2014 IL App (1st) 133056

SIXTH DIVISION
July 25, 2014

No. 1-13-3056

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MOSHE LEFKOWITZ, Plaintiff-Appellant, v. SKOKIE HOSPITAL; NORTHSHORE UNIVERSITY HEALTH SYSTEM; and RABBI JOSEPH OZARWOSKI, Individually, and as Apparent or Actual Agent of Skokie Hospital and Northshore University Health System, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 2013 L 062012 Honorable Roger G. Fein, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the dismissal with prejudice of plaintiff's amended complaint pursuant to section 2-619 of the Code of Civil Procedure, and remand this matter for further proceedings, as a question of material fact exists as to whether plaintiff had consented to the conduct of defendants which formed the basis of this negligence suit.

¶ 2 Plaintiff-appellant, Moshe Lefkowitz, appeals from the dismissal with prejudice of his amended complaint against defendants-appellees, Skokie Hospital, Northshore University Health System, and Rabbi Joseph Ozarowski, individually, and as apparent or actual agent of Skokie Hospital and Northshore University Health System, pursuant to section 2-619 of the Code of Civil Procedure (the Code). 735 ILCS 5/2-619 (West 2012). Plaintiff's amended complaint had

alleged defendants were negligent for failing to preserve his amputated leg for burial after surgery in accordance with his religious beliefs. For the following reasons, we reverse.

¶ 3 On March 5, 2012, plaintiff commenced his suit against defendants Skokie Hospital (hospital), Northshore University Healthsystem (Northshore), Rabbi Joseph Ozarowski and certain other entities which are no longer named as parties to this action. Upon filing suit, plaintiff demanded a jury trial.

¶ 4 According to the operative amended complaint, on March 3, 2011, plaintiff was a patient at the hospital and receiving treatment for his left leg, which eventually required amputation below the knee. At that time, Northshore allegedly "owned, operated, managed, controlled and staffed" the hospital. Rabbi Ozarowski was employed by Northshore to provide pastoral services at the hospital.

¶ 5 Plaintiff asserted Rabbi Ozarowski owed him a duty to provide for his spiritual and religious needs, disclose his spiritual and religious needs to all health care providers, and ensure that his religious traditions were "understood, appreciated and considered" during his care. The amended complaint contended Rabbi Ozarowski violated his duty, and was negligent in the following ways:

> "a. Failed to perform his duties as chaplain;
>
> b. Failed to inform health care providers involved in the Plaintiff's treatment of his spiritual and religious wishes;
>
> c. Failed to ensure that Plaintiff's religious traditions were carried out in accordance with his wishes;
>
> d. Failed to preserve the Plaintiff's amputated leg in accordance with the practices of his Orthodox Jewish denomination;
>
> e. Failed to ensure that the Plaintiff's amputated leg was disposed of in accordance with the practices of his Orthodox Jewish denomination; and

f. Was otherwise negligent, careless, or reckless in his involvement in Plaintiff's case."

Plaintiff's claims against the hospital and Northshore were based on these same purported negligent acts of Rabbi Ozarowski, under a theory of agency. Plaintiff sought damages in excess of $100,000 for the emotional distress he suffered as a result of defendants' negligence. Plaintiff's amended complaint does not include an affidavit pursuant to section 2-622 of the Code (735 ILCS 5/2-622 (West 2012)), which is required for a medical negligence claim.

¶ 6 On June 19, 2013, defendants filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), arguing plaintiff's suit was "precluded" because plaintiff had consented to defendants' disposal of his amputated leg. In support of their motion, defendants submitted the affidavit of Pamela Kring, the manager of health information record services-release of health information for Northshore. Ms. Kring attested she had personal knowledge as to the maintenance of patient medical records and that plaintiff's records included two "Procedure/Operation" consent forms (consent forms)—one signed by plaintiff on February 27, 2011, and one signed by plaintiff on March 1, 2011. The consent forms, which were also attached as exhibits to the motion, stated that plaintiff authorized defendants to perform an amputation of his left leg below the knee. Both consent forms listed Dr. Alan League as the surgeon who would perform the amputation. The consent forms further acknowledged medical personnel had discussed with plaintiff his condition and treatment, satisfactorily answered his questions, informed him of the risks and benefits of treatment, and alternatives to the proposed treatment. Finally, the consent forms also provided, in relevant part, that "[i]f any tissue, body part, or foreign bodies are removed, I consent to their appropriate investigation and disposal by authorities of [Northshore]." Both consent forms included the signature of plaintiff and the signature of a witness.

