2014 IL App (1st) 130069-U

THIRD DIVISION
March 5, 2014

No. 1-13-0069

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

KEITH ORUM,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 10 L 2906
	)	
SILVIA LUCHT,	)	Honorable
	)	Kathy M. Flanagan,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pucinski concurred in the judgment.

ORDER

¶ 1 *HELD*: The circuit court did not err in dismissing the amended complaint with prejudice where plaintiff did not plead sufficient facts that, if proven, would subject defendant to a claim of intentional or negligent infliction of emotional distress. Moreover, plaintiff has forfeited review of the sufficiency of the remaining three counts of the complaint on appeal because the opening appellate brief contains no argument or citations to relevant authority for these counts.

¶ 2 Plaintiff-appellant Keith Orum filed a complaint against defendant-appellee Silvia Lucht, alleging intentional and negligent infliction of emotional distress, breach of contract, promissory

estoppel and common law fraud. The underlying basis for each count in the complaint is Lucht's alleged promise to conceive and raise a child together with Orum. The circuit court granted Lucht's motion to dismiss Orum's fourth amended complaint with prejudice, pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). On appeal, Orum contends that the circuit court erred in granting the motion because the factual allegations in the complaint are sufficient to support a cause of action under each of the five counts in the complaint. For the reasons that follow, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On March 5, 2010, Orum, an attorney licensed to practice in Illinois, filed a complaint against Lucht, seeking to recover damages for the alleged wrongful actions of Lucht in connection with the parties' extramarital affair and the subsequent birth of their child. Orum alleges that the parties planned to have a child together and that Lucht agreed that they would also raise the child together. However, Orum claims that apart from a few brief visits, Lucht has prevented Orum from having any contact with their son. Lucht and the minor child are German citizens who reside in Freiburg, Germany.

¶ 5 Orum was granted leave to amend his original complaint and, on June 28, 2010, filed his first amended verified complaint, containing the following counts: (1) intentional infliction of emotional distress; (2) negligent infliction of emotional distress; (3) breach of contract; (4) promissory estoppel; and (5) common law fraud. On July 14, 2010, Orum filed approximately 940 exhibits, which included nude pictures of Lucht. Lucht subsequently filed both a motion to

dismiss the complaint and a motion to strike the exhibits.

¶ 6 At a hearing in January 2011,[1] the trial court noted that it was inappropriate to file a verified complaint in an action where the damages sought were not liquidated. The trial court pointed out other obvious defects in the complaint, namely that although Illinois is a fact-pleading state, Orum's complaint erroneously pleaded evidence by relying on the numerous exhibits attached to the complaint. The trial court explained to Orum that the complaint included many unnecessary details, and provided brief examples of how he could streamline the complaint. Pursuant to section 2-603 of the Code (735 ILCS 5/2-603 (West 2010)), the trial court ruled that the first amended verified complaint would be stricken because it did not contain a clear and concise statement of the causes of action. The trial court subsequently entered an order dismissing the complaint, granting Orum leave to file a second amended complaint that was not verified, and striking the exhibits in their entirety with an order to withdraw them from the record and return them to Orum.

¶ 7 Orum filed a second amended complaint with the same five counts and Lucht filed a motion to dismiss. On January 31, 2012, the trial court issued a written memorandum opinion and order. The court noted that because counts II through V simply restated every paragraph from the preceding count, those counts could be dismissed pursuant to section 2-603 of the Code because Orum impermissibly comingled causes of action. However, because all five counts failed to set forth the specific factual allegations necessary to allege each element of each cause

[1]Although the record includes, as an exhibit, what purports to be a transcript of a hearing on January 18, 2011, we note that the order that corresponds to what was discussed at the hearing is file stamped January 4, 2011.

of action, the trial court concluded that the second amended complaint failed to state a cause of action in its entirety. The order further stated: "While it appears that the Plaintiff may not be able to state these causes of action based on the facts and circumstances here, the Court will allow the Plaintiff another opportunity to attempt to do so." The trial court granted Lucht's motion to dismiss and allowed Orum 21 days to file a third amended complaint.

