No. 1-10-1853

SIXTH DIVISION
March 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NOEL TORRES,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 07 CH 8181
	)	
ALL TOWN BUS SERVICES, INC., an Illinois Corporation; GREG POLAN and PATTI HOGATE, Indiv. and as Agents of All Ten Bus Services, Inc.,	)	
	)	The Honorable
	)	Alexander P. White,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and R.E. Gordon concurred in the judgment.

ORDER

HELD: The plaintiff's first-amended complaint was properly dismissed with prejudice. The defamation claims were barred by the statute of limitations; the claims for intentional infliction of emotional distress, in addition to being untimely, failed to allege extreme and outrageous behavior; and the claims for intentional interference with prospective economic advantage failed to allege a reasonable expectancy of employment. The defects could not be cured.

Pro se plaintiff Noel Torres appeals the trial court's dismissal of his first-amended complaint with prejudice and the denial of his motions for reconsideration and for leave to amend the complaint. We affirm.

BACKGROUND

The plaintiff was employed as a school bus driver for the defendant All Town Bus Services, Inc., from September 2001 until January 19, 2005, when he was fired. At all times relevant here, defendants Greg Polan and Patti Hogate served as president and office manager of All Town Bus, respectively. It is undisputed that the defendants fired the plaintiff after he returned a bus that had sustained damage. Though not at issue before us, the parties dispute the severity and the cause of the damage to the bus.

On April 25, 2005, the plaintiff filed a complaint against the defendants in federal district court alleging he was illegally discriminated against because of his race, age and disability. The plaintiff also included a state-law count for intentional infliction of emotional distress based on his discharge. On April 28, 2008, the federal district court granted summary judgment to the defendants on the plaintiff's discrimination claims and dismissed his intentional infliction of emotional distress claim without prejudice to refile in state court. *Torres v. Alltown Bus Services, Inc.*, No. 05 C 2435, (N.D. Ill. April 28, 2008). On April 28, 2009, the Seventh Circuit affirmed. *Torres v. Alltown Bus Services, Inc.*, No. 08-2330, (7th Cir. April 28, 2009).

On May 9, 2008, the plaintiff filed this action in the circuit court of Cook County. The first-amended complaint asserted three grounds for relief: defamation, intentional infliction of emotional distress and interference with employment expectancy.

The first-amended complaint alleged defendant Polan threatened to accuse the plaintiff of marital infidelity if he did not drop the federal suit; it also alleged Polan told prospective bus company employers that the plaintiff was fired for child molestation. Against defendant Hogate, the complaint alleged she told prospective employers the plaintiff was fired because he was an undocumented alien, too old to drive, and disabled. The plaintiff alleged the defendants engaged in this conduct after he filed his federal discrimination action in 2005.

In the counts alleging intentional infliction of emotional distress, the plaintiff alleged that in July 2007, the defendants "again made known to [the plaintiff] that false and defamatory information would be communicated about him if he persisted with litigation." The first-amended complaint alleged only one other event that occurred after 2005-he suffered a heart attack in July 2007.

The defendants moved to dismiss the plaintiff's claims for defamation and intentional infliction of emotional distress as time-barred under section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(5) (West 2008)). Regarding the employment expectancy claim, the defendants argued this claim was subject to dismissal under section 2-615 of the Code (735 ILCS 5/2-615 (West 2008)) because the plaintiff failed to show a "reasonable expectancy of employment" based on his contacts with prospective employers.

On March 24, 2010, the trial court dismissed with prejudice the plaintiff's first-amended complaint in its entirety.

Within thirty days, the plaintiff moved to vacate the March 24, 2010, order, alleging he discovered new facts that would bring his defamation and intention infliction of emotional

distress claims within the applicable statute of limitation. He also filed a motion to reconsider and a motion for leave to file a second-amended complaint.

