

2016 IL App (2d) 150729-U
No. 2-15-0729
Order filed June 20, 2016

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JOSE MORENO,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 2014-AR-0049
)	
JOSHUA M. MARTIN and CITIZEN LAW)	
GROUP, LTD., an Illinois Corporation,)	Honorable
)	Joseph M. Grady
Defendants-Appellees.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court's order dismissing plaintiff's amended complaint containing counts of legal malpractice and breach of contract was affirmed pursuant to section 2-615 of the Code of Civil Procedure when: (1) in the legal malpractice count, plaintiff failed to allege facts that set out the essential elements of duty, breach or proximate cause with regard to his claims that defendants gave him bad advice and took no action on his case;; and (2) in the breach of contract claim, plaintiff failed to allege that he had substantially performed the contract.

¶ 2 Plaintiff Jose Moreno appeals from the trial court's order dismissing his amended complaint for legal malpractice and breach of contract against defendants, Joshua M. Martin and the Citizens Law Group, LTD (collectively, CLG). For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 The following facts are taken from Moreno's amended complaint. From 1992 until August 2013, Moreno resided at 804 Navajo Drive in Carpentersville, Illinois. On November 8, 2012, a default judgment was entered against him in a foreclosure action of his home. A judicial sale of the home was confirmed in April 2013. A month after the sale was confirmed, Moreno went to CLG and met with Martin. At that meeting, Moreno signed a "Fee and Retainer Agreement" (Retainer Agreement). Martin also signed the agreement. The Retainer Agreement provided, in pertinent part:

"1. **RETAINER/HOURLY RATE/BILLING.** Law Firm agrees to represent the Client in the defense of this matter for a flat fee of \$3,500.00 for the first 12 months following the execution of this retainer, and at a flat fee of \$3,500.00 per year for each subsequent 12 month period thereafter. As a judgment has already been entered the Client understands and acknowledges that there is a possibility that the presentation in this matter will not extend for 1 full year. *However, based on the Client's assertion that they did not live at the address that is the subject of this foreclosure proceeding, and that service was not had upon the Client or anyone residing at the Client's abode, there is a distinct possibility that a Motion to Quash will be granted and the judgment vacated should Client be able to provide sufficiently compelling documentation pertaining to their place of residence at the time of the purported service.*" (Emphasis added.)

¶ 5 On July 25, 2013, the Sheriff of Kane County posted a Notice of Sale on Moreno's front door. After receiving the Notice of Sale, Moreno called CLG, and CLG allegedly told him that he would not be removed from his home. On the morning of July 26, Moreno faxed the notice to CLG. Relying on CLG's advice that he would not be removed from his house, Moreno did not

search for alternative housing or make alternative storage arrangements for his personal property. On July 29, 2013, he was summoned to GLG where he was asked to review an affidavit CLG had prepared. Moreno claimed that the facts in the first draft of the affidavit were inaccurate, so he had to correct them. Moreno alleged that he signed a corrected draft of the affidavit.

¶ 6 Moreno also alleged that on August 14, 2013, he returned home to find that all of his property had been removed from his home and placed on the parkway in front of his house. Moreno called CLG and told one of its employees that his belongings had just been removed from his home. Moreno listed several items removed from his home, including all his furniture, washer, dryer, microwave, etc. He was barred from re-entering the home. He immediately sought an alternative storage solution for his personal property. However, much of his personal property was damaged, destroyed or stolen before he could safely store it elsewhere.

¶ 7 Moreno filed a one-count complaint alleging legal malpractice against CLG and Martin on January 23, 2014. In response, CLG filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). After a hearing, the trial court denied the motions. CLG filed a motion to reconsider.