¶ 7 In his written response to the motion, plaintiff explained that the law of his Jewish faith required that his amputated leg be buried. Plaintiff asserted that in contravention of these religious practices, his amputated leg had been incinerated following his surgery and defendants were negligent in failing to preserve it.

¶ 8 As to the consent forms, plaintiff explained he was legally blind and never actually viewed the consent forms. Plaintiff maintained that he had "relied on a verbal explanation by a nurse who presented the [consent] form solely as one obtaining his permission to perform the operation, not [to] dispose of the amputated leg," and that there was "no mention of disposal [of his leg] at that time." Finally, plaintiff asserted that he informed a nurse during "pre-op, in the presence of Dr. Alan League, that he did not wish to have the amputated leg disposed of." Based on these circumstances, plaintiff argued that there was a question of fact as to whether he had consented to the disposal of his amputated leg, a question that was for the jury to decide so that the dismissal of his amended complaint was improper.

¶ 9 Attached to the response to the motion to dismiss was an "affidavit" of plaintiff which stated that he was legally blind and fully explained the circumstances surrounding his signing of the consent form as was set forth in the response. The affidavit included the signature of plaintiff, but was neither verified nor notarized.

¶ 10 In his response, plaintiff also argued that "[r]ecovery in a medical battery case is allowed when the patient establishes a complete lack of consent to medical procedures performed, when the treatment is against the patient's will, and/or when the treatment is substantially at variance with the consent given." However, the allegations of the amended complaint do not set forth a claim of battery against defendants.

¶ 11 In reply, defendants argued plaintiff did not deny he had signed the consent forms.

Defendants also contended that plaintiff was now seeking to base this suit on his statement to a preoperative nurse in the presence of plaintiff's surgeon, a matter not actually set forth in the amended complaint. Defendants urged that plaintiff's argument, therefore, should be disregarded. Notably, defendants did not raise an objection as to the sufficiency of plaintiff's affidavit and did not move to strike the affidavit. Defendants' reply also did not present any counter-affidavits or any other evidence in contravention of plaintiff's affidavit.

¶ 12 In a written order entered on September 4, 2013, the circuit court granted defendants' motion and dismissed the amended complaint with prejudice. The circuit court found that plaintiff, by signing the consent forms, had authorized the disposal of his amputated leg. Plaintiff now appeals.

¶ 13 On appeal, plaintiff argues the dismissal of his amended complaint with prejudice should be reversed because his affidavit alleged he was blind and that the nurse who assisted him with the consent forms failed to explain to him the full meaning of the consent forms and, therefore, a question of fact exists as to whether plaintiff knowingly agreed to the disposal of his amputated leg. Defendants argue plaintiff is bound by the signed consent forms which included authorization for the disposal of plaintiff's amputated leg by defendants. Defendants also argue, for the first time, that even if plaintiff had not consented to the disposal of his leg, the dismissal of the amended complaint was proper because Illinois has not recognized a cause of action for clergy malpractice, and Rabbi Ozarowski did not owe plaintiff a duty of care.

¶ 14 We first address a number of preliminary matters. First, we consider the arguments defendants have first raised on appeal, that the dismissal order was proper because an action for clergy malpractice does not exist in Illinois, and Rabbi Ozarowski did not owe plaintiff a duty of care. Defendants never raised these arguments below in support of their section 2-619 motion.