In support of his motion to vacate, the plaintiff attached an affidavit by Dr. Nehemiah Russell. In the affidavit, Dr. Russell averred that on June 29, 2005, he participated in a four-person conference call with Hogate, the plaintiff's wife and a representative from Truth & Error Investigations, Inc., with whom the plaintiff had applied for employment. The affidavit does not detail Dr. Russell's relationship to Truth & Error Investigations other than his claim that he is "associated" with Truth & Error Investigations. Dr. Russell does not explain how he happened to participate in the "conference call" or his role in the conference call. According to the affidavit, defendant Hogate repeated during this conference call that the plaintiff was discharged because of his illegal alien status, disability, old age, marital infidelity and accusations of child molestation. The affidavit also makes reference to a conversation Dr. Russell had with defendant Polan in 2009. We quote verbatim the pertinent paragraphs of Dr. Russell's affidavit:

> "6. During this conference call, Ms. Hogate indicated that Noel Torres' termination was based on multiple facts: (a) disability, due to diabetes, even though he was and is not classified as 'disabled' officially; (b) age-related, as Mr. Torres was 'too-old' at 59; (c) undocumented alien and non-citizen; (d) child-molesting accusations for which she acknowledged there are no personal knowledge or police reports; (e) accidents for which she acknowledged no insurance or police reports could be provided. (f)

> Noel's unacceptable, derogatory racial relationship with undisclosed party, later learned to be Mr. Torres' wife; (g) racial & discriminatory issues re Mr. Torres' background. Mrs. Torres disputed All Town's allegations and indicated that they are false, derogatory, slander and defamatory smear tactics.
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> * * *
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> 8. To the best of my knowledge, information and belief, the above accusations and claims continue to present, or July 1, 2009 when Mr. Polan confirmed accusations against Mr. Torres detailed in Paragraphs.
>
> 9. Mr. Torres sought employment as a bus driver or as a security officer in 2005 and again March 5, 2010 at which time his wife was *first* informed of status of July 9, 2009 conversation; to the best of my knowledge, he is currently seeking such employment
>
> 10. Mr. Torres was not a party to first conversation, and only Mr. Polan and I in the 2009 conversation. I am not related to any of the parties herein. Mrs. Torres was *first* provided this information on 2nd conversation on March 5, 2010 when he applied for employment assistance."

No further information is provided about the conversations on July 1, 2009, and July 9, 2009, in

the affidavit.

The trial court denied each of the plaintiff's motions. He appeals.

ANALYSIS

We review *de novo* dismissal orders entered pursuant to sections 2-619(a)(5) and 2-615 of the Code. See *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579, 852 N.E.2d 825 (2006); *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 99, 820 N.E.2d 455 (2004). We review orders denying a plaintiff's request for leave to amend and a request for reconsideration for an abuse of discretion. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 352, 781 N.E.2d 1072 (2002); *Robidoux v. Oliphant*, 201 Ill. 2d 324, 347, 775 N.E.2d 987 (2002).

Defamation Counts

Under section 13-201 of the Code, a complainant has one year from the time of an alleged defamatory statement to file an action for defamation. 735 ILCS 5/13-201 (West 2008) ("Defmation-Privacy"). The defamation allegations in the plaintiff's complaint dismissed by the trial court are based on statements allegedly made in 2005. The plaintiff did not file the instant suit until May 9, 2008, long after the one-year period expired.

The plaintiff argues the defamation counts relate back to his federal discrimination action and, for this reason, fall within the "savings clause" provision in section 13-217 of the Code. 735 ILCS 5/13-217 (West 2004) ("Reversal or Dismissal"). Section 13-217 permits a party whose cause of action was dismissed for lack of jurisdiction and improper venue in the federal court to refile the same cause of action in the state court within one year, regardless of whether the cause is otherwise time-barred. 735 ILCS 5/13-217 (West 2004). Section 13-217 applies only where a

court can determine, by looking at the record in both cases, that the claims raised in the state case are identical to those raised in the federal case. *Hamilton v. Chrysler Corp.*, 281 Ill. App. 3d 284, 288-89, 666 N.E.2d 758 (1996), citing *Gibbs v. Crane Elevator Co.,* 180 Ill. 191, 196, 54 N.E. 200 (1899). However, the record before us does not contain a copy of his federal complaint and the plaintiff failed to assert this exception in the circuit court below.

The plaintiff, as appellant, has the burden to present this court with a sufficiently complete record to support relief sought on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92, 459 N.E.2d 958 (1984). Doubt arising "from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392. We resolve our doubts regarding the application of section 13-217 to the defamation claim against the plaintiff.

