No. 1-10-0282

FIFTH DIVISION
January 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ARVIND SONI, M.D.,	)	
	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
	)	Cook County
v.	)	
	)	No. 09 L 5439
ELMHURST MEMORIAL HOSPITAL ("EMH"); LEO FRONZA; DR. CONNIE PARKER; DR. MATTHEW LAMBERT; DR. AMARYLLIS GILL; JEAN LYDON, RN; SHARON RIMGALE, RN;	)	Honorable Thomas P. Quinn, Judge Presiding.
	)	
Defendants-Appellants.	)	

JUDGE EPSTEIN delivered the judgment of the court.
Justices Joseph Gordon and Howse concurred in the judgment.

ORDER

HELD: Trial court affirmed. Where appellant did not challenge the section 2-619 dismissal of his fraud claim, review of the section 2-615 dismissal of the same claim was unnecessary.

Plaintiff-appellant, Arvind Soni, M.D., appeals pursuant to Supreme Court Rule 304(a) (210 Ill. 2d. R. 304(a)) the trial court's dismissal of his fraud claim under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)). Defendant-appellees, who filed a combined

motion to dismiss, argue that the trial court dismissed plaintiff's claim pursuant to both sections 2-615 and 2-619 (735 ILCS 5/2-619 (West 2008)) and that plaintiff's failure to appeal the section 2-619 ruling renders review of the section 2-615 portion unnecessary. We agree and affirm.

BACKGROUND

Plaintiff, a radiation oncologist, alleges in his complaint that in May 2005 he contracted with Elmhurst Memorial Hospital ("EMH") on behalf of his medical corporation, Elmhurst Radiation Oncology Services P.C., to provide radiation therapy services until May 31, 2008. In November 2006, plaintiff informed Leo Fronza, EMH's chief executive officer, that he was interested in joining Hematology Oncology Associates of Illinois ("HOAI"), but would only do so if Fronza approved and allowed him to maintain his physical office at EMH. Fronza allegedly agreed and informed HOAI he did not object.

Unbeknownst to plaintiff, however, in December 2006 Drs. Connie Parker and Matthew Lambert, EMH's vice president and senior vice president, ordered a peer review of plaintiff's work.

> "24. Upon information and belief, Dr. Lambert instructed Dr. Amaryllis Gill to find patients of Dr. Soni about whom Dr. Gill had concerns for purposes of the peer review of Dr. Soni.
>
> 25. Dr. Gill held animosity against Dr. Soni over an incident in August 2006 where Dr. Soni discovered that Dr. Gill had tried to change a radiation prescription prescribed by Dr. Soni for a patient they share." Compl. ¶¶ 24-25.

Plaintiff learned of the peer review, but was assured by Fronza that it was being conducted for plaintiff's benefit.

In February or March 2007, plaintiff met with HOAI.

"29. [Plaintiff] and HOAI agreed in principle that [plaintiff] would join HOAI, HOAI would close its operations at Gottlieb Hospital, and HOAI would send its patients to EMH where [plaintiff] operated his practice.

30. By this agreement, EMH would make more money because more patients would be treated at EMH than if [plaintiff] remained a solo practitioner and Gottlieb Hospital remained a competitor.

31. On February 23, 2007, [plaintiff] signed a confidentiality agreement with HOAI in order to engage in negotiations regarding the potential execution of an employment contract. [He] informed Fronza that he was signing the confidentiality agreement.

32. In late summer or early fall 2007, Dr. Lyster, manager of the HOAI west district and practicing oncologist at EMH, Dr. Steven Newman, president of HOAI and practicing medical oncologist, and Roy Johnson, the business manager for HOAI, all met with Fronza to discuss their collaboration." Compl. ¶¶ 29-32.

The details or the result of that meeting are not alleged.

