2012 IL App (1st) 113217-U

Third Division
September 28, 2012

No. 1-11-3217

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOON KI LEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	10 L 1714
	)	
BYEONG HO SON, ESTHER INSOON PARK and THE MIDWEST PRESBYTERY OF THE KOREAN AMERICAN PRESBYTERIAN CHURCH,	)	Honorable
	)	James N. O'Hara,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Salone and Justice Steele concurred in the judgment.

ORDER

¶ 1 *Held*: The ecclesiastical abstention doctrine divests the trial court of subject matter jurisdiction to decide whether statements made by church members in the context of church disciplinary proceedings defamed the plaintiff, an elder of the church.

¶ 2 Joon Ki Lee, an elder of the Hebron Church, sued Byeong Ho Son, Esther Insoon Park, and the Midwest Presbytery of the Korean American Presbyterian Church (the

Presbytery) for defamation. The trial court dismissed the complaint with prejudice based on a finding that the court lacked subject matter jurisdiction to determine whether statements made in the context of church disciplinary proceedings defamed Lee. On Lee's appeal, we find that the defendants' unopposed affidavit established that they did not publish the allegedly defamatory statement on the church's website. Because Lee did not allege any other publication outside of the context of disciplinary proceedings, we hold that the ecclesiastical abstention doctrine bars the trial court from exercising subject matter jurisdiction over the claims alleged in the complaint. Therefore, we affirm the trial court's order dismissing the complaint, with prejudice, for lack of subject matter jurisdiction.

¶ 3 BACKGROUND

¶ 4 Son, a member of the Presbytery and secretary of its visiting committee, sent a memo dated February 4, 2010, to the moderator of the Presbytery. In the memo, Son said:

> "Since, on the Lord's Day, January 31, 2009, Elder Joon Ki Lee physically attacked Deaconess Insoon [Park] and caused her bodily injuries and as a result thereof, was convicted of a crime in accordance with the criminal law, he is subject to disqualification as an elder."

¶ 5 Son attached to the memo a document titled "Emergency Order of Protection," which ordered Lee to stay away from Park for 18 days. Before that order expired, Lee agreed to entry of an order directing him not to stalk or harass Park. The two orders include no findings of fact.

¶ 6 On February 8, 2010, Lee sued Son and Park for defamation. He later added the Presbytery as a defendant. Lee alleged that on January 31, 2010, Park and Lee had a physical altercation at the Hebron Church in Prospect Heights, and Park filed a battery complaint against Lee with the Prospect Heights Police Department. According to Lee, a police officer watched the church's video recording of the incident and concluded that Park pushed and slapped Lee, but Lee did not retaliate. Lee further alleged that the February 4 memo from Son to the Presbytery falsely accused Lee of hitting Park and committing a crime. Lee said, "Defendants posted the 2/4/2010 Publication on the website owned and controlled by Samuel Kim and Paul Hahm."

¶ 7 Lee filed a four-count complaint. In count I, he accused all of the defendants of defaming him by publishing the February 4 memo. Count II charged all defendants with invading Lee's privacy and placing him in a false light. In count III, Lee accused Park and Son of conspiring to defame Lee, and in the final count Lee claimed that the Presbytery negligently supervised Son.

¶ 8 The defendants moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619(a)(1) (West 2010)), claiming that principles of ecclesiastical abstention deprived the trial court of jurisdiction to hear the complaint. The defendants attached to their motion an affidavit of Jong Gyu Kim (Jong), who swore that he participated in maintaining the church's website, and the website never included a post of the February 4 memo. Instead, Lee posted a copy of the February 4 memo on a website he controlled.

¶ 9 Lee presented no affidavit or other evidence contesting Jong's affidavit. Lee argued that the affidavit did not suffice for a section 2-619 motion because the affidavit merely denied allegations of the complaint.