¶ 8 Orum filed a third amended complaint, alleging the same five counts, and Lucht again filed a motion to dismiss. In its memorandum opinion and order entered on June 20, 2012, granting Lucht's motion to dismiss, the trial court allowed Orum one final opportunity to amend the complaint. The trial court noted that in the third amended complaint, Orum stated conclusions of law applicable to certain causes of action in the introductory paragraphs. The court further noted that Orum still failed to set forth the specific, relevant factual allegations necessary to allege each element of each cause of action and the pleading continued to be based on conclusory allegations. Finally, the court noted that the claims for breach of contract and promissory estoppel which appeared to be based on illicit cohabitation, sexual relations, and child-rearing may be void as alleged but, in any event, were insufficiently pled. Thus, the third amended complaint failed to state a cause of action in its entirety.

¶ 9 On July 6, 2012, Orum filed his fourth amended complaint. According to the complaint, Orum, a United States citizen and resident of Illinois began an extramarital affair with Lucht, a German citizen and resident of Freiburg, Germany, in June 2003. The complaint further alleged that in 2006, Orum and Lucht made plans to conceive a child, leave their respective spouses, and raise the child together. In furtherance of these plans, both parties visited fertility specialists and

Orum made arrangements to establish a part-time residence in Germany. In February 2008, Lucht became pregnant and tests established that Orum was the father. By April of 2008, however, Orum alleged that Lucht "separated herself and their unborn child" from him. Lucht gave birth to a baby boy on October 3, 2008. The complaint alleged that Lucht does not provide information to Orum about their son and alienates their son's affection by keeping him from Orum with the exception of a few brief meetings in March 2010.

¶ 10 Lucht again filed a motion to dismiss and the trial court issued a written memorandum opinion and order on the motion on November 16, 2012, dismissing Orum's fourth amended complaint with prejudice. The trial court noted that the fourth amended complaint continued to contain conclusory assertions and irrelevant narration and continued to lack the specific, relevant factual allegations necessary to allege each element of each cause of action. Thus, the trial court found that the complaint failed to state a cause of action in its entirety. Orum timely filed this appeal.

¶ 11 ANALYSIS

¶ 12 A motion to dismiss under section 2-615 of the Code attacks the legal sufficiency of the complaint; it does not raise affirmative factual defenses but alleges only defects appearing on the face of the complaint. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). The question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id.* The cause of action should be dismissed only if it is clearly apparent that no set of facts can be proven that will entitle the plaintiff to recovery. *Id.* at 318. A reviewing court

determines *de novo* whether the trial court properly granted a section 2-615 motion to dismiss. *Id*.

¶ 13 Conclusions of law or fact are not considered well-pleaded, even if they generally inform the defendant of the nature of the claim. *Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1059 (2002). Stated differently, " 'an actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done.' " *Id.* (quoting *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 520 (1989)). Rather, because Illinois is a fact-pleading jurisdiction, a complaint must set forth a legally recognized claim and plead facts in support of each element that brings the claim within the cause of action in order to withstand a motion to dismiss. *Rabin v. Karlin & Fleisher, LLC,* 409 Ill. App. 3d 182, 186 (2011). A plaintiff may not rely on factual or legal conclusions that are not supported by factual allegations. *Davis v. Dyson*, 387 Ill. App. 3d 676, 682 (2008).

¶ 14 A. Intentional Infliction of Emotional Distress

¶ 15 In order to properly plead a cause of action for intentional infliction of emotional distress, a plaintiff must allege facts that establish the following three elements: (1) the conduct involved must be truly extreme and outrageous; (2) the actor must either intend that her conduct inflict severe emotional distress, or know that there is at least a high probability that her conduct will cause severe emotional distress; and (3) the conduct must in fact cause severe emotional distress. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 268-69 (2003).

¶ 16 Orum has not pled facts sufficient to establish that the conduct involved was extreme and outrageous. "[To] 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." *Id*. at 274. Whether the conduct rises to the level of outrageous depends on all of the facts and circumstances of the case. *Id*.

¶ 17 Orum relies on *Bhama v. Bhama*, 169 Mich. App. 73 (1988), in support of his contention that Lucht's conduct is extreme and outrageous. We first note that the *Bhama* court was persuaded by the reasoning in *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985). *Bhama*, 169 Mich. App. at 79. In *Raftery*, a couple divorced and the mother was awarded full custody of their three-year-old son while the father was granted visitation rights. *Raftery*, 756 F. 2d at 337. However, the mother left the state and the father was not able to locate her for approximately four years. *Id*. The father then sued to enforce his visitation rights and evidence showed that, in the intervening separation, the mother had successfully persuaded the son that he should not see his father. *Id*. The *Raftery* court upheld a jury award to the father in a subsequent cause of action for intentional infliction of emotional distress for the psychological damage resulting from the deliberate frustration of a close relationship between a parent and child. *Id*. at 340.