In December 2007, plaintiff met with Fronza to discuss certain perceived negative behavior by EMH including a statement by Dr. Lambert that plaintiff should resign. Fronza, who did not "retract his prior statements that [plaintiff] should join HOAI," advised plaintiff "not to worry about it." In January 2008, plaintiff advised Fronza he was joining HOAI. Fronza did not object. Plaintiff then signed a contract with HOAI effective June 1, 2008. Between March and May 2008 Fronza

cancelled meetings with plaintiff and HOAI regarding the transfer. On May 8, 2008, EMH's legal department informed plaintiff his services were no longer required, that his contract with EMH would not be renewed, and that Fronza wanted him to vacate EMH's premises by May 31, 2008. Plaintiff left on May 31, 2008, and was replaced by Nuclear Oncology.

In February 2009, HOAI terminated plaintiff's employment effective May 31, 2009. HOAI allegedly claimed it "could no longer sustain his employment in the absence of [his] office at EMH and privileges at EMH." On May 7, 2009, plaintiff filed the instant lawsuit against EMH; Fronza; Drs. Parker, Lambert, and Gill; Jean Lydon, EMH's assistance vice president; and Sharon Ringle, the head nurse of outpatient oncology at EMH. Defendants moved to dismiss plaintiff's three-count complaint sounding in fraud (count I), tortious interference (count II), and defamation (count III). The trial court granted defendants' motion in a written order. It dismissed count I with prejudice; defendants Fronza, Parker, Lambert, and Gill with prejudice; and counts II and III with leave to replead against Lydon and Rimgale only. The trial court denied plaintiff's motion for reconsideration, but entered a Rule 304(a) finding. See 210 Ill. 2d. R. 304(a). On appeal, plaintiff challenges only the dismissal of count I pursuant to section 2-615. There is no cross-appeal.

STANDARD OF REVIEW

"Section 2-619.1 of the Code allows a litigant to combine a section 2-615 motion to dismiss and a section 2-619 motion to dismiss in one pleading." *Northern Trust Co. v. County of Lake*, 353 Ill. App. 3d 268, 278 (2004).

"Sections 2-615 and 2-619 allow for dismissal under different legal theories. [Citation.] A section 2-615 motion attacks the legal sufficiency of the plaintiff's

> claims, while a section 2-619 motion admits the legal sufficiency of the claims but raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or established by external submissions, that defeat the action." *Zahl v. Krupa*, 365 Ill. App. 3d 653, 653-58 (2006).

"A cause of action should not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle plaintiff to recover." *Van Duyn v. Smith*, 173 Ill. App. 3d 523, 528 (1988). "When reviewing a trial court's disposition of a motion to dismiss filed under either section 2-615 or section 2-619, the reviewing court accepts all well-pleaded facts as true and makes all reasonable inferences therefrom. [Citation.] A dismissal under either section 2-615 or section 2-619 is reviewed *de novo*." *Krupa*, 365 Ill. App. 3d at 658.

ANALYSIS

> "In order to state a claim for common law fraud, a plaintiff must allege a misrepresentation by the defendant that was: (1) a false statement of material fact; (2) known or believed to be false by the party making it; (3) intended to induce the other party to act; (4) acted upon by the other party in reliance upon the truth of the representations; and (5) damaging to the other party as a result. [Citation.] Fraud claims must include specific allegations of fact from which fraud may be inferred." *Hoopingarner v. Stenzel*, 329 Ill. App. 3d 271, 278 (2002).

Plaintiff alleges in count I that, in addition to the facts above,

> "75. EMH, through Fronza, repeatedly assured Dr. Soni that EMH would renew his contract and allow him to keep his office at EMH.

76. EMH, through Fronza and others, repeatedly encouraged Dr. Soni to leave his solo practice and join HOAI.

77. EMH, through Fronza and others, knew that EMH was conducting peer reviews of Dr. Soni and that EMH would not be renewing Dr. Soni's contract.

78. EMH, through Fronza and others, knew that Dr. Soni's offer to join HOAI was dependent upon him having a physical office at EMH.

79. EMH, through Fronza, intended to induce Dr. Soni to leave to his solo practice to join HOAI so that EMH could replace him and his office space with a group that would bring in more business.

