2017 IL App (1st) 161183-U

FIRST DIVISION
March 31, 2017

No. 1-16-1183

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ROBERT DANZIGER and MARY GELLENS,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 14 L 007650
	)	
JAMES DANZIGER,	)	Honorable
	)	James O'Hara,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: Affirming the circuit court's dismissal of plaintiffs' second amended complaint finding plaintiffs failed to state a claim for intentional infliction of emotional distress where they did not allege sufficient facts to support that defendant's conduct was extreme and outrageous; affirming the circuit court's denial of plaintiffs' motion for leave to file a third amended complaint finding it was not an abuse of discretion.

¶ 2 Robert Danziger and Mary Gellens, a married couple, filed a two-count complaint against Robert's brother, James Danziger, alleging intentional infliction of emotional distress on the grounds that James had directed numerous threats at Robert and Mary during two different periods approximately six years apart and also filed two false reports against them with the

Illinois Department on Aging. All of this alleged conduct was directed to Robert and Mary's treatment of Robert and James' mother, Gertrude Dangizer. The circuit court dismissed Robert and Mary's second amended complaint with prejudice pursuant to section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)) and denied their motion for leave to file a third amended complaint. Robert and Mary appeal both rulings. For the reasons that follow, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 On July 22, 2014, Robert Dangizer and Mary Gellens filed their original complaint against James Dangizer for intentional infliction of emotional distress (IIED). The circuit court dismissed the complaint, without prejudice, partially on the basis that Robert and Mary "fail[ed] to allege sufficient facts to support that [James'] conduct was extreme and outrageous," as required to state a claim for IIED, and gave them leave to file an amended complaint. Robert and Mary subsequently filed their first amended complaint which the court also dismissed without prejudice, again stating that Robert and Mary "fail[ed] to allege sufficient facts to support that [James'] conduct was extreme and outrageous." The court once more gave Robert and Mary leave to file an amended complaint, stating in its order that this was their "last opportunity to allege a sufficient cause of action" against James.

¶ 5 Robert and Mary filed their second amended complaint on September 3, 2015. They alleged that James "engaged in a pattern of extreme and egregiously outrageous conduct" which was "designed and intended" to cause them "severe emotional distress." They alleged that, at the end of 2006 and the beginning of 2007, James directed "numerous" threats at Robert and Mary regarding Robert and James' mother, Gertrude. James allegedly threatened to tell the police that Robert and Mary had kidnapped and abused Gertrude, and that he would file a complaint against

them with the Illinois Department on Aging. Robert and Mary also alleged that, in February 2007, James actually filed a complaint with the Department on Aging that he knew to be false and not in Gertrude's best interest, which the Department on Aging investigated. The Department on Aging "determined that it would not substantiate the complaint," after finding that it had no basis.

¶ 6 Robert and Mary further alleged that, in October 2013, James again began directing "numerous" threats at them, both to report them to the police and the Department on Aging for kidnapping and emotionally abusing Gertrude and for holding her against her will. They alleged that, in November 2013, James made his second complaint to the Department on Aging, again asserting that Robert and Mary were abusing Gertrude, which they claim James knew to be false and not in Gertrude's best interest. They alleged that the Department on Aging again closed this complaint in late November 2013, after investigation, because the complaint had no basis. Robert and Mary further alleged that, again, on or around November 28, 2013, James began making "numerous" threats to report them to the police and, again, to the Department on Aging stating that they had kidnapped Gertrude.

¶ 7 Robert and Mary alleged that James' conduct was designed and intended to cause severe emotional distress to them, that it did in fact cause them both to experience anxiety and physical manifestations of emotional distress including headaches and sleeplessness, and that it "caused great strain" on Robert and Mary's marriage. They also alleged that James' conduct caused Robert, who had a heart condition resulting from an earlier heart attack, to experience heart pains. Robert and Mary alleged that James was advised of the effects his conduct was having on them and that when they communicated the impact of his conduct, including the effects on Robert's health and how James' conduct "could end up killing" him, James responded that he

"did not care." Robert and Mary alleged that James was a physician and was fully aware of Robert's prior heart attack and heart condition.

¶ 8 James moved to dismiss Robert and Mary's second amended complaint. After the motion was fully briefed, the circuit court heard oral argument on the motion on February 10, 2016. During this hearing, plaintiffs' counsel was asked to specify exactly what "numerous" meant in reference to the number of times James directed threats at Robert and Mary:

> "THE COURT: And by numerous how many is numerous to the best of your knowledge?
>
> [Plaintiffs' counsel]: I would think – My understanding is perhaps five to ten times of that –
>
> THE COURT: So you don't – You just know numerous. You don't know how many times?
>
> [Plaintiffs' counsel]: If Your Honor requires that, I would ask leave. I can present that.
>
> THE COURT: No, if you were going to do it, you would have done it by now. That's okay. So numerous is whatever that number means."