¶ 18 In *Bhama*, the parties had lived together with their two children and subsequently divorced, and in the ensuing custody battles the children were placed with first one parent, then the other, and even at one point separated with each parent being awarded custody of one of the children. *Bhama*, 169 Mich. App. at 75-76. The father ultimately regained full custody of both children. *Id*. at 76. The mother filed a cause of action for intentional infliction of emotional distress alleging that the father, a psychiatrist, used his training in psychiatry over an extended period of time to manipulate and brainwash the children into rejecting her to "the point of

extreme antagonism and instilled hatred." *Id*. The court held that under those facts, the deliberate destruction of the parent-child relationship could be considered outrageous conduct. *Id*. at 80.

¶ 19 Contrary to Orum's assertion, these cases do not "squarely address[] in the affirmative whether separation of a father from his son could support an [i]ntentional infliction of emotional distress count." When considering the facts and circumstances of these cases in their entirety, both cases involve situations in which a parent-child bond had already been established and the custodial parent took deliberate actions to destroy that bond. We are not persuaded to extend the reasoning in either of these cases to the facts here, where the complaint alleges that a child conceived as the result of an extramarital affair never bonded with his father and the father was only allowed a few brief visits approximately 17 months after the child's birth.

¶ 20 In Illinois, cases in which claims for intentional infliction of emotional distress have been upheld have frequently involved a defendant who stood in a position of power or authority relative to the plaintiff. See *McGrath v. Fahey*, 126 Ill. 2d 78, 87 (1988). In the context of a marital relationship, the closest factual similarity to this case, our supreme court has held that detailed allegations of verbal and physical abuse spanning a decade constituted conduct that was sufficiently extreme and outrageous to support a cause of action for intentional infliction of emotional distress. *Feltmeier*, 207 Ill. 2d at 275. However, we have not found case law in Illinois on the issue of whether the prevention of the establishment of a parent-child bond can be considered outrageous conduct that goes beyond all possible bounds of decency and is intolerable in a civilized society.

¶ 21 In considering whether Orum has alleged facts that, viewed in the light most favorable to him, establish the element of extreme and outrageous conduct, we do not consider any legal and factual conclusions in Orum's fourth amended complaint. Such conclusions include the statement that a "highly qualifie[d] forensic psychiatrist" has determined that Lucht's conduct is outrageous and intolerable in a civilized society, and the statement that Lucht "has orchestrated a complex strategy of lies, stalling, and deceit arranged to alienate the affection of [the child] in order to psychologically injure [Orum]." We also do not consider the allegations in the complaint that Lucht's conduct is in violation of German law.

¶ 22 Indeed, the fourth amended complaint contains so many legal and factual conclusions that it is difficult to separate out merely the alleged facts that purport to support the extreme and outrageous element of a cause of action for intentional infliction of emotional distress. According to the complaint, Orum decided to impregnate Lucht with the full knowledge that she was married to someone else (as was he), and was a citizen and resident of another country, on the strength of an alleged promise that she would leave her spouse and would raise the child together with Orum. Given this background, even accepting as true that Lucht has prevented and continues to prevent Orum from having any contact with their son, and that she refuses to provide Orum with any information related to their son's health and well-being, such facts are insufficient to rise to the level of conduct that goes beyond all possible bounds of decency and is regarded as intolerable in a civilized community.