Indeed, we believe these contentions would have been more appropriately raised in a section 2-615 motion. 735 ILCS 5/2-615 (West 2012). Such a motion challenges the legal sufficiency of the complaint, and dismissal is proper where a cause of action has not been adequately set forth therein. *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1075 (1992). In that there appears, at a minimum, to be a lack of clarity as to the exact nature and substance of plaintiff's suit, a section 2-615 motion may have had merit here. However, defendants chose to seek the dismissal of plaintiff's amended complaint pursuant to a section 2-619 motion which, as discussed below, assumes the legal sufficiency of the amended complaint. Thus, we will not address defendants' arguments as to whether plaintiff has set forth a recognized cause of action in the context of this appeal. *Nikolic v. Seidenberg*, 242 Ill. App. 3d 96, 102 (1993) (an issue not raised in the trial court is not properly preserved and waived on appeal).

¶ 15 Second, in a footnote to their brief, defendants argue that we should not consider plaintiff's affidavit, as it is neither notarized nor verified. We do not agree. Illinois Supreme Court Rule 191(a) governs the use of affidavits in section 2-619 proceedings. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). Rule 191(a) provides, in relevant part:

> "Motions for summary judgment under section 2-1005 of the Code of Civil Procedure and motions for involuntary dismissal under section 2-619 of the Code of Civil Procedure must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure, and affidavits submitted in connection with a motion to contest jurisdiction over the person, as provided by section 2-301 of the Code of Civil Procedure,

> shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used." *Id*.

¶ 16 Defendants failed to object to or move to strike plaintiff's affidavit in the circuit court and, therefore, have waived any argument as to its sufficiency. *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 15 (1989). Even if the argument had been preserved, plaintiff's affidavit complies with the personal knowledge requirement of Rule 191(a), as the facts asserted therein are clearly within the personal knowledge of plaintiff. Furthermore, plaintiff would be competent to testify as a witness as to his legal blindness, the facts surrounding the signing of the consent forms, and his statement to the preoperative nurse in the presence of his surgeon. We find the affidavit, as a whole, satisfies Rule 191(a). *Id*. ("Where it affirmatively appears from the whole of the document that the affiant could competently testify to the contents of the affidavit at trial, then technical insufficiencies in the affidavit should be disregarded." (citing *Mount Prospect State Bank v. Forestry Recycling Sawmill*, 93 Ill. App. 3d 448, 459 (1980) and *LaMonte v. City of Belleville*, 41 Ill. App. 3d 697, 701 (1976))).

¶ 17 Third, we note that in the circuit court defendants argued that plaintiff did not include in his amended complaint any allegation regarding the purported statements to the preoperative nurse about preserving the amputated leg, and argued that this allegation should therefore be disregarded. Defendants have failed to challenge the relevance of the statement to the

preoperative nurse on this basis on appeal and the argument is, therefore, waived. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Any waiver aside, plaintiff introduced this evidence to refute defendants' own evidence introduced in support of their motion to dismiss, and it may therefore properly be considered as to the issue of whether plaintiff knowingly consented to the destruction of his amputated leg so as to warrant dismissal of the amended complaint.

¶ 18 We now turn to a discussion of the propriety of the circuit court's dismissal of plaintiff's amended complaint pursuant to section 2-619 of the Code. A section 2-619 motion admits the legal sufficiency of the complaint. *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2014 IL App (1st) 130764, ¶ 77. Indeed, section 2-619(a)(9) allows a complaint to be dismissed by an " 'affirmative matter' " which is " 'in the nature of a defense which negates the cause of action completely ***.' " *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003) (quoting *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 486 (1994)); see also 735 ILCS 5/2-619(a)(9) (West 2012). Such a motion provides a "means of obtaining summary disposition of issues of law, or of easily proven issues of fact." *Henderson Square Condominium Ass'n, LLC*, 2014 IL App (1st) 130764, ¶ 82.