80. Dr. Soni justifiably relied upon the false statements and encouragement of EMH, through Fronza and others, and left his solo practice to join HOAI.

81. Dr. Soni suffered damages as a result of his reliance on EMH and Fronza, among others, in that he lost his office space at EMH, lost his patients who he treated at EMH's facility, and lost his job at HOAI."

Defendants moved to dismiss this claim pursuant to section 2-615 arguing that it does not meet the heightened pleading standard for fraud claims; that the facts alleged therein do not state a claim against any of the defendants; and that EMH's contract bars any reasonable reliance by Dr. Soni as a matter of law. Defendants also claimed, pursuant to section 2-619(a)(9), that, *inter alia*, EMH's bylaws bar all of plaintiff's claims. Dr. Soni responded that defendants' combined motion was improper; that the improper motion "waived [defendants'] 2-615 arguments as to the complaint's insufficiency"; and that he would therefore "only respond to the dispositive 2-619 bases for

dismissal, without waiving his opportunity to respond to the 2-615 arguments if [the trial] court [did] not strike the 2-615 sections." The trial court did not strike defendants' motion, and it tacitly overruled Dr. Soni's position by holding, pursuant to section 2-615, that:

> "Count I alleges fraud against Leo Fronza, CEO of EMH. Specifically, plaintiff alleges that Fronza misrepresented that EMH would renew his contract. The exact date and content of these statements is not specified. Regardless, these deficiencies cannot be cured because plaintiff could not have reasonably relied upon an oral statement that his written contract would be renewed. The contract states that it will end on May 31, 2008, and that it cannot be charged unless incorporated by amendment."

The trial court further held, under the section 2-619 portion of its order, that:

> "Additionally, defendants claim they are immune from liability pursuant to §14.1 of the Bylaws that provides:
>
> > The Hospital and the Medical Staff and any such representative acting within the scope of duties exercised as a representative of the Hospital or Medical Staff, and any third party participating with, assisting or providing services to the Hospital or Medical Staff or any such representative, shall not be liable to [a] Practitioner for damages or other relief for any actions, omissions, communications, decisions, opinions, statements, disclosures, recommendations or any other conduct, provided that such

representative or third party acts in good faith and without malice.

The Hospital and Medical Staff and any such representatives acting within the scope of duties exercised as a representative of the Hospital or Medical Staff, and any third party, shall not be liable to a Practitioner for damages or other relief by reason of providing information to a representative of the Hospital or Medical Staff or to any other health care entity or organization of health professionals concerning a Practitioner who is, or has been, an Applicant to or Member of the Medical Staff, or an Applicant for, or who did or does exercise, Clinical Privileges, provided that the Hospital, Medical Staff, such representative, or such third party acts in good faith and without malice.

Plaintiff has not offered matter showing that he was not bound by the Bylaws. Instead, Dr. Soni argues that since the Bylaws do not define 'malice,' the question of its definition is one for the trier of fact and is not subject to a motion to dismiss pursuant to §2-619. 'When determining the plain and ordinary meaning of words, a court may look to the dictionary.' *Montgomery v. Nostalgia Lane, Inc.*, 383 Ill. App. 3d. 1098, 1105 (2008). Malice is '[t]he intent without justification or excuse, to commit a wrongful act.' *Black's Law Dictionary*, (8th ed. 2004). Thus, defendants are covered by the immunity provisions in the Bylaws.

Accordingly, defendants Elmhurst Memorial Hospital ("EMH"), Leo Fronza,

> Dr. Connie Parker, Dr. Matthew Lambert, Dr. Amaryllis Gill, Jean Lydon, R.N., and Sharon Rimgle, R.N.'s motion is GRANTED. Count I is dismissed with prejudice and without leave to replead. Defendants Fronza, Parker, Lambert, and Gill are dismissed with prejudice. Plaintiff is given 21 days to replead counts II and III against defendants Lyndon and Rimgale. Said counts must be repled in accordance with this order – with specificity and facts supportive of willful, wanton, and malicious conduct. If plaintiff chooses to stand on his complaint, this order will be made final."