¶ 9 Prior to the circuit court ruling on James' motion to dismiss, Robert and Mary filed a motion for leave to file a third amended complaint on February 26, 2016. In their motion, Robert and Mary stated that they sought to "minimally amend" their complaint "to more specifically allege *** the number of threats made" by James. According to the proposed third amended complaint, which was attached to the motion, the threats by James at the end of 2006 and beginning of 2007 were "collectively made at least fifteen (15) times."

¶ 10 On March 30, 2016, the circuit court dismissed, with prejudice, Robert and Mary's second amended complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)). In its order, the court stated that Robert and Mary had "fail[ed] to allege sufficient facts to sustain a cause of action" for IIED, specifically facts "to support that [James'] conduct was extreme and outrageous." The court did not reach the alternative arguments James made in his motion that portions of the second amended complaint should be stricken because James had immunity for his reports to the Department on Aging and because certain allegations were barred by the statute of limitations. In its order, the circuit court also denied Robert and Mary's request for leave to file a third amended complaint on the basis that it had made clear that their second amended complaint was their final chance to state a claim and that, in any event, the proposed amendment would not cure the defective pleading.

¶ 11 JURISDICTION

¶ 12 Robert and Mary timely filed their notice of appeal on April 27, 2016. We therefore have jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 13 ANALYSIS

¶ 14 Robert and Mary contend that the circuit court erred both in dismissing their second amended complaint and in denying them leave to file a third amended complaint. We review each of these two issues in turn.

¶ 15 I. Dismissal of the Second Amended Complaint

¶ 16 Our review of a circuit court's order granting a motion to dismiss pursuant to section 2-615 of the Code is *de novo*. *Freeman v. Williamson*, 383 Ill. App. 3d 933, 936 (2008). A section 2-615 motion to dismiss is a challenge asserting that the complaint fails to state a cause of action

upon which relief can be granted. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 147 (2002). The circuit court should grant a section 2-615 motion to dismiss if it appears that no set of facts exist which, when interpreted in a light most favorable to the plaintiff, state a cause of action that would entitle the plaintiff to relief. *McGrath v. Fahey*, 126 Ill. 2d 78, 90 (1988).

¶ 17 To state a claim for IIED, a plaintiff must allege each of the following: (1) that conduct by the defendant was "truly extreme and outrageous," (2) that the defendant intended his conduct to cause severe emotional distress or knew there was a high probability that it would cause severe emotional distress, and (3) that the conduct did in fact cause the plaintiff severe emotional distress. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 50 (citing *McGrath*, 126 Ill. at 86).

¶ 18 Here, the circuit court concluded that Robert and Mary failed to state sufficient facts to meet this first element—allegations that James had engaged in conduct that was "truly extreme and outrageous." The determination of whether conduct meets this standard is made "in view of all the facts and circumstances pleaded and proved in a particular case." *McGrath*, 126 Ill. 2d at 90. "[T]o 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." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 274 (2003). There shall be no relief granted for conduct that merely rises to the level of "insults, indignities, threats, annoyances, petty oppressions or trivialities." *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 89-90 (1976). "A pattern, course, [or] accumulation of acts" could rise to the level of outrageous conduct even where an individual instance of the same conduct may not. *Feltmeier*, 207 Ill. 2d at 274.

¶ 19 Our supreme court recently laid out several factors that should be considered by a court in determining whether a defendant's conduct can be deemed extreme and outrageous. See

Schweihs, 2016 IL 120041, ¶ 52. These factors include whether the defendant was in a position of power to affect the plaintiff's interests and abused that power, whether the defendant reasonably believed that the conduct was done to achieve a legitimate objective, and whether the defendant was aware that the plaintiff was "particularly susceptible to emotional distress." *Id.*; see also *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 21 (1992) ("Behavior that might otherwise be considered merely rude, abrasive or inconsiderate, may be deemed outrageous if the defendant knows that the plaintiff is particularly susceptible to emotional distress."). The presence or absence of any of those factors is not critical to the determination of whether the plaintiff had adequately alleged an IIED claim; rather, "[t]hose factors are to be considered in light of all of the facts and circumstances in a particular case." *Schweihs*, 2016 IL 120041, ¶ 52.

