2019 IL App (1st) 180579-U
No. 1-18-0579
March 11, 2019
Modified Upon Denial of Rehearing April 22, 2019

FIRST DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MILENA APPLEBY, M.D.,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellant,	)	
	)	No. 13 L 1984
v.	)	
	)	Honorable
MALCOLM HERZOG,	)	Margaret Ann Brennan,
	)	Judge Presiding.
Defendant-Appellee.	)	

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal pursuant to 2-615 of the Code of Civil Procedure is reversed where the Plaintiff's complaint has set forth sufficient facts to state a cause of action.

¶ 2 When her checks from Professional Neurological Services (PNS) bounced, Dr. Milena Appleby (Appleby) sued PNS's president, Dr. Malcolm Herzog (Herzog), for "intentional misconduct." Appleby alleged Herzog told her PNS would pay for her work when he knew PNS could not pay. The circuit court initially denied Herzog's motion to dismiss the

complaint, but reconsidered the decision and dismissed the complaint for failure to state a cause of action.

¶ 3 We hold: (1) the circuit court had authority to reconsider the court's initial ruling on the motion to dismiss; (2) Illinois does not recognize an independent tort of "Intentional Misconduct;" and (3) we are not bound by the label on the claim ("intentional misconduct"), we are focused on the gist of the claim itself. Appleby's complaint has alleged a cause of action for misrepresentation because she pleaded facts to support a finding that the false promise formed part of a scheme to defraud.

¶ 4 BACKGROUND

¶ 5 In 2010 PNS issued checks to Appleby for work she did for PNS. The bank returned the checks to Appleby due to insufficient funds in PNS's account. Appleby sued PNS and Herzog, alleging in count I that PNS failed to pay for her services and in count II that PNS falsely stated it would pay for her work. In count III, the count against Herzog for the tort of "intentional misconduct," Appleby alleged:

> "16. *** Herzog *** breached his duty with each of the following wrongful acts or omissions:
>
> a. He told Milena Appleby *** that [PNS] would pay her the amounts due her when he knew or should have known that it was unable to pay the amounts due ***.
>
> b. He repeatedly requested and allowed Milena Appleby *** to work for [PNS] when he knew or should have known that it was and would be unable to pay her ***.

c. He directed staff of [PNS] that regular payments that were received from third parties for the work of Milena Appleby, M.D. were not [to] be used to pay her."

¶ 6 Herzog filed a motion to dismiss count III pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)), for failure to state a claim for relief. Judge James O'Hara denied the motion, specifically holding, "Plaintiff has both stated a cognizable cause of action upon which relief can be granted, and she has sufficiently pleaded facts to support her claims."

¶ 7 Appleby amended her complaint to correct an erroneous allegation concerning the extent of Herzog's ownership interest in PNS. The amended complaint did not affect the essential allegations of misconduct.

Herzog filed a section 2-615 motion to dismiss count III of the amended complaint, again arguing the complaint failed to state a cognizable cause of action. Judge Margaret Brennan granted the motion to dismiss count III with prejudice. The parties agree that PNS has no assets with which to pay the amount due to Appleby. Appleby voluntarily dismissed counts I and II of her amended complaint. Appleby now appeals.

¶ 8 ANALYSIS

¶ 9 The voluntary dismissal of counts I and II of the complaint makes the dismissal of count III final and appealable. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 503 (1997). Appleby contends we must reverse the circuit court's judgment without considering the adequacy of her complaint because Judge Brennan should not have considered Herzog's renewed motion to dismiss count III. Appleby cites *Balciunas v. Duff*, 94 Ill. 2d 176 (1983), where our supreme court said, "a successor judge, before whom the case has been assigned,

should revise or modify previous discovery rulings only if there is a change of circumstances or additional facts which warrant such action. Such a rule minimizes the potential for 'judge shopping' and preserves the orderly and efficient functioning of the judicial system." *Id*. at 188. Herzog did not respond to the argument. We address the argument without the assistance of Herzog's counsel.

¶ 10 The *Balciunas* court specifically limited its ruling to "the context of discovery, where abuse is said to be widespread and delay phenomenal." *Balciunas*, 94 Ill. 2d at 187. The case before us does not involve a discovery motion. This case falls under the more general principles articulated in *Balciunas*:

> "[A]n interlocutory order may be reviewed, modified or vacated at any time before final judgment, and it is of no consequence that the original order was entered by another circuit judge. [Citations.] *** [W]e think that this court's decision in *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113 (1978), is virtually dispositive.
>
> In that case, one of the defendants had moved for judgment *** dismissing [the count against that defendant]. That motion was denied by the motion judge, and the action was assigned to another judge for a pretrial conference. Defendant renewed his motion before the second judge, who, agreeing with defendant's contention, dismissed plaintiff's action against that defendant. On appeal, this court considered the propriety of the second judge's action. First, the court noted that the original order denying the motion was in the nature of an

> interlocutory order, and that the circuit court has inherent power to amend and revise such an order prior to final judgment. The court further stated:
>
> 'In the instant case, the trial court had jurisdiction over the entire controversy, and would retain jurisdiction until final judgment. While prior rulings should be vacated or amended only after careful consideration, especially if there is evidence of "judge shopping" on behalf of one who has obtained an adverse ruling, a court is not bound by an order of a previous judge (citation) and has the power to correct orders which it considers to be erroneous. Here, the cause was assigned to the second judge as a matter of procedure. The defendant could properly renew his motion, even though it had been denied by another judge, and the pretrial judge, in turn, could review and modify the first judge's interlocutory order.' " *Balciunas*, 94 Ill. 2d at , *quoting Towns*, 73 Ill. 2d at 121.

