2019 IL App (1st) 182602-U

No. 1-18-2602

Fourth Division
September 26, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ALBERT JAMES ISAAC, III,	)	
Plaintiff-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	No. 17 L 5509
PECK BLOOM, LLC, d/b/a Peck Ritchey, LLC, a Limited Liability Company,	)	The Honorable Brigid Mary McGrath, Judge Presiding.
Defendant-Appellee.	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* Plaintiff's complaint was properly dismissed where the complaint failed to state a cause of action with respect to any count. The trial court also properly declined to consider plaintiff's motion for summary judgment until after the disposition of defendant's motion to dismiss, and did not abuse its discretion in permitting defendant to file its motion one day late.

¶ 2 The instant appeal arises from the trial court's dismissal of plaintiff's *pro se* complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)). Plaintiff Albert James Isaac, III, filed a multi-count complaint against defendant Peck

Bloom, LLC, arising from defendant's representation of plaintiff in a will contest. The trial court dismissed the complaint, but permitted plaintiff leave to file an amended complaint with respect to several of the counts. However, plaintiff stated that he did not intend to file an amended complaint, leading the trial court to then dismiss the entire complaint with prejudice. Plaintiff appeals and, for the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On June 1, 2017, plaintiff filed a five-count *pro se* verified complaint against defendant. According to the complaint and the exhibits attached thereto, plaintiff is the only child of Albert James Isaac, Sr. (the decedent), who died on May 13, 2013. The decedent had previously been married to Glenda Wells, who had a daughter from a prior relationship, Tamika Wells.[1] There were no children born during the marriage between the decedent and Glenda, and they were not married at the time of his death. Plaintiff's complaint alleges that plaintiff was the decedent's "only child, only closest living heir, [and] only beneficiary to his estate, pursuant to his Will." In support of this allegation, plaintiff attached a will, dated November 11, 1994. Under the will, the decedent left the bulk of his estate to Glenda, who was described as his "wife-to-be" in the will; if Glenda predeceased the decedent, her share would be bequeathed to plaintiff.[2] The decedent left to plaintiff two properties owned by the decedent, as well as a half-interest in a third property; the other half was bequeathed to Glenda. The decedent also left to plaintiff the contents of two bank accounts.

[1] Since the two women share the same last name, we refer to them by their first names for clarity.
[2] The record does not indicate if Glenda predeceased the decedent.

¶ 5 On June 11, 2013,[3] Tamika filed a petition for the probate of a will and for letters testamentary, claiming that the decedent left a will dated October 22, 2009, in which Tamika was named as executor. This will, attached to the petition, named Tamika as executor of the decedent's estate and left to her the bulk of the estate. The will bequeathed plaintiff $1000 in cash and "[forgave] any and all outstanding and unpaid debts of [plaintiff's] to [the decedent]," making the bequest "on the condition that he does not contest this Will nor any part of my estate." The will indicated that it had been prepared by attorney Alan Kawitt, who was also named as successor executor.[4] Attached to the complaint is also a power of attorney for property, dated February 22, 2007, in which the decedent purportedly appointed Tamika as his agent with respect to his property and financial matters.[5]

¶ 6 Plaintiff retained defendant to represent him in a will contest on August 12, 2013; an engagement letter attached to the complaint showed that defendant had been retained to represent plaintiff in contesting the decedent's will based on the decedent's diminished capacity and Tamika's alleged undue influence over him. Plaintiff's complaint alleges that, at all times, defendant's employees "knew or should have known" that the will submitted by Tamika was "a fraudulent document" that was prepared without the decedent's knowledge or consent by Kawitt. Plaintiff's complaint also alleges that defendant's employees "knew or should have known" that the decedent had Alzheimer's disease, diagnosed in 2005, and that Tamika used undue influence to obtain the decedent's signature on the will.

¶ 7 In support of these allegations, plaintiff attached an affidavit by Kavitt, dated August 29, 2013. In the affidavit, Kavitt averred that he had prepared the 1994 will for decedent and that

[3] Plaintiff's complaint alleges that the date of the filing was June 12, 2014, but the petition itself, attached as an exhibit to the complaint, indicates that it was filed on June 11, 2013.