¶ 20 Robert and Mary here alleged two types of conduct by James to support their claims of IIED. First, they alleged that James made threats "numerous" times both in 2006 to 2007 and again in late 2013. According to the second amended complaint, these numerous threats were clustered over two different time periods, with a break of over six years in-between. Second, Robert and Mary alleged James filed two complaints with the Department on Aging, one in 2007 and the other in 2013, both of which were closed by the Department on Aging after investigation. As we discuss below, we find that none of the conduct alleged by Robert and Mary, either separately or collectively, rises to the level of outrageousness required to state a claim for IIED.

¶ 21 A. Threats

¶ 22 The threats that Robert and Mary relied on in this case fall far short of the kind of threats that can provide the basis for an IIED claim. Robert and Mary alleged that, between late 2006 and early 2007, and again in 2013, James threatened to report them to the police for kidnapping and emotionally abusing Gertrude and said that he would "have them jailed." They also alleged

that James threatened on numerous occasions to report them to the Department on Aging for emotionally abusing Gertrude and confining her against her will. According to Robert and Mary, James was aware of the physical and emotional effects his conduct had on them, that he in fact intended his conduct to have those effects, and that he was aware of the heart condition that made Robert particularly vulnerable to suffer heart problems as a result of James' conduct. We agree with the circuit court that these allegations did not rise to a level of extreme and outrageous conduct. The inadequacy of these allegations is apparent when they are compared to the conduct at issue in the cases that plaintiffs rely on, which the courts have found to be sufficiently extreme and outrageous to support an IIED claim.

¶ 23 Robert and Mary first cite *Feltmeier*, 207 Ill. 2d 263, to support their argument that James' actions constituted outrageous conduct because it was a "pattern and accumulation of repeated and egregious accusations and threats." In *Feltmeier*, the plaintiff alleged that her former husband caused "physical and psychological abuse for the duration of their 11-year marriage and beyond" in that he physically battered the plaintiff, confined her in their house, made repeated degrading and demeaning epithets to her, and stalked her. *Id.* at 267-68. Where the conduct in *Feltmeier* involved repetitive, traumatic, and severe domestic abuse, the conduct alleged here, in contrast, is significantly less offensive in its duration, frequency, and intensity. While the conduct in *Feltmeier* was ongoing for 11 years, the conduct alleged here took place over two discrete periods, each of which was, at most, six months in duration. While the conduct there included physical abuse, the conduct here did not. Moreover, Robert and Mary did not allege in their second amended complaint that James "stood in a position of power or authority" relative to them, which is very frequently involved in IIED cases and was certainly key in *Feltmeier*. *Id.* at 273; see also *McGrath*, 126 Ill. 2d at 86-87 ("The more control which a

defendant has over the plaintiff, the more likely that defendant's conduct will be deemed outrageous[.]").

¶ 24 Robert and Mary also cite *McGrath*, 126 Ill. 2d 78; *Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736 (2000); and *Pilotto v. Urban Outfitters West, LLC*, 2017 IL App (1st) 160844; in support of their contention that James' conduct, even if not otherwise actionable, rose to the level of outrageousness due to his awareness of Robert's heart condition, which made Robert particularly susceptible to emotional distress. Each of these cases is quite different than this one and none of them suggests that a heart condition can transform conduct which would otherwise not support an IIED claim into a cause of action.

¶ 25 The defendant in *McGrath* was a corporation that "allegedly engaged in conduct very much akin to extortion" through "a scheme to defraud [the plaintiff] *** out of millions of dollars." *McGrath*, 126 Ill. 2d at 90-91. The *McGrath* plaintiff warned the defendant that heart problems ran in his family and said that he was concerned about the effect that the anxiety caused by this issue would have on his health. *Id.* at 84. During the dispute with the defendant that was allegedly causing the emotional distress, the plaintiff actually suffered "a massive heart attack" and underwent open-heart surgery. *Id.* The defendant nonetheless persisted with the conduct while the plaintiff was recovering from the surgery, despite the plaintiff's protests. *Id.* at 84-85. The facts of *McGrath* are completely different from this case where Robert did not actually suffer a heart attack during the period of the alleged threats and the threats themselves were not of the same extreme nature.

¶ 26 Robert and Mary cite *Graham* to compare the physical manifestations of the emotional distress in that case with the allegations here. Robert and Mary alleged that, as a result of James' conduct, they experienced headaches and sleeplessness and that Robert experienced heart pain.