¶ 8 In the motion to reconsider CLG claimed that Moreno had failed to state a cause of action for legal malpractice as a matter of law. CLG alleged that Moreno had lied to them about material facts at the time Moreno retained them. Specifically, the Retainer Agreement between the parties contemplated the filing of a motion to quash based upon Moreno's representation that he did not live at the foreclosed property at the time he was purportedly served. However, after they were retained, CLG learned that Moreno had lied about where he resided at the time of service, and that service was properly made upon Moreno. As a result, CLG would have violated several rules of professional responsibility if they had filed a motion to quash. CLG

informed Moreno that it could not file a motion to quash since it now knew that the allegations supporting the motion would have been false. CLG alleged that they had made several attempts to return the \$3,000 that Moreno had paid to them; however, Moreno refused the money and instead demanded amounts that exceeded that amount “by several multiples.” After a hearing, the court granted CLG’s motion to reconsider and dismissed Moreno’s complaint without prejudice.

¶ 9 On March 2, 2015, Moreno filed a three-count amended complaint. The amended complaint alleged causes of action for legal malpractice, breach of contract, and unjust enrichment¹. In the count for breach of contract Moreno alleged that the Retainer Agreement was a valid and enforceable contract and the agreement provided that CLG would “use their best efforts and judgment on [Moreno’s] behalf.” Moreno alleged that CLG breached their contract with him by “failing to provide competent legal services to him and improperly advising him to ignore the Sheriff’s notice of eviction.”

¶ 10 CLG again moved to dismiss, and alleged that the only substantive change to the complaint was that Moreno now added a count for unjust enrichment, a cause of action that was not available in contract cases. CLG also incorporated by reference all the arguments raised in the motion for reconsideration and alleged that the amended complaint was a mirror image of the first complaint filed in this matter.

¶ 11 At the hearing on CLG’s motion to dismiss the amended complaint, Moreno’s counsel first argued that any motion to dismiss the count for breach of contract was not properly before the trial court because it was not referenced in CLG’s motion to dismiss the amended complaint. In response, CLG’s counsel argued that there was no breach of contract here because CLG did

¹ Moreno is not appealing the dismissal of the count for unjust enrichment.

not have a duty to violate the Code of Ethics and commit perjury on behalf of a client. Counsel explained that Moreno's claim was that CLG breached their duty to him by not filing a motion to quash in the underlying foreclosure action. Counsel stated that the possibility of filing a motion to quash was expressly documented in the Retainer Agreement, and that Moreno had represented to CLG that there were facts that would lead to the filing of a proper motion to quash. However, when CLG learned that Moreno was living at the home when the foreclosure action was instituted (which Moreno admitted to in both his complaint and amended complaint), CLG could not properly file a motion to quash. CLG argued that since the judgment of foreclosure had been entered and the sale had been approved, there was no other legal action that they could have taken.

¶ 12 As to causation, counsel said that Moreno had proper notice by the Kane County Sheriff's Department that it was going to evict Moreno and anyone else in home. Moreno also knew that there was no motion to quash on file. Even with this knowledge, Moreno failed to act. Therefore, counsel argued, CLG actions or inactions were not the proximate cause of Moreno's alleged damages. Counsel then argued that the damages were speculative.

¶ 13 On June 23, 2015, the trial court granted CLG's motion to dismiss with prejudice. The trial court did not provide its reasoning in dismissing the amended complaint, and it did not specify whether it was being dismissed pursuant to section 2-615 or 2-619 of the Code. 735 ILCS 5/2-615, 2-619 (West 2014). Moreno timely appealed.

¶ 14

II. ANALYSIS

¶ 15 On appeal, Moreno claims that the trial court erred in dismissing his counts for legal malpractice and breach of contract in his amended complaint under both sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-615, 2-619 (West 2014).

¶ 16 We initially note that CLG has not filed a brief in this court. However, as the issues are relatively simple, we may resolve them without the benefit of an appellee's brief. *People v. Maberry*, 2015 IL App (2d) 150341, ¶ 8 (citing *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill.2d 128, 133 (1976)).