¶ 10 The trial court held that by leaving Jong's affidavit unopposed, Lee admitted that the defendants had not published the February 4 memo on the church's website. The court held:

> "Son's dissemination of the statement to the church was part of the disciplinary process. Son did not publish this statement to any other individuals. The statement was made for the purpose of possibly initiating disciplinary proceedings against [Lee]. Therefore, this Court is obligated to refrain from interfering."

The court dismissed the complaint with prejudice. Lee now appeals.

¶ 11 ANALYSIS

¶ 12 We apply the following principles to this appeal from a ruling on a section 2-619 motion to dismiss:

> "A motion to dismiss, pursuant to section 2-619 of the Code, admits the legal sufficiency of the plaintiffs' complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiffs' claim. [Citation.] Section 2-619 motions present a question of law, and we review rulings thereon *de novo*." *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006).

¶ 13 Ecclesiastical Abstention

¶ 14 The United States Supreme Court outlined the doctrine of ecclesiastical abstention in *Watson v. Jones,* 80 U.S. (13 Wall) 679 (1872), where the Court held:

> "[T]he rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws *** is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." *Watson,* 80 U.S. (13 Wall) at 727.

The Court in *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696 (1976), explained that " '[t]o permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to decide ... religious law [governing church polity] ... would violate the First Amendment in much the same manner as civil determination of religious doctrine.' " *Milivojevich,* 426 U.S. at 709, quoting *Maryland & Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.,* 396 U.S. 367, 369 (1970) (Brennan, J., concurring).

¶ 15 The court in *Stepek v. Doe*, 392 Ill. App. 3d 739 (2009), applied the ecclesiastical abstention doctrine to a case involving church disciplinary procedures. In *Stepek*, Doe told a priest that Father Stepek had molested Doe years before, when Doe was a minor. The priest contacted the Office of Professional Responsibility of the Archdiocese of Chicago (OPR), and Doe told OPR about the molestation. When the Archdiocese removed Stepek

from the ministry, Stepek sued Doe for defamation. Doe moved to dismiss the complaint for lack of jurisdiction. The trial court denied the motion to dismiss, but the court certified for interlocutory appeal the following question:

> "Whether the circuit court of Cook County has subject matter jurisdiction over causes of action for defamation and intentional infliction of emotional distress arising from allegedly false statements accusing a priest of criminal sexual abuse of children when those statements were made to an ecclesiastical body of the Archdiocese of Chicago convened for the purpose of regulating the clergy[.]" *Stepek*, 392 Ill. App. 3d at 741.

¶ 16 The appellate court reviewed cases from other jurisdictions and concluded that "a person must be free to say anything and everything to his Church, at least so long as it is said in a recognized and required proceeding of the religion and to a recognized official of the religion." *Cimijotti v. Paulsen,* 230 F. Supp. 39, 41 (N.D. Iowa 1964), quoted in *Stepek*, 392 Ill. App. 3d at 751-52. Thus, when defamation claims arise solely from actions that took place as an inextricable part of church disciplinary processes, the court lacks subject matter jurisdiction to consider the claims. *Stepek*, 392 Ill. App. 3d at 751. But if a person makes defamatory statements outside of the disciplinary process, the court has subject matter jurisdiction to consider a civil claim for defamation. *Stepek*, 392 Ill. App. 3d at 751. The *Stepek* court held that because Doe made his statements as part of proceedings to evaluate Stepek's fitness for ministry, the trial court lacked subject matter jurisdiction to consider the

complaint. *Stepek*, 392 Ill. App. 3d at 753.

¶ 17 Following *Stepek*, we hold that the trial court lacked subject matter jurisdiction to consider the complaint insofar as Park, Son and the Presbytery made their statements about Lee in the context of church proceedings involving the possibility of disciplining Lee. Park spoke to Son, secretary of the Presbytery's visiting committee, and Son then sent the allegedly defamatory memo to the Presbytery, which has the power to discipline Lee. Insofar as the complaint alleges that both Park and Son communicated with church officials with the power to initiate disciplinary proceedings, the first amendment divests the trial court of subject matter jurisdiction to consider the complaint. See *Stepek*, 392 Ill. App. 3d at 751-53.