[4] Kawitt had also been named as successor executor under the 1994 will, after a bank, which had been named as the executor.

[5] We note that this form is missing a required witness signature.

he continued representing the decedent in landlord/tenant and business matters until 2000. Kavitt averred that he never had any discussions with the decedent about changing his will until May 2009, when Tamika contacted him by telephone and requested the preparation of a new will. Tamika provided Kawitt with instructions as to the terms of the new will, and Kawitt produced a new will pursuant to those instructions. Kawitt instructed Tamika that she needed to bring the decedent and two witnesses to Kawitt's office, but Tamika refused. Instead, Tamika met Kawitt in October 2009 at the Daley Center, where Kawitt presented Tamika with the will. There were two other individuals present with Tamika, and she informed Kawitt that they would be witnessing the signing of the will. The decedent was not present at the October 2009 meeting, and the will was not signed at that meeting. Kawitt averred that Tamika provided him with payment for preparation of the will in October 2009.

¶ 8 According to a copy of a settlement agreement attached to the complaint, on November 27, 2013, the 2009 will was denied admission to probate. On December 12, 2013, Tamika filed an amended petition for the probate of a will and letters testamentary. On December 23, 2013, plaintiff filed a petition for the probate of a will and letters of administration. Plaintiff was appointed as the independent administrator for the decedent's estate by the probate court on January 14, 2014.[6] On the same day, Tamika's amended petition was denied. On February 6, 2014, Tamika filed a second amended petition for the probate of a will and letters testamentary.

¶ 9 On March 4, 2014, one of defendant's attorneys sent a letter to plaintiff confirming a March 3, 2014, conversation about the status of the decedent's estate. The letter indicated that, "[a]s [another attorney] discussed with you, we have had many successes to date,

[6] An order attached to plaintiff's motion for summary judgment shows that the 1994 will was admitted to probate on the same day.

including the denial to probate of the Will presented by Tamika Wells, the admission of the current Will to probate, your appointment as Administrator with the Will Annexed, and the dismissal of two credit card claims filed against the Estate." However, the letter stated that Tamika had recently filed a second amended petition for the probate of a will and that, "[a]s you know, the Will she presented was initially denied admission to probate given certain defects in the attestation clause of the Will. It appears that Tamika Wells has addressed these defects by attaching affidavits to her Second Amended Petition that provide the missing information and remedy the defects." The letter cautioned that "[a]s [the other attorney] discussed with you, there is a strong possibility that [the probate judge] will reverse her position and will admit the Will presented by Tamika Wells to probate." The letter stated that, if that occurred, plaintiff's letters of office as administrator would be revoked and he would again be in a position to have to contest the 2009 will on the basis of lack of capacity and undue influence. However, the letter suggested that Kawitt would not be a reliable or credible witness and "[w]e do not want the Will contest to rise on Allan [*sic*] Kawitt's credibility, which is likely what the case would come down to." The letter also pointed out that, given the value of the decedent's estate, it was not likely to be cost-effective to proceed with a will contest, as legal fees would consume a large percentage of the estate's assets even if plaintiff prevailed. As an alternative, the letter suggested pursuing a settlement with Tamika, although the attorney was aware that plaintiff had expressed opposition to the idea.

¶ 10 Plaintiff's complaint alleges that he instructed defendant's employees that he had no interest in any settlement agreement with Tamika. However, the complaint also alleges that plaintiff was unaware that the probate court had found the will produced by Tamika to be

invalid due to lack of attestation on three[7] separate occasions in 2013 and 2014; plaintiff's complaint alleges that plaintiff was not aware of these rulings until April 2016.

¶ 11 On June 18, 2014, plaintiff and Tamika executed a settlement agreement and mutual release, in which they agreed that Tamika would receive 25% of the appraised value of one of the decedent's properties upon sale of the property and a 2006 Dodge vehicle.[8] A cashier's check attached to the complaint shows that Tamika was paid $22,500 on November 5, 2015.