On appeal, plaintiff challenges only the section 2-615 portion of the trial court's order arguing that count I states a claim for fraud and that any defects therein could have been cured by amendment. Defendants respond that, *inter alia*, plaintiff's failure to address the section 2-619 portion of the trial court's order, an alleged basis for dismissing count I with prejudice, forfeits that issue and eliminates the need to address plaintiff's section 2-615 claims of error. Plaintiff replies that count I was dismissed under section 2-615 only, and the section 2-619 ruling "was limited to counts II-III *** because the circuit court had already dismissed count I." That argument fails.

Supreme Court Rule 341 mandates that: "Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." 210 Ill. 2d. 341(h)(7). "Consistent with the plain language of the rule, [our supreme] court has repeatedly held that the failure to argue a point in the appellant's opening brief results in forfeiture of the issue." *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). The trial court's order dismissed count I on the grounds of sections 2-615 and 2-619. We reject the notion that the section 2-619 ruling did not apply to count I or that plaintiff can reasonably claim he was unaware that it applied because:

(a) The trial court did not limit its section 2-619 ruling on the bylaws to counts II and III;

(b) Although plaintiff's fraud claim is premised on Fronza's alleged statements that "EMH would renew [plaintiff's] contract and ***allow him to keep his office at EMH***" (emphasis added), the trial court's section 2-615 ruling addresses only the renewal of plaintiff's contract;

(c) plaintiff responded only to defendants' section 2-619 claims (and declined to address section 2-615);

(d) Plaintiff's motion to reconsider argued the bylaws issue in relation to count I, an issue that, again, is only cognizable in the context of section 2-619:

> "Whether malice existed is a matter for the trier of fact to determine, not an issue to be decided as a matter of law in the absence of a definition in the Bylaws or allegations to support the argument that Defendants' actions were done in good faith and without malice. This court should reconsider its dismissal with prejudice of Defendants Fronza, Parker, Lambert, and Gill and Count I as whether wilful and wanton conduct existed can be inferred by the allegations in the complaint, and in any case, are more appropriately decided at summary judgment where discovery can be taken."

The trial court's section 2-619 ruling on the bylaws applied to count I. Plaintiff's contention below that defendants' section 2-615 grounds were waived; the limitation of his response to the section 2-619 grounds only; and the bylaws-based portion of his motion to reconsider demonstrate plaintiff's knowledge that the trial court dismissed count I on section 2-619 grounds. Plaintiff has therefore

forfeited review of the trial court's section 2-619 ruling by not appealing it, rendering review of trial court's section 2-615 ruling unnecessary.

Furthermore, defendants argued as part of their motion to dismiss that count I be stricken as against the individual defendants because "all of [its] allegations are made only against Leo Fronza and none of the remaining defendants." The trial court stated in its order that, "Count I alleges fraud against Leo Fronza, CEO of EMH." Plaintiff did not challenge this characterization in his motion to reconsider, arguing only that the trial court's "three-sentence ruling on Plaintiff's fraud count against Fronza" was erroneous. Plaintiff does not dispute, however, that Fronza was dismissed with prejudice under the section 2-619 portion of the trial court's ruling. While plaintiff originally appealed that dismissal, seeking in his notice of appeal an order vacating "the order dismissing Count I with prejudice and dismissing defendants Fronza, Parker, Lambert and Gill with prejudice," he abandoned his appeal regarding the individual defendants by not renewing that issue in his opening brief. Consequently, even if the trial court erroneously dismissed count I pursuant to only section 2-615, we need not reach the merits of that issue because Fronza, the party against whom count I is allegedly brought, is immune from liability under the unchallenged portion of the trial court's ruling. We affirm the trial court's dismissal of count I and do not reach counts II and III, which, although referenced in the parties' briefs, are not before us.

CONCLUSION

The trial court's dismissal of count I is affirmed. Plaintiff having forfeited the section 2-619 portion of the trial court's dismissal order, we need not determine whether count I states a claim under section 2-615.

Affirmed.