Even without the federal complaint, the orders from federal district court and the Seventh Circuit make clear the plaintiff did not allege a defamation cause of action anywhere in his federal complaint. The one claim the plaintiff was permitted to refile within one year in the state court under section 13-217 was the plaintiff's intentional infliction of emotion distress claim. Intentional infliction of emotional distress is a separate cause of action from defamation. Compare *Green v. Rogers*, 234 Ill. 2d 478, 492, 917 N.E.2d 450 (2009) (setting out elements for defamation), with *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 285, 798 N.E.2d 75 (2003) (setting out elements for intentional infliction of emotional distress).

It also cannot be denied that the facts giving rise to the intentional infliction of emotional distress claim filed in federal court could not include those giving rise to the defamation claims alleged here because, according to the plaintiff, the defamation claims relate to conduct that

occurred *after* the federal complaint was filed.

The plaintiff cannot avoid the time bar in section 13-201 of the Code for his defamation counts. The trial court properly dismissed the plaintiff's defamation counts under section 2-619(a)(5) of the Code.

Intentional Infliction of Emotional Distress Counts

1. Untimeliness

A claim alleging intentional infliction of emotional distress must be filed within two years of the occurrence. 735 ILCS 5/13-202 (West 2008) ("Personal injury-Penalty"); *Feltmeier*, 207 Ill. 2d at 278 (two-year statute of limitations applies to actions alleging intentional infliction of emotional distress). With one exception, the allegations giving rise to the plaintiff's intentional infliction of emotional distress claims relate to conduct that occurred in 2005, undeniably more than two years before the plaintiff filed this action in 2008.

The plaintiff once again argues that these claims are saved under section 13-217 of the Code. Once again, however, the record before us does not permit us to apply the exception in the plaintiff's favor in the absence of the federal complaint. In any event, we doubt the federal complaint could benefit the plaintiff because the plaintiff asserts his cause of action for intentional infliction of emotional distress arose *after* the federal complaint was filed in 2005.

Nor does the plaintiff's single post-2005 allegation that in July 2007 the defendants "again made known to [the plaintiff] that false and defamatory information would be communicated about him if he persisted with litigation" make the emotion distress claims timely. The allegation that the defendants repeated the "false and derogatory information" in 2007 does not give rise to

a claim of a continuing tort under *Feltmeier*, 207 Ill. 2d 263. In any event, no "continuing tort" claim is made by the plaintiff before us, which is fatal to any such implicit suggestion. See 210 Ill. 2d R. 341(h)(7) (points not argued in appellate brief are waived).

The trial court properly dismissed the intentional infliction of emotional distress claims as untimely.

2. Lack of Specificity

As another basis to affirm the dismissal of the intentional infliction of emotional distress claim, the defendants argue the allegation that they "again made known to [the plaintiff] that false and defamatory information would be communicated about him if he persisted with litigation" in 2007 lacks the specificity required to state a cause of action for an emotional distress claim and is therefore subject to dismissal under section 2-615 of the Code.

Section 2-615 of the Code permits the dismissal of claims that are "substantially insufficient in law." 735 ILCS 5/2-615 (West 2008). A claim is insufficient under section 2-615 where the facts in the complaint, and all reasonable inferences therefrom, when considered in the light most favorable to the plaintiff, fail to state a claim on which relief can be granted. *Feltmeier*, 207 Ill. 2d at 267. Because claims alleging intentional infliction of emotional distress can be easily made, such claims must be "specific and detailed beyond what is normally considered permissible in pleading a tort action." *McCaskil v. Barr*, 92 Ill. App. 3d 157, 158, 414 N.E.2d 1327 (1980).

To state a cause of action for intentional infliction of emotional distress, a plaintiff must allege conduct that meets three elements:

> " 'First, the conduct involved must be truly extreme and outrageous. Second, the actor must either intend that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will cause severe emotional distress. Third, the conduct must in fact cause severe emotional distress.' "

Feltmeier, 207 Ill. 2d at 269, quoting *McGrath v. Fahey*, 126 Ill. 2d 78, 86, 533 N.E.2d 806 (1988).

If the complaint fails to make a sufficient showing of any one of the three elements, it fails as a matter of law. "[T]o qualify as outrageous, the nature of the defendant's conduct must be so extreme as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community." *Feltmeier*, 207 Ill. 2d at 274.

The first-amended complaint alleges that in July 2007, the defendants told the plaintiff they would make false and defamatory statements about him to third parties if he did not drop his federal discrimination lawsuit. The defendants argue that in the context of this case, this allegation does not amount to extreme and outrageous behavior. We agree.