¶ 12 As noted, the complaint set forth five counts. Count I of the complaint is for "Undue Influence" and alleges that one of defendant's attorneys contacted plaintiff indicating that he had drafted a settlement agreement. Plaintiff informed the attorney that he was not interested in any settlement agreement and believed that a will contest would be successful. However, the attorney led plaintiff to believe that the success of the will contest was dependent on Kawitt, and that Kawitt would not make a good witness. The attorney also informed plaintiff that Tamika had addressed the defects in the will, and that there was a strong probability that the probate court would reverse its ruling as to the will's invalidity. Plaintiff's complaint alleges that plaintiff nevertheless insisted on pursuing the case, at which point the attorney became angry. The complaint alleges that plaintiff "gave in to [the attorney's] pressure" and signed the settlement agreement. However, unbeknownst to plaintiff, the probate court had already ruled the will invalid.[9] In addition to seeking damages caused by the execution of the

[7] According to the settlement agreement, the 2009 will was denied admission to probate twice prior to the execution of the settlement agreement.

[8] The record shows that on July 24, 2014, the probate court entered an order approving the settlement agreement and mutual release.

[9] We note that this allegation appears to contradict the earlier allegation that the attorney had informed plaintiff that there was a strong probability that the probate court would reverse its ruling. If the attorney informed plaintiff that there was a ruling that would be reversed, then presumably, plaintiff would also know what that ruling was—namely, that the will had been found invalid due to a lack of attestation. This allegation also contradicts the letter from the attorney that was attached to the complaint, which references the prior denials of the will to probate.

settlement agreement, count I requested the trial court to "declare the Settlement Agreement and Mutual Release unconscionable" and to "bar it's [*sic*] enforcement."

¶ 13 Count II of the complaint is for "Fraudulent Misrepresentation In the Inducement," and incorporates the allegations from count I. Count II alleges that defendant's attorneys knowingly made misrepresentations about Kawitt's suitability as a witness in order to induce plaintiff to sign the settlement agreement. Count II further alleges that defendant's attorney "was in such a rush" for plaintiff to sign the settlement agreement that he did not explain any of the terms of the settlement agreement or explain to plaintiff the impact of the probate court's prior rulings. Count II does not contain any specific request for relief, requesting only "such other and further relief as this Court may deem just and proper or to which [plaintiff] would be legally and justifiably *** entitled to recover as determined by [a trier] of fact, plus interest and costs."

¶ 14 Count III of the complaint is for "Fraud" and incorporates the allegations from the previous counts. Count III alleges that Tamika and Kawitt created the will in order to conceal fraudulent activity committed against the decedent's estate, and that defendant's attorneys knew or reasonably should have known that the will was fraudulent. Count III further alleges that defendant's attorneys "used the settlement agreement as a device to conceal fraud against" the decedent's estate and against plaintiff, alleging that the attorneys knew or reasonably should have known of fraudulent activities against the estate due to their access to documents and financial records. Finally, count III alleges that the attorneys knew or reasonably should have known that the settlement agreement was an attempt to deny plaintiff his property and his legal rights. As with count II, count III does not contain any specific

request for relief, requesting only "such other and further relief as this Court may deem just or proper or to which [plaintiff is] entitled as a matter of law."

¶ 15 Count IV of the complaint is for "Malpractice—Breach of Fiduciary Duty" and incorporates the allegations from the previous counts. Count IV alleges that defendant's employees were under a fiduciary duty to act in plaintiff's best interest, which they did not do. Count IV alleges that plaintiff requested that defendant's attorney obtain records from (1) Kawitt and Tamika concerning the decedent's personal, business, and financial records; (2) the decedent's certified public accountant concerning the financial records of the decedent's business; and (3) the bank handling the decedent's business account. However, defendant produced only a few years of the decedent's personal tax returns and refused to obtain the other records. Count IV also alleges that plaintiff requested that defendant's attorney "deed the [decedent's] real property into [plaintiff's] name" and the attorney refused to do so. Count IV seeks damages against defendant "in the amount that [plaintiff] would be legally and justifiably be [*sic*] entitled to recover as determined by the trier of fact, plus interest and costs."