¶ 17 Defendants' motions to dismiss were brought under section 2-619.1 of the Code, which allows a party to file a motion combining a section 2-615 motion to dismiss with a section 2-619 motion to dismiss. See 735 ILCS 5/2-619.1 (West 2014); 735 ILCS 5/2-615, 2-619 (West 2014). A section 2-615 motion to dismiss challenges a complaint's legal sufficiency. *State ex rel. Pusateri v. Peoples Gas Light & Coke Co.*, 2014 IL 116844, ¶ 8. To survive dismissal under section 2-615, a complaint must allege facts that set out all the essential elements of a cause of action. *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 724 (2007). A section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts a defense outside the complaint that defeats it. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

¶ 18 When ruling on a section 2-615 or 2-619 motion to dismiss, a court must accept all well-pleaded facts as true and accord all reasonable inferences to the nonmoving party. *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶¶ 18, 47. We review a trial court's decision on a motion to dismiss pursuant to section 2-615 or section 2-619 of the Code under a *de novo* standard of review. *Id.*

¶ 19 We will first address Moreno's claim that the trial court erred in dismissing his legal malpractice and breach of contract counts pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2014).

¶ 20

A. Legal Malpractice

¶ 21 On appeal, Moreno argues that his amended complaint properly pled all four requirements to survive a motion to dismiss his count for legal malpractice. Specifically, he claims that he sufficiently stated that a duty between he and CLG was created when the parties both signed the Retainer Agreement and an attorney-client relationship began. He contends that he alleged sufficient facts to demonstrate that a breach of that duty occurred when CLG: (1) took no action in the foreclosure case; and (2) failed to advise him of the imminent danger of eviction that he faced when the Sheriff's Notice of Sale was put on the front door to his home. He also alleged sufficient facts to establish proximate cause when he alleged that but for CLG's assurances that he would not be evicted from his home, he would have made arrangements to secure his personal property before being evicted by the Kane County Sheriff. As a result of that reliance, Moreno argues that he suffered the harm of which he complained of in this lawsuit. Finally, he alleges that the amended complaint contained sufficient allegations of fact to establish the element of damages because in addition to the loss of personal property, he also alleged that he incurred the loss of the \$3,000 he paid to defendants.

¶ 22 To state a cause of action for legal malpractice, the plaintiff must allege facts to establish that: (1) the attorney owed the client a duty of due care arising from an attorney-client relationship, (2) the attorney breached that duty, (3) the client suffered an injury in the form of actual damages, and (4) the actual damages resulted as a proximate cause of the breach. *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶ 28. A legal malpractice suit is by its nature dependent upon a predicate lawsuit. *Id.* Therefore, a legal malpractice claim presents a "case within a case." *Id.* "[N]o malpractice exists unless counsel's negligence has resulted in the loss of an underlying cause of action, or the loss of a meritorious defense if the attorney was

defending in the underlying suit.” *Id.* (quoting *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 122 (1986)).

¶ 23 Here, Moreno’s amended complaint did not allege sufficient facts to properly plead and prove three elements of legal malpractice. First, with regard to his claim that CLG breached a duty to him when they failed to advise him of the imminent danger of eviction that he faced when the Sheriff’s Notice of Sale was put on the front door to his house, we find no breach here because Moreno did not allege sufficient facts to properly plead a duty on CLG’s part to provide such advice. Although Moreno alleged in his amended complaint that CLG had a duty to “advise [him] that the notice posted on his home by the Sheriff of Kane County of July 25, 2013, posed a real and present danger of imminent eviction and significant loss of personal property,” it is clear from the terms of the Retainer Agreement that Moreno hired CLG for one thing only: to file a motion to quash in the foreclosure action in order to get the foreclosure action and judicial sale reversed. Even that legal action was predicated upon Moreno being able to provide sufficiently compelling documentation that he and his family did not live at their residence at the time of the purported service of the foreclosure action.

¶ 24 In ruling on a motion to dismiss, 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 is negated. *Outboard Marine v. Chisholm & Sons*, 133 Ill.App.3d 238, 245 (1985). Here, we find that the allegations in Moreno’s amended complaint conflict with the clear terms of the Retainer Agreement, therefore, the Retainer Agreement controls. A plain reading of the Retainer Agreement does not contemplate CLG providing legal advice to Moreno on the issue of whether