The tort of intentional infliction of emotional distress generally does not extend to mere threats. *McGrath*, 126 Ill. 2d at 87, quoting Restatement (Second) of Torts §46 cmt. d (1965). A threat, however, can rise to the level of extreme and outrageous behavior if the defendant is in the position to carry out that threat by virtue of the authority or control he or she exerts over the plaintiff, action which would constitute an abuse of the defendant's position. See *Doe v. Calumet City*, 161 Ill. 2d 374, 392-93, 641 N.E.2d 498 (1994) (extreme and outrageous character of conduct can be inferred where a defendant abuses a position of authority over the plaintiff).

The facts alleged in the plaintiff's first-amended complaint to support his claim of intentional emotional distress fail to demonstrate any "authority or control over the plaintiff." The plaintiff was fired by the defendants in 2005, which triggered his federal discrimination suit. Although the defendants, as the plaintiff's former employer, could make defamatory statements to third-parties in the course of responding to inquiries regarding the plaintiff's prior employment with All Town Bus, no showing has been made that the defendants' abused their position by carrying out the alleged threat. Absent a showing of abuse, we cannot say that the threats the plaintiff attributes to the defendants rose to the level of extreme and outrageous behavior contemplated by the tort of intentional infliction of emotional distress.

To the extent the plaintiff's claims for intentional infliction of emotional distress are not time-barred, we hold they were properly dismissed under section 2-615 of the Code for failure to allege extreme and outrageous conduct.

Intentional Interference with Prospective Economic Advantage

To state a cause of action for intentional interference with prospective economic advantage, a plaintiff must allege four elements: (1) the plaintiff had a reasonable expectancy of employment; (2) the defendant knew of the expectancy; (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy; and (4) injury resulting from the interference. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 406-07, 667 N.E.2d 1296 (1996). "The hope of receiving a job offer is not a sufficient expectancy." *Anderson*, 172 Ill. 2d at 408.

The plaintiff alleged in his first-amended complaint that he applied for employment as an

investigator with Truth & Error Investigations and as a bus driver with several bus companies. The plaintiff further alleged that but for defamatory statements by the defendants to Truth & Error Investigations, Latino Express and other unnamed prospective employers, he would have received offers of employment. The trial court found these allegations insufficient under *Anderson* to state a claim for intentional interference with prospective economic advantage.[1] *Anderson* guides our review of the allegations in the plaintiff's first-amended complaint.

In *Anderson*, an employee brought an intentional interference with prospective economic advantage claim against her employer, arguing she would have been offered employment by the YMCA had the defendant not made defamatory statements about her work performance. *Anderson*, 172 Ill. 2d at 403-04. The plaintiff alleged she interviewed with the YMCA several times; she was told by her interviewers that the interviews went well and she was the leading candidate for the job. *Anderson*, 172 Ill. 2d at 403-04. She alleged the defendants' defamatory statements caused the YMCA to stop considering her for employment by cancelling two follow-up interviews. *Anderson*, 172 Ill. 2d at 404.

Our supreme court held the plaintiff's allegations in *Anderson* failed to state a cause of action for intentional interference with a prospective economic advantage. *Anderson*, 172 Ill. 2d

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[1] We take the plaintiff's caption of "interference with an employment expectancy" as a specific context for the common-law description of this cause of action. The allegations of the complaint, not the characterization of the cause of action, determine the nature of a claim. *Lovgren v. Citizens First National Bank of Princeton*, 126 Ill. 2d 411, 419, 534 N.E.2d 987 (1989).

at 407. The court explained that the plaintiff's allegations demonstrated "nothing more than that the plaintiff was a candidate for a position with the YMCA and that she was scheduled for further interviews at the time her candidacy came to an end." *Anderson*, 172 Ill. 2d at 407-08. The fact the plaintiff was told by those who interviewed her that the interviews went well and that she would be recommended for the job did not give "rise to a legally protectible expectancy." *Anderson*, 172 Ill. 2d at 408. Much like informal assurances of good will, comments in the course of interviews "do not by themselves constitute contractual obligations." *Anderson*, 172 Ill. 2d at 408. The allegation by the plaintiff that she was the leading candidate for the job was nothing more than her own subjective belief. *Anderson*, 172 Ill. 2d at 408-09. The court also expressed concern were it to find the plaintiff's allegations sufficient to state a cause of action for intentional interference with prospective economic advantage. Such a ruling would considerably broaden the scope of that tort to expose "anyone supplying a negative reference to a prospective employer *** to an action for intentional interference with prospective economic advantage." *Anderson*, 172 Ill. 2d at 411.