¶ 16 Count V of the complaint is for "Breach of Contract," and incorporates the allegations from the previous counts. Count V alleges that defendant and its' employees "actions, and non-actions[,] was [*sic*] fraudulent [and] thereby a breach of contract." Count V also alleges that, in April 2016, plaintiff requested a true and complete copy of his client file from defendant's attorneys, which he did not receive. Count V seeks "recovery of actual and compensatory damages arising from [defendant's] breach of the 2013 contract; attorney's fees, expenses and cost[s]; and such other and further relief as this Court may deem just and proper or to which [plaintiff] is entitled to [*sic*] as a matter of law."

¶ 17 After setting forth the five counts, the complaint includes a section entitled "Prayer [for] Relief," which sets forth the prayers for relief for each count of the complaint. The prayers for relief for counts II, III, and IV are similar to those set forth within the counts themselves, but the prayers for relief for counts I and V are slightly different. The prayer for relief for count I requests "a decree that the Settlement Agreement and Mutual Release is invalid [and] any other relief the Plaintiff would be legally and justifiably be [*sic*] entitled" to receive. The prayer for relief for count V requests "attorney fees, interest, and cost[s] not in this action," but in the probate case.

¶ 18 On July 7, 2017, defendant filed an appearance. On July 25, 2017, defendant filed a motion for extension of time to file a responsive pleading, which the trial court granted, giving defendant until August 22, 2017, to file its responsive pleading.

¶ 19 On August 11, 2017, plaintiff filed a *pro se* motion for summary judgment, supported by his affidavit and the same exhibits that had been attached to his complaint. Plaintiff later amended the affidavit to add additional supporting documents.

¶ 20 On August 22, 2017, defendant filed a motion for extension of time, seeking an additional 28 days to answer or otherwise respond to plaintiff's complaint. On August 30, 2017, the trial court entered a case management order granting defendant's motion for extension of time and ordering defendant to answer or otherwise plead by September 13, 2017; the court also ordered defendant "to file [Rule] 191(b) affidavit" by September 27, 2017. The trial court also entered and continued plaintiff's motion for summary judgment to October 4, 2017.

¶ 21 On September 14, 2017, defendant filed a motion to dismiss the complaint pursuant to section 2-615 of the Code, claiming that plaintiff had failed to state a cause of action with

respect to any of the counts of his complaint. With respect to count I, for undue influence, defendant claimed that plaintiff had not alleged that defendant's attorneys had made any representations to plaintiff that were actually false, and that plaintiff apparently failed to understand the nonfinality of the probate court's orders denying admission of the 2009 will to probate. Accordingly, defendant argued that all its attorneys provided plaintiff was true, material explanations concerning Tamika's second amended petition to admit the 2009 will. Defendant also claimed that plaintiff's request for relief was insufficient, as plaintiff had not demonstrated that invalidating the settlement agreement would have resulted in a better outcome than that achieved in the settlement agreement.

¶ 22 With respect to count II, for fraudulent misrepresentation in the inducement, defendant claimed that this count was merely duplicative of count I. Again, defendant claimed that plaintiff never alleged that the representations made by defendant's attorneys were actually false; defendant also claimed that plaintiff's allegations that he had never been informed of the denial of the prior petitions for admission of the 2009 will were explicitly contradicted by the letter attached to plaintiff's complaint. Defendant also claimed that the request for relief was insufficient because plaintiff did not specify his alleged injury or how it was caused by defendant's conduct.

¶ 23 With respect to count III, for fraud, defendant claimed that plaintiff had not pled the cause of action with specificity or particularity and that plaintiff had failed to allege even one false statement made by defendant.

¶ 24 With respect to count IV, for breach of fiduciary duty, defendant claimed that plaintiff had failed to set forth the elements for a legal malpractice cause of action because he made conclusory allegations. For instance, defendant claimed that in alleging that defendant had

failed to obtain certain records, plaintiff failed to allege what those records would have shown or that a reasonable attorney would have obtained them. Similarly, in alleging that defendant's attorney refused to prepare a deed to transfer the decedent's house to plaintiff, defendant claimed that plaintiff failed to allege any context concerning that request or explain how the attorney could fulfill that request when the estate was pending in probate court.

