief.

¶ 18 A section 2-615 motion to dismiss attacks the legal sufficiency of the complaint. *Norton v. City of Chicago*, 267 Ill. App. 3d 507, 510 (1994). In reviewing the trial court's dismissal pursuant to section 2-615, a reviewing court determines whether the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, state a cause of action upon which relief can be granted. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440-41 (2004). We review the trial court's grant of a section 2-615 motion to dismiss *de novo*. *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 586 (2004).

¶ 19 For a preliminary injunction, a party must plead and prove (1) a clear right or interest in need of protection; (2) irreparable harm if the injunction is not granted; (3) lack of an adequate remedy at law; and (4) the likelihood of success on the merits. *Keege-Shea Joint Venture v. City of Evanston*, 332 Ill. App. 3d 163, 169 (2002). The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits. *Id*. On the other hand, permanent injunctions are "designed to extend or maintain the status quo indefinitely when the [party] has shown irreparable harm and that there is no adequate remedy at law." *Butler v. USA Volleyball*, 285 Ill. App. 3d 578, 582 (1996). A party seeking a permanent injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that he or she will suffer an irreparable harm if the injunction is denied; and (3) there is no adequate remedy at law. *Kopchar v. City of Chicago*, 395 Ill. App. 3d 762, 772 (2009). Regardless of whether it is temporary or permanent in nature, an injunction is an "extraordinary remedy." *Id*. at 772-73. Therefore, a claim for such relief "must plead facts which clearly show a right to injunctive

relief." *New Park Forest Associates II v. Rogers Enterprises, Inc.*, 195 Ill. App. 3d 757, 761 (1990). The claim must contain "factual allegation[s], not mere opinion, conclusion or belief." *Betts v. State of Illinois*, 78 Ill. App. 3d 102, 108 (1979).

¶ 20 In defendants' counterclaim for injunctive relief, they allege that plaintiff is attempting to interfere with their practices of law, that they "would be irreparably harmed if the [attorney general] is allowed to arbitrarily continue to interfere with" their law practices, and that "[t]here is no adequate remedy at law." Defendants' mere assertion that there is no adequate remedy at law, without factual allegations given in support, is insufficient to establish lack of a legal remedy. See *Betts*, 78 Ill. App. 3d at 108 (party claiming injunctive relief must set forth facts showing right to such relief, including the lack of an adequate remedy at law). Even an allegation that there exists, or a threat exists, of multiple actions against the party is insufficient to show lack of a legal remedy. *Id*. at 109. Since defendants' counterclaim does not allege sufficient facts supporting their allegation seeking injunctive relief, the trial court properly granted plaintiff's section 2-615 motion to dismiss.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 23 Affirmed.