

No. 1-11-1852

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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DONALD L. JOHNSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 10 L 9553
	)	
NICHOLAS LANE and RICHARD LANE,	)	Honorable Kathy M.
	)	Flanagan,
Defendants-Appellees.	)	Judge Presiding.

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JUSTICE KARNEZIS delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

- ¶ 1 *HELD:* Plaintiff's defamation complaint was properly dismissed for failing to specifically allege publication of defamatory statements; and, even if the complaint had alleged publication of defamatory statements, the attorney litigation privilege applied since the statements had a connection to the litigation.
- ¶ 2 Plaintiff Donald Johnson appeals from an order of the circuit court dismissing his defamation complaint against defendants Nicholas Lane and Richard Lane pursuant to

section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)). On appeal, Johnson contends that the circuit court erred in granting the motion to dismiss based on the attorney litigation privilege and in finding that Johnson had not pled sufficient factual allegations in his complaint. Although defendants have not filed a brief on appeal, we will consider the appeal pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-133 (1976). For the following reasons, we affirm.

¶ 3 Background

¶ 4 In December 2010, Johnson filed an amended complaint alleging defamation *per se* against Nicholas Lane, an attorney, and Richard Lane, a real estate developer (collectively "Lane" unless otherwise noted). The defamation complaint alleged that Lane made false statements about Johnson in a legal malpractice complaint. The malpractice complaint stemmed from Johnson's representation of the plaintiffs in a contract action (The Siegel Action).

¶ 5 The Siegel Action

¶ 6 In 2006, the plaintiffs in Siegel Development, LLC, *et. al.*, hired Johnson to file a complaint against the defendants 842 Wood, LLC, Peak Properties LLC, Colin Hebson, Richard Lane, Michael Zucker, Eric Bernstein, Michael Obloy and Brad Court (No. 06 L 11187). Richard Lane was defended by the law firm of Pedersen & Houpt and Colin Hebson was represented by attorney Aaron Stanton. The Siegel action was ultimately settled.

¶ 7 The Malpractice Action

¶ 8 In August 2010, Nicholas Lane filed a legal malpractice complaint against Richard Lane's former attorneys Pedersen & Houpt, P.C., Thomas Murphy, Kimberly Cornell, Lawrence Byrne and Robert Lattas (No. 10 L 009260). The malpractice complaint alleged that Richard Lane's former attorneys had committed legal malpractice when they represented him in the Siegel action. The malpractice complaint alleged that Johnson had colluded with attorney Thomas Murphy to: (1) settle the Siegel case for more money than it was worth; and, (2) "drag out" the Siegel case to obtain more attorney's fees for Pedersen & Houpt.

¶ 9 The Current Defamation Action

¶ 10 Johnson's amended complaint for defamation *per se* specifically alleged that upon information and belief Richard Lane told Stanton and/or Hebson at some unknown time between August 12, 2010, and December 1, 2010, that Johnson and Murphy had colluded to settle the Siegel case for more money than it was worth and to "drag out" the Siegel case to obtain more attorney's fees for Petersen & Houpt. The allegation was based on the knowledge that Stanton asked Carl Dreyer, an attorney employed by Johnson, whether Dreyer was aware that Johnson had filed a defamation action based on allegations in the malpractice complaint.

¶ 11 Lane subsequently filed a motion to dismiss the defamation complaint pursuant to 2-619(a)(9) of the Code. The motion alleged that the attorney litigation privilege precluded Johnson's defamation claim. The court granted the motion to dismiss finding

that the alleged publication of the defamatory statements to Hebson and/or Stanton were not sufficiently pled because there were no factual allegations supporting the allegation made upon information and belief. The court additionally determined that even if the amended complaint had sufficiently pled a publication outside of the judicial proceedings, it would have been authorized because it was to participants in the underlying action from which the malpractice claim arose.

¶ 12 Analysis

¶ 13 On appeal, Johnson contends that the circuit court erred in granting the motion to dismiss based on the attorney litigation privilege and in finding that Johnson had not pled sufficient factual allegations in his complaint.

¶ 14 Section 2-619(a)(9) of the Code provides for involuntary dismissal of a cause of action where the claim asserted is barred by other affirmative matter avoiding the legal effect of or defeating the claim. 735 ILCS 5/2-619(a)(9) (West 2000). In a defamation action, the issue of privilege is an affirmative defense that may be raised and determined in a section 2-619 motion. *Edelman, Combs and Lattuner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, (2003). When ruling on a motion to dismiss, the court accepts all well-pleaded facts in the complaint as true and draws all reasonable inferences from those facts in favor of the nonmoving party. *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162 (1998). Our review is *de novo*. *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 99 (2004).

¶ 15 The attorney litigation privilege permits the publication of defamatory matter

1-11-1852

concerning another during the course, and as part of, a judicial proceeding. *Thompson v. Frank*, 313 Ill. App. 3d 661, 664 (2000). The privilege is based upon the public policy of allowing attorneys as officers of the court the utmost freedom in their efforts to seek justice for their clients. *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 701-02 (2000). The privilege is available when the publication: (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law. *Edelman, Combs and Lattuner*, 338 Ill. App. 3d at 157-58. In light of the complete immunity provided by the privilege, the classification of absolutely privileged communication is necessarily narrow. *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 701 (2000). The privilege does not cover the publication of defamatory matter that has no connection whatsoever to the litigation. *Edelman, Combs and Lattuner*, 338 Ill. App. 3d at 157.

¶ 16 Johnson argues that the litigation privilege does not apply to the defamatory statements made to Stanton and/or Hebson because the statements were not made in a judicial proceeding, did not have a connection to the malpractice action, were not made to achieve a litigation objective in the malpractice action, and neither Stanton nor Hebson were litigants or other participants authorized by law. Johnson also argues that he pled sufficient factual allegations in his complaint.

¶ 17 Here, the defamation complaint alleged that upon information and belief Lane had made defamatory statements to Stanton and/or Hebson. The allegation was based

1-11-1852

on a conversation Stanton had with Dryer, an attorney employed by Johnson. According to the complaint, Stanton asked Dryer if Dryer knew that Johnson had filed a defamation complaint against Lane based on Lane's allegations in the malpractice action. The complaint therefore alleged that since Stanton knew about the defamation complaint, Lane also told Stanton the defamatory statements that were alleged in the malpractice complaint. Although the complaint alleged that Stanton and/or Hebson knew of Lane's defamation action, the complaint did not allege that the actual defamatory statements alleged in the malpractice complaint were ever published to Stanton and/or Hebson. Knowing that Johnson filed a defamation complaint against Lane is not the same as knowing the actual defamatory statements that were alleged in the malpractice complaint. Therefore, we find that the defamation complaint failed to specifically allege the defamatory statements were published to Stanton and/or Hebson. However, even if the complaint had specifically alleged the defamatory statements were published to Stanton and/or Hebson, we find that the attorney litigation privilege applied. The defamatory statements were made to Hebson, a defendant in the Siegel action, and/or Stanton, Hebson's attorney in the Siegel action, and related to Johnson's conduct as an attorney representing the plaintiffs in the Siegel action. Therefore, the publication involved a litigant and/or his attorney in the Siegel action, and the malpractice complaint stemmed from the Siegel action. Therefore, we find that the publication had a connection to the litigation and it was privileged. The circuit court properly dismissed Johnson's defamation complaint.

1-11-1852

¶ 18

Conclusion

¶ 19 Accordingly, we affirm the judgment of the circuit court.

¶ 20 Affirmed.