¶ 25 With respect to count V, for breach of contract, defendant claimed that plaintiff had not identified any portion of the contract that had been breached. Additionally, defendant claimed that plaintiff's allegations concerning his client file were insufficient because plaintiff had not identified what portions had not been turned over to him or any injury arising from that conduct.

¶ 26 On October 4, 2017, the trial court entered a case management order entering and continuing all pending motions until October 25, 2017. The order noted that plaintiff was not present in court, and ordered that plaintiff appear on October 25, 2017, or else the case would be dismissed for want of prosecution. The next day, the trial court entered an order setting a briefing schedule on defendant's motion to dismiss.

¶ 27 On October 25, 2017, plaintiff filed a response in opposition to defendant's motion to dismiss, claiming that he had sufficiently stated causes of action for each count of the complaint. On the same day, the trial court entered a case management order continuing the matter to November 17, 2017. The order also provided: "Plaintiff's motion for summary judgment is entered and continued generally pending resolution of Defendant's motion to dismiss."

¶ 28 At the November 17, 2017, status date, the trial court entered an order setting the motion to dismiss for ruling on January 10, 2018. However, on January 10, 2018, a different judge entered an order finding that plaintiff's cause of action stemmed from a commercial relationship and should be transferred to the commercial calendar. The case was transferred to the presiding judge of the law division for reassignment to the commercial calendar and the motion to dismiss was entered and continued for hearing by the judge to whom the case would be assigned.

¶ 29 On January 11, 2018, plaintiff filed a "motion for extension of time to appear for the defendant's hearing" on the motion to dismiss, claiming that he had recently been hospitalized in Alabama, his home state, and was not able to travel to the January 10, 2018, court date. On January 25, 2018, the trial court entered an order setting the case for a status hearing on January 29, 2018. On January 29, 2018, the trial court entered an order setting the motion to dismiss for hearing on March 23, 2018.[10] On the same day, plaintiff filed a "motion for entry [of] default judgment," claiming that he was entitled to a default judgment because defendant had failed to file an answer to his complaint.

¶ 30 On March 22, 2018, plaintiff filed a motion for a continuance, claiming that his doctor recommended that he not travel to Chicago. On March 23, 2018, the trial court entered an order providing that on the court's own motion, "the court will rule on defendant's motion [to dismiss] without oral argument due to plaintiff's asserted inability to attend." "Accordingly, based solely on the briefs," the court dismissed each count of plaintiff's complaint. First, the court dismissed count I of the complaint with prejudice, "as the relief sought is not available

[10] We note that the January 29, 2018, order technically set the matter for hearing on "3/23/17." We presume that the year was inadvertently listed as 2017 and the matter was, in actuality, set for March 23, 2018.

in this action." Next, the court dismissed counts II and III without prejudice, finding that the allegations in these counts were contradicted by the exhibits to the complaint and, therefore, the allegations of the complaint failed to set forth any false statement of material fact. The court also dismissed count IV without prejudice "for failure to allege any action against plaintiff's best interest or any damages proximately caused as a result." Finally, the court dismissed count V without prejudice "for failure to assert sufficient facts to plead breach of contract, including but not limited to damages."

¶ 31 The court set a subsequent case management conference for June 4, 2018, at which it would set a date by which plaintiff would be required to file an amended complaint. The court noted that plaintiff was not required to attend in person if his medical condition prohibited it and would be able to attend by phone or by contacting defendant's attorney to submit a proposed agreed order. On June 4, 2018, plaintiff filed a motion for a 90-day continuance, due to his medical condition, which the trial court granted on the same day over defendant's objection. The court set a case management conference for September 4, 2018, for status on filing an amended complaint; the order provided that plaintiff was to attend by telephone if he was unable to appear in person.

¶ 32 On August 28, 2018, plaintiff filed a "motion for a hearing on plaintiff's motion for summary judgment," requesting a hearing on his motion for summary judgment or an entry of default judgment. On September 4, 2018, after a case management conference at which all parties were present, the court entered an order, over defendant's objection, granting plaintiff a final extension of time to file an amended complaint on or before November 14, 2018. The same order provided that the court "has suggested that plaintiff discuss 735 ILCS 5/2-1009 with an attorney."

