2017 IL App (1st) 153143-U

FIFTH DIVISION
January 27, 2017

No. 1-15-3143

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

ANDREW S. CWIK, Plaintiff-Appellant, v. LAW OFFICES OF JONATHAN MEREL, P.C., a law firm, and JONATHAN MEREL, an individual, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County No. 14 L 1637 Honorable Kathy M. Flanagan, Judge Presiding.

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

ORDER

¶ 1 *Held*: The circuit court's dismissal of plaintiff's third amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 West (2014)) is affirmed where plaintiff failed to allege specific facts to demonstrate that, but for defendants' negligence, he would have been successful in his underlying claims.

¶ 2 Plaintiff Andrew Cwik appeals *pro se* from an order of the circuit court of Cook County dismissing his third amended complaint alleging legal malpractice against the Law Offices of Jonathan Merel, P.C. and Jonathan Merel (collectively defendants), pursuant to section 2-615 of

the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 West (2014)), where defendants had previously represented plaintiff in a domestic relations action. On appeal, plaintiff argues the circuit court erred in finding that he failed to sufficiently plead a cause of action because (1) he need not allege any facts to establish that, but for defendants' negligence, he would have succeeded in his underlying claim in the domestic relations action and (2) he alleged sufficient facts to demonstrate that, but for defendants' negligence, he would have defeated his ex-wife's motion to dismiss in the underlying claim. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 As this matter involves a legal malpractice action, we first set forth the facts regarding the underlying claim.

¶ 5 A. Plaintiff's Underlying Claim

¶ 6 Plaintiff and Pamela Cwik (Pamela) were married in 1996 and divorced in 2009 in Hamilton County, Ohio. On February 2, 2009, the Court of Common Pleas in Hamilton County, Ohio (Ohio court) issued a decision allocating parental rights and responsibilities which required plaintiff to participate in psychotherapy sessions to manage his anger and distress. On October 30, 2009, the Ohio court entered a divorce decree, naming Pamela the "residential parent and legal custodian" of their two minor children and permitting plaintiff supervised visits.

¶ 7 On January 19, 2010, the Ohio court entered an order granting Pamela's motion to relocate to Chicago. The order also provided that if plaintiff relocates to Chicago, the parenting time order shall remain the same as provided in the divorce decree. Thereafter, on February 5, 2010, the Ohio court entered an order of protection in favor of Pamela. The order directed plaintiff "be restrained from committing acts of abuse or threats of abuse" against Pamela and was enforceable through January 6, 2015. Pamela and her two minor children moved to Chicago

in August 2010.

¶ 8 On June 2, 2011, Pamela filed in the Ohio court a motion to modify parenting time, arguing plaintiff (1) was a flight risk with the children because he refused to provide Pamela with his address, no longer had a permanent address, and did not file an intent to relocate with the Ohio court, (2) engaged in inappropriate behavior with the minor children and approached Pamela in violation of the order of protection, and (3) requested to drive with the children during parenting time despite a court order providing that Pamela is to provide transportation. This motion was scheduled for presentment the following month in July 2011.

¶ 9 While Pamela's motion was pending in the Ohio court, defendants, as counsel for plaintiff, filed two petitions in the circuit court of Cook County (circuit court) on June 28, 2011: (1) petition to enroll a foreign judgment for dissolution of marriage; and (2) petition to modify the parenting schedule (collectively plaintiff's petitions). In his petition to enroll foreign judgment for dissolution of marriage, plaintiff stated that the minor children, Pamela, and plaintiff had resided in Chicago, Illinois for a period in excess of 90 days. In his petition to modify parenting schedule, plaintiff stated he had moved to Chicago in November 2010, and that he sought to obtain unrestricted and increased parenting time with his children. The two petitions were each supported by a certification signed by plaintiff attesting to the truth of his statements.

¶ 10 On July 14, 2011, the Ohio court granted Pamela's motion to modify plaintiff's parenting time. The Ohio court's order stated (1) plaintiff remains a resident of Hamilton County as all notices of appeal included his Cincinnati address and he did not file an intent to relocate with the court, (2) the court was not apprised of any ongoing litigation regarding the reallocation of parental rights and responsibilities of the parties in any other court, and (3) the court "retains

exclusive continuing jurisdiction over the issue of reallocation of parental rights and responsibilities of the minor children of the parties pursuant to Ohio Revised Code Section 3127.16, The Uniform Child Custody Jurisdiction and Enforcement Act," and "fully intends to retain and exercise its continuing jurisdiction within the confines of the law." The Ohio court's order also stated that plaintiff has engaged in behavior that is "potentially harmful to the children" and "that he knows or has reason to believe is frightening to [Pamela]." Accordingly, the Ohio court ordered plaintiff's parenting time be terminated and that he was not to have any in-person contact with the minor children. Plaintiff, however, could apply for reinstatement of supervised parenting time by providing evidence that he had participated in weekly psychotherapy sessions and psychological evaluations demonstrating his parental fitness. The same day, the Ohio court granted Pamela's motion to not disclose her address.