¶ 23 Moreover, even if we were to agree that the complaint alleges adequate facts to support the element of extreme and outrageous conduct, Orum has not pled facts sufficient to allege that

he in fact suffered from severe emotional distress. The "infliction of such emotional distress as fright, horror, grief, shame, humiliation and worry is not sufficient to give rise to a cause of action." *Adams v. Sussman & Hertzberg, Ltd.*, 292 Ill. App. 3d 30, 38 (1997). Orum has not alleged that he was hospitalized, sought and received psychiatric treatment, or even was prescribed medication. See *id*. at 38-39. Instead, the complaint alleges that Orum felt extreme horror when he thought Lucht may have terminated the pregnancy, and that he feels extreme grief and disappointment and constant worry over his son's well-being. The complaint further alleges that Orum has experienced daily nausea, weight loss, insomnia and recurrent nightmares. Finally, the complaint alleges that Orum experiences symptoms of Parental Alienation Syndrome. The complaint does not include any facts related to medical or psychiatric treatment sought by Orum, anything that would indicate an actual diagnosis provided by a medical professional, or any medication prescribed. The complaint merely alleges that "[a]t least one highly qualified forensic psychiatrist in Illinois states that the emotional distress resulting from [Lucht's] behavior is so severe that no reasonable man could be expected to endure it." However, this statement is not sufficient to plead that Lucht's conduct in fact caused severe emotional distress. Moreover, Orum's statements that he is having difficulty eating and sleeping are insufficient to support a cause of action for intentional infliction of emotional distress.

¶ 24 For these reasons, we agree with the trial court that the fourth amended complaint fails to state a cause of action for intentional infliction of emotional distress.

¶ 25 B. Negligent Infliction of Emotional Distress

¶ 26 A plaintiff who wishes to state a cause of action for negligent infliction of emotional

distress must establish the traditional elements of negligence: duty, breach, causation and injury. *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 363 (2010). Unless a plaintiff can first establish that a duty is owed, there can be no cause of action for negligence. *Washington v. City of Chicago*, 188 Ill. 2d 235, 239 (1991). "Whether a duty exists is a question of law for the court to decide." *Id*. In making this determination, a court must consider whether a relationship exists between the parties that would impose a legal obligation upon one for the benefit of the other. *Id*. Relevant factors in resolving the question of duty include the foreseeability of injury, the likelihood of such injury, the magnitude of guarding against the injury, and the consequences of placing that burden on the defendant. *Id*.

¶ 27 Orum has failed to establish that Lucht owed him a duty. The complaint merely contains the legal conclusion that Lucht owed Orum a duty of care because he is the father of her child. In his appellate brief, Orum cites to case law regarding the definition of a fiduciary relationship, but does not explain how this applies to his relationship with Lucht. Orum then merely states that Lucht owed him a duty of care with respect to her treatment of him regarding their child.

¶ 28 There is nothing in the facts alleged in the complaint that would establish that Lucht owed Orum a duty. The relationship between Lucht and Orum was a personal, intimate relationship that in no way imposed a legal obligation on either party for the benefit of the other. Because Orum cannot establish that Lucht owes him a duty, the complaint fails to state a cause of action for negligent infliction of emotional distress.

¶ 29 C. Breach of Contract, Promissory Estoppel and Common Law Fraud

¶ 30 Orum has forfeited the remaining three issues on appeal. In his appellate brief, Orum

merely asserts that he adequately pled the required elements for each cause of action. For the promissory estoppel and common law fraud counts, he includes a citation in each section that sets forth the required elements for the respective causes of action; the argument section on the breach of contract count includes no citation to relevant authority even for the required elements for a breach of contract action. The brief does not include any argument or any relevant citations to authority in support of Orum's contention that he sufficiently pled the required elements for any of the three counts.

¶ 31 It is well established that the failure to argue a point in an appellant's opening brief, in violation of the requirements of Illinois Supreme Court Rule 341(h) (eff. Feb. 6, 2013), results in forfeiture of the issue. See *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010). Both arguments and citations to relevant authority are required, and "[a]n issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule." *Id*. Thus, Orum has forfeited these issues and we decline to address them.

¶ 32 In conclusion, we note that Orum was afforded multiple opportunities to amend his complaint. In fact, the trial court went out of its way to explain to Orum, an attorney who represented himself, what was needed in order to correct the deficiencies in his complaint. "The trial court may bring the litigation to an end when it believes that further amendments to pleadings will not further the interests of justice." *Plocar v. Dunkin' Donuts of America, Inc.*, 103 Ill. App. 3d 740, 750 (1981). Here, despite five opportunities to state a cause of action, Orum was unable to allege specific facts to support an actionable wrong. Thus, the trial court did not err in dismissing Orum's fourth amended complaint with prejudice.

¶ 33 For the reasons stated herein, the judgment of the circuit court is affirmed.

¶ 34 Affirmed.