Similarly, the *Graham* plaintiff alleged that he "endured stomach pain, lack of sleep, [and] headaches" as a result of the defendant's conduct. *Graham*, 318 Ill. App. 3d at 748. The *Graham* court, however, only examined these symptoms to determine whether the plaintiff had "sufficiently pleaded the second and third elements of the tort," *e.g.*, that the defendant intended to cause or knew of the high probability of causing severe emotional distress, and that the conduct actually had that result. *Id.* The second and third elements are not at issue here. The *Graham* court had separately determined that the defendant's alleged actions constituted the extreme and outrageous conduct necessary to meet the first element of an IIED claim: the defendant in *Graham*, the plaintiff's employer, had allegedly "pursued a five-month-long sham investigation" of the plaintiff "for the sole purpose of retaliating against him" for reporting nuclear safety violations. *Id.* Furthermore, during this investigation, the defendant "interviewed over 100 employees where it made several allegedly defamatory statements" about the plaintiff which the defendant knew to be false and pressured the employees to confirm their knowledge of those statements. *Id.* This coercive and retaliatory conduct was far different than what was alleged here, and Mary and Robert do not even argue that the conduct alleged here was similar to that alleged in *Graham*.

¶ 27 James' alleged conduct is similarly distinguishable from the defendant's actions in *Pilotto*. In that case, the plaintiff suffered from Crohn's disease which, under Illinois law, is an "eligible medical condition" requiring retailers to allow access to the employee bathroom upon request. *Pilotto*, 2017 IL App (1st) 160844, ¶¶ 5, 10. The plaintiff was denied access to a retailer's employee restroom despite showing an employee her "Restroom Access" card and explaining her need to use the facility. *Id.* ¶ 5. The plaintiff then "lost control of her bowels and defecated in the presence of customers at the shopping mall." *Id. Pilotto* involved an extremely

specific harm that the plaintiff's Restroom Access card made the defendant aware was very likely to occur if the defendant did not comply with its legal obligation to provide her access to the restroom. Here, there is no allegation that James violated any legal obligations or that he took action knowing specifically how it would impact Robert and that it, indeed, had that impact. *Pilotto* is quite different than this case.

¶ 28 B. Complaints with the Illinois Department on Aging

¶ 29 Robert and Mary also assert that the two complaints that James filed with the Illinois Department on Aging in February 2007 and November 2013 constituted outrageous and extreme conduct sufficient to support their IIED claims. According to the allegations of their second amended complaint, these complaints accused Robert and Mary "of confining Gertrude against her will" and "emotionally abusing Gertrude," and neither complaint was found to have a basis by the Department on Aging. Robert and Mary alleged that these complaints were not only "knowingly false" and not in Gertrude's best interest, but also were made in bad faith and for the sole purpose of causing distress to Robert and Mary. These additional allegations do not bring the overall pattern of conduct alleged anywhere close to the realm of truly extreme and outrageous.

¶ 30 These additional allegations are so conclusory that they really add almost nothing to the IIED claims. While a plaintiff need not set forth evidence in a complaint, the plaintiff must allege sufficient facts to state a claim within a legally recognized cause of action, not simply conclusions. *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 429-30 (2006). Here, Robert and Mary's assertions that James filed knowingly false complaints with the Department on Aging in bad faith and against Gertrude's interests are not supported by any alleged facts explaining how the complaints were false or why they were not in Gertrude's best interest.

¶ 31 Further, when evaluating conduct to determine whether it is outrageous, courts should consider whether the defendant had a reasonable belief that his objective was legitimate. *Schweihs*, 2016 IL 120041, ¶ 52. "A reasonable belief that his objective was legitimate does not automatically allow the defendant to pursue that objective by outrageous means, but it is a substantial factor in evaluating the outrageousness of the conduct." *Graham*, 318 Ill. App. 3d at 746. Here, Robert and Mary have not alleged any facts that would allow this court to infer that James did not reasonably believe that he was pursuing a legitimate objective by filing the two complaints with the Department on Aging.

¶ 32 While the circuit court did not reach the immunity issue, we note that, even if the contents of the complaints James filed with the Department on Aging were eventually proven to be false, James is protected from liability if he filed the complaints in Gertrude's best interest. The Adult Protective Services Act specifically provides that a false complaint filed in the Department on Aging is only actionable if it was made in bad faith. See 320 ILCS 20/4(a-7) (West 2014) (the person making such a report is not liable if the report is made "in the belief that it is in the alleged victim's best interest"). Thus, absent allegations to support the conclusions that these complaints were made in bad faith and not in Gertrude's best interest, the filing of the complaints cannot give rise to liability.