¶ 11 On August 3, 2011, Pamela filed a motion to dismiss plaintiff's petitions in the circuit court, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). Pamela asserted plaintiff's petitions were filed to forum-shop and evade the Ohio court. In her motion, Pamela further argued (1) the Ohio court had exclusive jurisdiction as expressly indicated in its order entered on July 14, 2011, (2) plaintiff incorrectly relied on section 512(c) of the Illinois Marriage and Dissolution of Marriage Act (the Act) (750 ILCS 5/512(c) (West 2010)), and (3) plaintiff failed to attach the complete judgment and postdecree documents as required by section 511(c) of the Act (750 ILCS 5/511(c) (West 2010)).

¶ 12 On August 10, 2011, defendants, as counsel for plaintiff, filed a response to Pamela's motion to dismiss, arguing Illinois had jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). In the response, plaintiff again alleged he had relocated to Chicago in November 2010. Plaintiff also submitted a signed certification attached

to his response in which he attests to the truthfulness of the statements in his response. Thereafter, on August 15, 2011, the circuit court granted Pamela's motion to dismiss and denied plaintiff's petitions with prejudice. On March 15, 2012, the circuit court denied plaintiff's motion to vacate.

¶ 13 On April 13, 2012, plaintiff retained new counsel and filed a notice of appeal. On September 2013, this court determined plaintiff failed to raise a genuine issue of fact regarding his residency to survive a motion to dismiss and affirmed the circuit court's ruling.

¶ 14 B. Plaintiff's Legal Malpractice Claim

¶ 15 On February 19, 2014, plaintiff, with the assistance of counsel, filed his complaint against defendants. In his complaint, plaintiff alleged that, but for defendants' failure to establish his residency in Illinois, he would have been successful in his petitions. The circuit court granted defendants' motions to dismiss the complaint and two subsequent iterations of the complaint for failure to state a claim, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). In each order granting defendants' motions to dismiss, the circuit court specifically stated plaintiff had failed to allege sufficient facts to demonstrate (1) he would have succeeded in the underlying claim regarding his petitions to factually demonstrate the "case within a case" and (2) "he would have prevailed on all of the cite[d] bases in [Pamela's] motion to dismiss." Thereafter, plaintiff filed the third amended complaint, the operative complaint in this matter.

¶ 16 In his complaint, plaintiff argued that, but for defendants' failure to establish his residency in Illinois, he would have successfully defeated all the arguments Pamela raised in her motion to dismiss. Plaintiff, however, did not allege he would have succeeded in his petitions. On October 21, 2015, the circuit court again granted defendants' motion to dismiss, pursuant to

section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)). The circuit court found that despite the addition of some allegations and the removal of others, the pleading remained conclusory with regard to proximate cause. Specifically, the circuit court found plaintiff had failed to allege facts demonstrating he would have been successful in his petitions for the fourth time, and as it appeared that under the facts and circumstances he would be unable to do so, plaintiff's third amended complaint was dismissed with prejudice. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, plaintiff argues *pro se* that the circuit court erred in dismissing his complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)).

¶ 19 Generally, a section 2-615 motion of the Code challenges the legal sufficiency of a complaint by alleging defects apparent on its face. 735 ILCS 5/2-615 (West 2014); *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47. The relevant question in reviewing the sufficiency of a complaint is whether the allegations, when construed in a light most favorable to the plaintiff, are sufficient to state a cause of action on which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). A motion to dismiss a complaint for failure to state a cause of action should not be granted unless it is "clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). At this stage, we accept as true all well-pleaded facts and reasonable inferences that may be drawn from those facts. *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 291 (2010). While a plaintiff is not required to provide evidence or prove his case in the complaint, he must allege facts sufficient to bring a claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429-30 (2006). Conclusions of law or allegations that are unsupported by specific facts are not sufficient to survive dismissal. *Anderson v. Vanden*