¶ 18 Lee argues that the first amendment does not protect Park's statements to Son and Son's statements to the Presbytery because Son and the visiting committee, for which Son served as secretary, lacked authority to investigate charges of misconduct by church officials, and they lacked authority to discipline Lee. *Stepek* involved a similar string of communications, as Doe first spoke to a priest about the molestation, and that priest contacted the OPR, which led the OPR to interview Doe and question him about Stepek's conduct. Similarly, here, Park spoke to Son, a church official, about Lee's conduct, and Son relayed the complaint to the Presbytery, a body which had the power to investigate the charges and discipline Lee. The ecclesiastical abstention doctrine protects those statements as part of the disciplinary process within the church. See *Stepek*, 392 Ill. App. 3d at 751-53.

¶ 19 Affidavit

¶ 20 Next, Lee argues that the trial court erred when it found that the defendants never

disseminated the statement outside of church disciplinary proceedings. In his complaint, Lee alleged that "Defendants posted the 2/4/2010 Publication on the website owned and controlled by Samuel Kim and Paul Hahm." The defendants presented an affidavit in which Jong swore he helped maintain the church's website, and no one ever posted the February 4 memo to that website, which he identified by its URL. Lee did not file a counteraffidavit or other evidence to refute Jong's assertions. Instead, he relied on the argument that a section 2-619 motion admits the truth of the complaint's allegations, and therefore, for purposes of the motion to dismiss, the defendants admitted that they published the February 4 memo on the website.

¶ 21 The court in *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065 (1992), explained how a party may use affidavits to support a section 2-619 motion to dismiss. The *Barber-Colman* court first noted that most complaints do not show on their faces the basis for a section 2-619 dismissal. The court said:

> "Consequently, the defendant will almost always be attaching affidavits or other material in support of section 2-619 motions. ***
>
> *** If a defendant wishes to challenge the factual sufficiency of a plaintiffs claim, the summary judgment motion is the proper vehicle. *** The affidavits filed by a defendant in support of a summary judgment motion, which contest the allegations in plaintiff's complaint, are specifically challenging the truth of these charges. ***
>
> A section 2-619 motion and its accompanying affidavits,

however, are not attacking the factual basis of the plaintiff's claim; they are asserting 'other affirmative matter avoiding the legal effect of or defeating the claim.' Ill. Rev. Stat.1991, ch. 110, par. 2-619(a)(9) [n/c/a 735 ILCS 5/2-619(a)(9) (West 2010)].

It is only in the context of the plaintiff's *claim* that it is proper to state that a defendant in a section 2-619 motion admits all well-pleaded facts. The defendant does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the 2-619 motion.

* * *

*** If, however, the plaintiff does not respond to the defendant's affidavits, then the materials therein are to be accepted as true for purposes of the motion.

As a final example, the plaintiff could anticipatorily plead an exception to an affirmative defense, the minority of the plaintiff, for instance. Such pleadings are not uncommon in cases involving discovery exceptions to the statute of limitations, but the fact that an exception is pled anticipatorily does not entitle it to any different treatment. An exception to the statute of limitations (section 2-619(a)(5)), a claim of fraud to void a release (section 2-619(a)(6)), or a difference in the claims of a similar pending case (section 2-

> 619(a)(3)) may all defeat a section 2-619 motion, but none of them are elements in the claim of the plaintiff, and none of them are admitted by a section 2-619 motion." (Emphasis in original). *Barber-Colman*, 236 Ill. App. 3d at 1073-75.