¶ 33 Moreover, for the same reasons James' threats do not constitute extreme and outrageous behavior, James' filing of two complaints with the Department on Aging more than six years apart simply would not constitute extreme and outrageous behavior even if, as alleged, these complaints were dismissed because they were found to be not meritorious. A claim of IIED can only be sustained "where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and

utterly intolerable in a civilized community." *Schweihs*, 2016 IL 120041, ¶ 51. There is nothing in the filing of two complaints, regardless of their merit, that rises to this level.

¶ 34 As Robert and Mary failed to allege sufficient facts to support that James' conduct was extreme and outrageous, they failed to state a claim for IIED against James and the circuit court properly dismissed their second amended complaint.

¶ 35 II. Denial of Motion for Leave to File Third Amended Complaint

¶ 36 Robert and Mary argue that the circuit court erred in denying their motion for leave to file a third amended complaint. We review a circuit court's ruling on a motion to file an amended pleading pursuant to an abuse of discretion standard. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351 (2002). A circuit court's order reviewed under an abuse of discretion standard should not be overturned on appeal unless it is "clearly against logic." *State Farm Fire & Casualty Co. v. Leverton*, 314 Ill. App. 3d 1080, 1083 (2000).

¶ 37 The overriding concern for whether a plaintiff should be allowed to amend their complaint is "justness and reasonableness." *In re Estate of Hoover*, 155 Ill. 2d 402, 416 (1993). In order to determine whether a circuit court has abused its discretion in denying a motion for leave to amend, we must consider the following factors: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). However, where it is apparent even after amendment that no cause of action can be stated, allowing leave to amend would not fulfill the "primary consideration" of "further[ing] the ends of justice" and the motion should be denied. *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7 (2004).

¶ 38 Robert and Mary's proposed third amended complaint included one change from the previous version: it specified that James had threatened them "at least fifteen (15) times" at the end of 2006 and beginning of 2007, whereas the second amended complaint stated only that he had threatened them "numerous" times. Robert and Mary argue that, "to the extent that it was necessary" to define the term "numerous" to state a claim for IIED, the circuit court erred in denying leave to amend to make that clarification. They contend that their request for leave to amend was made specifically in response to the court's question to plaintiffs' counsel during the hearing on James' motion to dismiss the second amended complaint about what the term "numerous" meant.

¶ 39 Both Robert and Mary's original complaint and their first amended complaint were dismissed on the basis that they failed to allege sufficient facts to support their contention that James' conduct was extreme and outrageous. The second dismissal order included the explicit statement that "[t]his is [Robert and Mary's] last opportunity to allege a sufficient cause of action against [James]." The court subsequently dismissed Robert and Mary's second amended complaint for the exact same reason that the previous two complaints had been dismissed.

¶ 40 In denying Robert and Mary leave to amend, the circuit court stated:

> "[T]he Court considered the proposed pleading, compared the proposed pleading to the [second amended complaint] currently on file, and weighed the effect the amendment would have on the ends of justice. After considering the totality of the circumstances, the Court finds that the ends of justice remain static irrespective of amendment; [Robert and Mary's] IIED claims would remain fatally defective. Further, leave to amend would obfuscate this Court's prior Order and would be an exercise in futility."

We agree with the court's conclusion and find its decision to deny Robert and Mary's motion for leave to amend was not an abuse of discretion.

¶ 41 The one change Robert and Mary sought to make to their second amended complaint would not have cured the defective pleading. The increased specificity does not make James' alleged conduct any more extreme or outrageous, and the claims would have failed for the same reason that they failed in the second amended complaint. Robert and Mary never actually dispute the circuit court's finding that their IIED claims would "remain fatally defective," but instead focus on the court's question to plaintiffs' counsel about what "numerous" meant in the context of the second amended complaint. This attempt by the court to clarify the ambiguous pleadings during the hearing is immaterial to our analysis. The fact that the court twice before dismissed their complaints for having the same defect, and specifically warned that the second amended complaint would be their last opportunity to cure any defects in those claims, further supports our decision that the court did not abuse its discretion by not allowing any further amendments.

¶ 42 Because we find that Robert and Mary's defective pleading would not have been cured by their proposed amendment, we need not discuss the remaining factors in our assessment of whether the court abused its discretion in denying them leave to amend. See *Hayes Mechanical*, 351 Ill. App. 3d at 7.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 45 Affirmed.