Dorpel, 172 Ill. 2d 399, 408 (1996). In addition, we review *de novo* the circuit court's order granting or denying a section 2-615 motion to dismiss. *Marshall*, 222 Ill. 2d at 429 (2006). Under *de novo* review, we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 20 Further, in order to state a cause of action for legal malpractice, a plaintiff must allege facts which establish that (1) the defendant owed the plaintiff a duty arising from an attorney-client relationship, (2) that duty was breached, (3) the plaintiff sustained damages, and (4) the defendant's breach of duty proximately caused the plaintiff's damages. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 55. Specifically, to satisfy the proximate cause element of a legal malpractice action, the plaintiff must plead and prove a "case within a case," meaning that the malpractice complaint is dependent on the underlying lawsuit. *Sharpenter v. Lynch*, 233 Ill. App. 3d 319, 323 (1992). Thus, no malpractice exists unless the plaintiff proves that, but for the attorney's negligence, the plaintiff would have been successful in the underlying action. *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 788 (2002). Accordingly, we must consider whether plaintiff's complaint alleged sufficient facts to establish that he would have been successful in the underlying case regarding his petitions. *Id.*

¶ 21 In the instant case, plaintiff's third amended complaint is not only devoid of specific facts to establish he would have been successful on his petitions, but he also fails to argue his petitions would have succeeded. We initially note plaintiff admits he has "specifically exclud[ed] any allegations relating to the potential success of the petitions *** in the underlying matter," thus defeating his malpractice claim. *Fabricare Equipment Credit Corp.*, 328 Ill. App. 3d at 788. In addition, regarding plaintiff's petition to modify his parenting schedule, he fails to allege a basis for an increased and unrestricted parenting schedule with his children. He also does not plead

facts to establish how and why it would have been in the best interests of his minor children to award him with more parenting time. Rather, the record reveals the Ohio court had indicated in an order entered on February 2, 2009, that plaintiff would be given an opportunity to modify his parenting time if he remedied the situation by seeking psychotherapy. On July 14, 2011, however, the Ohio court found plaintiff had engaged in behavior that was potentially harmful to his children and frightening to Pamela and accordingly, terminated his parenting time. The Ohio court added plaintiff was not to have any in-person contact with his minor children. In light of these circumstances, we find plaintiff has failed to plead proximate cause that, but for defendants' failure to establish his residency in Illinois, he would have succeeded in his petition to modify his parenting schedule. See *Merrilees,* 2013 IL App (1st) 121897, ¶ 57 (the plaintiff failed to sufficiently plead proximate cause where her amended complaint was completely devoid of facts to support why she would have succeeded in her underlying claim that she was entitled to the sole custody of her minor children).

¶ 22 Moreover, plaintiff sets forth no facts to demonstrate the circuit court would have granted his petition to enroll the Ohio court's judgment in Illinois, even if defendants had established his residency in Illinois. In this matter, section 206 of the UCCJEA provides, in pertinent part:

> "a court of this State may not exercise its jurisdiction under this Article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with this Act, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this State is a more convenient forum under Section 207." 750 ILCS 36/206 (a) (West 2014).

¶ 23 Here, the record is clear that Pamela filed her action in the Ohio court before plaintiff

filed the instant action in the circuit court. Plaintiff commenced his proceedings in Illinois on June 28, 2011, when he filed his two petitions. However, by this time, Pamela had already filed her motion to modify parenting time in the Ohio court on June 2, 2011. Moreover, on July 14, 2011, the Ohio court specifically stated in an order that it retained exclusive jurisdiction in the matter. Also, the Ohio court never terminated nor stayed the proceeding. We thus cannot find the circuit court erred in refusing jurisdiction over this matter. *Gainey v. Gainey*, 237 Ill. App. 3d 868, 869-71 (1992) (exercise of jurisdiction under UCCJEA by Illinois trial court was improper, where custody proceedings were in progress in Florida at the time the father filed a petition in Illinois and Florida retained jurisdiction over custody proceedings). Accordingly, we conclude plaintiff has failed to allege facts to demonstrate that, but for defendants' failure to establish his residency in Illinois, the circuit court would have allowed plaintiff to enroll Ohio's judgment in Illinois. See *id.*

¶ 24 Additionally, we agree with the circuit court that even if plaintiff demonstrated he would have defeated Pamela's motion to dismiss in the underlying action, he would still have to allege facts to establish his success on his petitions, to allege legal malpractice. *Sharpenter*, 233 Ill. App. 3d at 323. As plaintiff has failed to plead specific facts to establish he would have succeeded in his underlying action regarding his petitions, we thus conclude plaintiff has failed to sufficiently plead proximate cause. *Fabricare Equipment Credit Corp.*, 328 Ill. App. 3d at 788. We therefore find the circuit court properly granted defendants' motion to dismiss. Accordingly, we need not determine whether plaintiff would have defeated Pamela's motion to dismiss in the underlying action, but for defendants' negligence. See *id.*

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.