¶ 22 Our supreme court showed the proper use of affidavits in support of a section 2-619 motion in *Zedella v. Gibson*, 165 Ill. 2d 181 (1995). In *Zedella*, Zedella accused Daniel Gibson of driving negligently and he accused Robert Gibson of negligently entrusting his car to Daniel. Zedella specifically alleged that Robert was the owner of the car. Robert filed a section 2-619 motion to dismiss, supported by an affidavit in which Robert asserted that he and Daniel co-owned the car. The court said, "When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted." *Zedella*, 165 Ill. 2d at 185. Because Zedella did not file a counteraffidavit in response to Robert's affidavit, he admitted that Daniel co-owned the car, and therefore the court could not hold Robert liable for negligently entrusting the car to one of its owners. *Zedella*, 165 Ill. 2d at 190. Thus, the section 2-619 motion did not admit the allegation that Robert was the owner of the car, even though Zedella needed that allegation to state a cause of action against Robert. The section 2-619 motion admitted only those facts needed to state a cause of action against Daniel for driving negligently. Zedella's failure to file an affidavit contradicting Robert's affidavit proved fatal to the complaint's count against Robert. *Zedella*, 165 Ill. 2d at 190-94.

¶ 23 Here, Lee stated a cause of action for defamation when he alleged that Son said to the

Presbytery that Lee struck Park and a court convicted Lee of a crime as a result. The section 2-619 motion admits the truth of these allegations, but it does not admit the truth of the further allegation that the defendants published the February 4 memo on the church's website. Jong's affidavit supports the conclusion that the defendants did not publish the memo on the church's website.

¶ 24 Lee presented no counteraffidavit or other evidence in response to Jong's affidavit. On appeal, Lee asserts that Jong's affidavit does not justify the judgment because the court cannot determine from the affidavit whether the website to which Jong refers is the same as the website to which Lee referred in the complaint. But "the sufficiency of an affidavit cannot be tested for the first time on appeal where no objection was made either by motion to strike, or otherwise, in the trial court." *Fooden v. Board of Governors of State Colleges and Universities*, 48 Ill. 2d 580, 587 (1971). Lee waived this issue by failing to raise it in the trial court. See *Jordan v. Bangloria*, 2011 IL APP (1st) 103506 ¶ 24.

¶ 25 Finally, Lee argues that the allegations of his complaint, contradicted by Jong's affidavit, create an issue of material fact for trial. "[W]here well-alleged facts within an affidavit are not contradicted by counteraffidavit, they must be taken as true notwithstanding the existence of contrary averments in the adverse party's pleadings. [Citation.] If a defendant's affidavit contesting jurisdiction is not refuted by a counteraffidavit filed by the plaintiff, the facts alleged in the defendant's affidavit are accepted as true." *Kutner v. DeMassa*, 96 Ill. App. 3d 243, 248 (1981). "A counteraffidavit is necessary, however, to refute evidentiary facts properly asserted by affidavit supporting the motion [to dismiss] else

the facts are deemed admitted. If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed." *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d 112, 116 (1993). Because Lee did not contradict Jong's affidavit, Lee effectively admitted that the defendants did not post to the church's website a copy of Son's February 4 memo. Without any other allegation that the defendants repeated the assertions of the memo outside of the context of church disciplinary proceedings, the ecclesiastical abstention doctrine required the trial court to dismiss the complaint for want of subject matter jurisdiction.

¶ 26 CONCLUSION

¶ 27 The ecclesiastical abstention doctrine precludes the court from asserting its subject matter jurisdiction to decide a claim that a church member defamed another church member, when the church member accused of defamation confined his or her remarks to church disciplinary proceedings. Park's statements to Son and Son's statements to the Presbytery occurred in the context of church disciplinary proceedings. The complaint here includes only one allegation that the defendants made a remark outside of the disciplinary context, and that is the alleged statement made on the church's website. Because Lee presented no counteraffidavit or other evidence to contradict the defendants' affidavit, the averments in the affidavit stand admitted, and we must infer that defendants did not post Son's memo on the church's website. Thus, the complaint includes no unrefuted allegation of dissemination of the allegedly defamatory material outside of the context of church disciplinary proceedings.

Accordingly, we affirm the trial court's order dismissing the complaint for lack of subject matter jurisdiction.

¶ 28 Affirmed.