to accept the plain language of the Sheriff's Notice of Sale as true or not. Since there was no duty here, we cannot find a breach. Also, Moreno failed to allege that CLG's alleged "bad advice" was the proximate cause of his injuries. Again, "[N]o malpractice exists unless counsel's negligence has resulted in the loss of an underlying cause of action, or the loss of a meritorious defense if the attorney was defending in the underlying suit." *Id.* (quoting *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 122 (1986)). In this case, the underlying case has already been lost as a judgment has been entered against Moreno. Thus, the first half of this statement has not been satisfied. Additionally, there was no loss of a meritorious defense because Moreno's complaint admitted that he was in fact residing on the premises. Therefore, it was unreasonable for Moreno to have relied on anything his lawyers said because Moreno knew or should have known that he was going to be evicted in due course because there was no meritorious defense. Of course, this analysis assumes *arguendo* that there was in fact an attorney-client relationship beyond the limitations placed on the relationship in the retainer agreement.

¶ 25 Second, with regard to Moreno's allegation that he pled sufficient facts to demonstrate that a breach of duty occurred when CLG took no action in the case, we again find that Moreno failed to properly plead and prove the existence of the elements of duty, breach and proximate cause. As we have previously noted, in his amended complaint Moreno alleged that he lived at the residence in question when the foreclosure action was instituted. Therefore, under the terms of the Retainer Agreement, CLG was under no duty to file a motion to quash. Again, if there was no duty, then there could be no breach of that duty. Finally, with regard to proximate cause, Moreno again failed to allege that but for CLG's negligence, he would have been successful in the foreclosure proceeding. Since Moreno's complaint failed to allege a cause of action for legal

malpractice it was properly dismissed pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2014). Therefore, we need not address Moreno's claim that the trial court erred in dismissing this claim pursuant to section 2-619 of the Code.

¶ 26

B. Breach of Contract

¶ 27 Moreno first points out that CLG's written motion to dismiss did not address his breach of contract claim contained in the amended complaint, and that only limited argument was presented by CLG with respect to the breach of contract claim at the hearing on CLG's motion to dismiss. Next, Moreno states that he is incorporating the arguments that he presented in the earlier part of his brief into his argument that the trial court erred in dismissing the count for breach of contract.

¶ 28 To state a claim for breach of contract, a plaintiff must allege: (1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) resultant damages. *Gonzales v. American Express Credit Corp.*, 315 Ill. App. 3d 199 (2000).

¶ 29 We initially note that although Moreno mentions the fact that CLG did not address his breach of contract claim in their written motion to dismiss, he does not argue that this omission constituted error. Instead, he simply quotes passages from the hearing on CLG's motion to dismiss where CLG argued to the trial court that no breach of contract occurred. Accordingly, he has forfeited any claim of error on this point. See Ill. S. Ct. R. 341(h)(7) (eff. Feb.6, 2013) ("Points not argued [in an appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 30 Moreno has also forfeited his claim that the trial court erred in dismissing his breach of contract count. Any incorporation of his earlier arguments as to why the trial court erred in

dismissing his legal malpractice count are irrelevant because, as we have noted, to survive dismissal under section 2-615, a complaint must allege facts that set out all the essential elements of a cause of action. *Pecoraro v. Balkonis*, 383 Ill. App. 3d 1028, 1033 (2008). On appeal, Moreno's focus should have been that he properly alleged facts that set out the essential elements of a cause of action for breach of contract in his amended complaint. Although he provided the legal requirements for a breach of contract action in his brief, nowhere does he explain how his amended complaint set out facts supporting those requirements. Therefore, this argument is also forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb.6, 2013). In any event, even if Moreno had not forfeited this issue, we would find it to be without merit. The count for breach of contract in the amended complaint did not allege that Moreno, as the plaintiff, had substantially performed the contract. Since a required element of the cause of action was not pled, the trial court properly dismissed this count pursuant to section 2-615 of the Code. 735 ILCS 5/2-615 (West 2014). Again, since we have found dismissal here proper under section 2-615 we need not address whether it was also proper under section 2-619.

¶ 31

III. CONCLUSION

¶ 32 For the reasons stated, we affirm the dismissal of Moreno's amended complaint because he failed to state a cause of action for legal malpractice or breach of contract as a matter of law.

¶ 33 The judgment of the circuit court of Kane County is affirmed.

¶ 34 Affirmed.