¶ 11 Thus, under *Balciunas*, Herzog could properly renew his motion to dismiss after a new judge is assigned to the case. Judge Brennan had the power to rule on the prior motion to dismiss.

¶ 12 A motion to dismiss pursuant to section 2-615 of the Code tests the legal sufficiency of a complaint. When ruling on the motion, the question presented is whether the allegations in the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Turner v. Memorial Medical Center*, 233 Ill.2d 494, 499 (2009). All facts apparent from the face of the pleadings, including the attached exhibits may be considered. *Haddick V. Valor Insurance*, 198 Ill.2d 409 (2001). A cause of action should not be dismissed under 735 ILCS 5/2615 (2012) unless

it is apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). We review *de novo* the dismissal of count III for failure to state a claim for relief. *Id.*

¶ 13 Appleby contends she has stated a cause of action for "intentional misconduct." She relies on *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978), where the court said, "punitive or exemplary damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when the defendant acts willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others." The *Kelsay* court noted that the trial court in that case properly awarded compensatory damages for the recognized tort of retaliatory discharge.

¶ 14 Our supreme court addressed a similar argument in *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, where the plaintiff asked the court to recognize a tort of willful and wanton conduct. Our supreme court held, "[t]here is no separate, independent tort of willful and wanton conduct. *** In order to recover damages based on willful and wanton conduct, a plaintiff must plead and prove the basic elements of a negligence claim — that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury. [Citation.] In addition, a plaintiff must allege either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare." *Doe-3*, 2012 IL 112479, ¶ 19.

¶ 15 We find that Illinois law also does not recognize an independent tort of “intentional misconduct.” Appleby "must plead and prove the basic elements of a negligence claim —

that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury." *Doe-3*, 2012 IL 112479, ¶ 19.

¶ 16 Appleby claims she adequately alleged that Herzog, as president of PNS, had a duty not to deceive her about payment prospects, and he breached that duty. Insofar as she relies on a duty not to mislead her, she must meet the requirements for pleading a cause of action for fraudulent or negligent misrepresentation. See *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1087 (2010).

¶ 17 Section 735 ILCS 5/2-603(c) states, "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." We are not bound by the label on the pleadings; we are focused on the substance of pleadings and not the title ("intentional misconduct"). A review of the operable complaint sets forth a cause of action because it alleged that Herzog told Appleby that PNS "would pay her the amounts due her when he knew or should have known that it was unable to pay the amounts due." Appleby continued to work in reliance on this alleged misrepresentation. Whether the plaintiff's reliance was justified is a factual issue that must be viewed in light of the surrounding circumstances

¶ 18 "[A] promise to perform an act, even though made without a present intention to perform, is insufficient to constitute fraud." *Baker, Bourgeois & Associates, Inc. v. Taylor*, 84 Ill. App. 3d 909, 914 (1980). To adequately allege a fraudulent misrepresentation, the plaintiff must allege facts showing that the false promise formed part of a scheme to defraud. *Id.* at 914. "[I]t is not enough that the party ha[s] made a false promise not intending to keep it; the total facts must show a scheme or device to defraud, and the fraud must be pleaded with

specificity." *Id.* at 914. Appleby has alleged a scheme to defraud because she alleged in subparagraphs 16 a, b, and c of the amended complaint as follows:

> a. He told Milena Appleby *** that [PNS] would pay her the amounts due her when he knew or should have known that it was unable to pay the amounts due ***.
>
> b. He repeatedly requested and allowed Milena Appleby *** to work for [PNS] when he knew or should have known that it was and would be unable to pay her ***.
>
> c. He directed staff of Professional Neurological Services, Inc. that regular payments that were received from third parties for the work of Milena Appleby, M.D. were not [to] be used to pay her. “

¶ 19 The complaint alleged facts with particularity to survive a section 2-615 motion. At this stage we are concerned with a pleading's sufficiency, not with matters of proof. Whether plaintiff can prove all the required elements of the claim is for another day.

¶ 20 CONCLUSION

¶ 21 The circuit court had the power to reconsider its denial of Herzog's motion to dismiss the complaint. Illinois law does not recognize a tort of "intentional misconduct." However, we are not bound by the label on the claim (“intentional misconduct”), we are focused on the gist of the claim itself. Appleby's complaint has alleged a cause of action for fraudulent misrepresentation because she plead facts to support a finding that the false promise formed part of a scheme to defraud. Because count III of the amended complaint alleged facts that

could support a judgment in favor of Appleby, the court erred by dismissing count III with prejudice.

¶ 22 Reversed and remanded.