The allegations in the plaintiff's first-amended complaint are thinner than those in *Anderson*. Other than Latino Express and Truth & Error Investigations, the plaintiff did not name any of the prospective employers with whom the defendants allegedly spoke. Nor does the plaintiff provide any detail to support his claim that, based on his contacts with these prospective employers, he had a "reasonable expectancy of employment." With even less specificity than in *Anderson*, the plaintiff alleges no more than conclusions of fact "unsupported by specific factual allegations." *Anderson*, 172 Ill. 2d at 408.

We affirm the trial court's dismissal of the counts in the plaintiff's first-amended complaint captioned "interference with an employment expectancy" for failure to state a cause of action under section 2-615 of the Code.

Newly Discovered Evidence Motion

The plaintiff sought to vacate the trial court's dismissal order based on newly discovered evidence that the defendants defamed him to prospective employers as late as July 2009. The motion to vacate was limited to the trial court's dismissal of the plaintiff's defamation and intentional infliction of emotional distress claims on statute of limitation grounds under section 2-619(a)(5) of the Code.

The plaintiff asserts that Dr. Russell's affidavit resurrects the defamation and intention infliction of emotional distress counts based on information Dr. Russell received in 2009. Dr. Russell's affidavit, which is quoted in relevant part above, avers that defendant Hogate made defamatory statements allegedly to a representative of Truth & Error Investigations on June 29, 2005. Dr. Russell then seeks to bring those statements into 2009 by the assertion that to "the best of [his] knowledge, information and belief," the defamatory statements were "confirmed" by defendant Polan on July 1, 2009. We are not told whether this allegation, statement, or averment is based on his knowledge, information, or belief. Nor will we choose among the three.

Based on our reading of the affidavit, defendant Polan at most "confirmed" to Dr. Russell that defendant Hogate made the statements on June 29, 2005, in a conversation Dr. Russell had with defendant Hogate in 2009, making the information neither new nor evidence that the plaintiff just discovered.

Nor are we inclined to find a vague and uncertain statement by Dr. Russell regarding a reference to a conversation on July 9, 2009, regarding defendant Polan as constituting evidence when no information is provided regarding with whom the conversation was had or how that conversation came about.

Even if the information could be credibly seen as newly discovered "evidence," Dr. Russell's averments fail under the standard for affidavits established by Rule 191(a) (eff. July 1, 2002). Rule 191(a) requires that affidavits submitted in opposition to a motion for involuntary dismissal "shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based." Ill. S. Ct. R. 191(a) (eff. July 1, 2002). Dr. Russell's affidavit fails to satisfy that standard.

The trial court did not abuse its discretion in denying the plaintiff's motion to vacate based on the plaintiff's claim that Dr. Russell's affidavit constituted newly discovered evidence.

Motion for Reconsideration

The plaintiff's motion for second reconsideration warrants no discussion as it relies on Dr. Russell's affidavit, which we have ruled insufficient to avoid dismissal.

Leave to Amend Complaint

Generally, leave to amend pleadings should be liberally allowed. See *Reuter v. MasterCard Intern., Inc.*, 397 Ill. App. 3d 915, 929, 921 N.E.2d 1205 (2010). However, when leave to amend is denied, no abuse of discretion occurs when the plaintiff falls on the wrong side of four factors: (1) whether the proposed amendment would cure a defect; (2) whether the proposed amendment prejudice or surprise other parties; (3) whether the proposed amendment is

untimely; and (4) whether there were previous opportunities to amend the pleading. *Clemons*, 202 Ill.2d at 355-56. We have read the plaintiff's proposed second-amended complaint and considered the totality of the record and find that none of the above factors favor the plaintiff's contention that the trial court abused its discretion in this case.

The trial court acted within its discretion in denying the plaintiff leave to file a second-amended complaint.

CONCLUSION

We affirm the trial court's dismissal, with prejudice, of the plaintiff's first-amended complaint under sections 2-615 and 2-619(a)(5) of the Code. We also affirm the trial court orders denying the plaintiff's motion to vacate the dismissal based on a claim of newly discovered evidence and his motion for reconsideration.

The judgment of the circuit court is affirmed.

Affirmed.