¶ 19 In determining a 2-619 motion to dismiss, a court must accept as true all well-pled facts and reasonable inferences to be drawn from those facts. *Id.* Further, we must view all the pleadings and supporting documents in a light most favorable to the nonmovant. *Van Meter*, 207 Ill. 2d at 368. However, where the nonmoving party has made a jury demand, any disputed questions of fact must be determined by a jury. *Henderson Square Condominium Ass'n, LLC*, 2014 IL App (1st) 130764, ¶ 82; *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892 (2005). Thus, we "must 'consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is

proper as a matter of law.' " *Henderson Square Condominium Ass'n, LLC*, 2014 IL App (1st) 130764, ¶ 82 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 115, 116-17 (1993)). Our review of a motion to dismiss is *de novo*. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004).

¶ 20 Here, defendants moved to dismiss plaintiff's negligence claims by arguing that plaintiff, by signing the consent forms, authorized defendants to dispose of his amputated leg. Where, as here, the affirmative matter is not apparent on the face of the complaint, the defendant must support a motion to dismiss pursuant to section 2-619(a)(9) with an affidavit establishing the basis of the motion. *Hodge*, 156 Ill. 2d at 116. When the defendant satisfies this initial burden of proof, the burden then shifts to the plaintiff to submit evidence which refutes the defendant's evidence. *Hollingshead v. A.G. Edwards and Sons, Inc.*, 396 Ill. App. 3d 1095, 1102 (2009). Defendants satisfied their initial burden by presenting an affidavit which provided authentication and foundation for plaintiff's signed consent forms. Those consent forms state that plaintiff permitted defendants to destroy his amputated leg. Thus, the burden shifted to plaintiff to refute this evidence.

¶ 21 In response to the motion to dismiss, plaintiff submitted his unsworn and unnotarized affidavit setting forth that he was legally blind and had not read the consent forms. In his affidavit, plaintiff further stated that a nurse had explained the consent forms to him and, based on those discussions, plaintiff's understanding was that the consent forms authorized only the surgery, and not defendants' destruction of his amputated leg. In further support of the assertion that he did not consent to defendants' destruction of his amputated leg, plaintiff also stated that prior to surgery he informed the preoperative nurse—in the presence of the surgeon, Dr. League—that he wanted his amputated leg preserved.

¶ 22 Because defendants offered no counter affidavit or other evidentiary matter to oppose plaintiff's affidavit, we must take all well-pleaded facts set forth therein as true, and make all reasonable inferences which may be drawn from those facts. *Kirby*, 190 Ill. App. 3d at 13. Moreover, plaintiff demanded a jury trial here. In such a circumstance, a trial court may not resolve any general issue of material fact, but must deny the motion to dismiss without prejudice to a defendant's right to raise the affirmative matter in its answer to the complaint. *Turner*, 355 Ill. App. 3d at 896; see also 735 ILCS 5/2-619(c) (West 2012).

¶ 23 The hospital and Northshore generally used the consent forms to obtain a patient's consent to procedures. A patient, such as plaintiff, would not have been involved in the preparation of these documents. Plaintiff asserts he is legally blind and did not read the consent forms. He further maintains that before signing the consent forms, those consent forms were explained to him by a nurse and the destruction of his amputated leg was never mentioned during that explanation. Before surgery, plaintiff also made his wishes clear to the attending nurse that his amputated leg was to be preserved. Although plaintiff signed the consent forms, we conclude that his affidavit raised a material issue of fact as to whether he knowingly consented to the destruction of his amputated leg when he signed the consent forms based on the allegedly incomplete explanation of the consent forms given by an employee of the hospital. It was therefore error to grant the section 2-619 motion to dismiss on the sole basis of the consent forms, where there is a material issue of fact as to whether plaintiff knowingly agreed to the destruction of his amputated leg.

¶ 24 Because defendants failed to raise any arguments as to the legal sufficiency of the amended complaint, plaintiff's affidavit satisfies the requirements of Rule 191(a), and because that affidavit raises at least a question of material fact as to whether plaintiff knowingly

consented to the disposal of his amputated leg (the sole issue presented by defendants' section 2-619 motion), we reverse the dismissal with prejudice of plaintiff's amended complaint pursuant to section 2-619 and remand for further proceedings.

¶ 25 Reversed and remanded.