¶ 33 On November 2, 2018, plaintiff filed a "motion opposing ex parte communications," claiming that the trial court improperly ruled on defendant's motion to dismiss when only defendant's counsel was present in court. On November 16, 2018, the trial court entered an order denying plaintiff's motion concerning the purported *ex parte* communications. The order further provided that "plaintiff advis[ed] the Court he will not be filing an amended complaint because he believes the 3/23/18 order dismissing the complaint was in error." Accordingly, the trial court dismissed the complaint with prejudice. Plaintiff timely filed a notice of appeal, and this appeal follows.

¶ 34 ANALYSIS

¶ 35 On appeal, plaintiff raises three primary arguments: (1) that the trial court erred in permitting defendant to file its motion to dismiss, (2) that the trial court erred in granting the motion to dismiss, and (3) that the trial court erred in failing to rule on plaintiff's motion for summary judgment.

¶ 36 With respect to plaintiff's argument concerning his motion for summary judgment, we note that the motion for summary judgment was filed on August 11, 2017, prior to the August 22, 2017, deadline for defendant to file a responsive pleading. On August 22, 2017, defendant again filed a motion for extension of time to file a responsive pleading, and was given until September 13, 2017, to answer or otherwise plead. On September 14, 2017, defendant filed its motion to dismiss. While we discuss the timeliness issue below, the fact remains that plaintiff filed his motion for summary judgment prior to the time when defendant was required to answer or otherwise plead. When defendant did so, it did so through a motion to dismiss, which it was entitled to do.

¶ 37 A plaintiff may file a motion for summary judgment "[a]ny time after the opposite party has appeared or after the time within which he or she is required to appear has expired." 735 ILCS 5/2-1005(a) (West 2016). In the case at bar, plaintiff filed his motion for summary judgment prior to this time, meaning that plaintiff filed it prematurely. Defendant had not even had the opportunity to answer or challenge the allegations of the complaint prior to plaintiff's seeking summary judgment. The proper procedure would have been to wait until defendant had filed a responsive pleading, as required by the Code. Once that pleading was filed, or the time for filing had passed, plaintiff could then seek entry of summary judgment.

¶ 38 Here, when defendant did file its responsive pleading, it chose to do so by filing a motion to dismiss the complaint. Where there is both a motion to dismiss and a motion for summary judgment at issue, our supreme court has indicated that the proper approach is for a defendant to first challenge the legal sufficiency of the complaint; it is only when the legal sufficiency of the complaint has been established that a court should entertain a motion for summary judgment. *Janes v. First Federal Savings & Loan Ass'n of Berwyn*, 57 Ill. 2d 398, 406 (1974) ("The defendants in this case should have first challenged the legal sufficiency of the complaint. When, and only when, a legally sufficient cause of action had been stated should the court have entertained the motions for summary judgment and considered the affidavits filed in support thereof."). We cannot find that there was any error in the trial court choosing to first consider defendant's arguments as to the sufficiency of the complaint prior to determining whether plaintiff was entitled to summary judgment. Accordingly, if the trial court properly dismissed plaintiff's complaint, then there would have been no reason for the court to have proceeded to consider the motion for summary judgment. We turn, then, to the question of whether the dismissal of the complaint was proper.

¶ 39 As an initial matter, plaintiff takes issue with the fact that he was not present when the trial court entered its order dismissing the complaint. Plaintiff had filed a motion for a continuance of the March 23, 2018, hearing date on March 22, 2018, claiming that his doctor had recommended that he not travel to Chicago. On March 23, 2018, the trial court found that plaintiff was excused from appearing due to medical issues and, on its own motion, decided that oral argument on the motion to dismiss was not necessary. Instead, the court expressly stated that it would decide the motion based on the briefs. Oral argument in a civil proceeding not involving a jury is a privilege, not a right, and is accorded to the parties by the court in its discretion. *Parkway Bank & Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 441 (2010). Thus, it is not improper for a court, under certain circumstances, to permit argument from only one party. See *Parkway Bank*, 406 Ill. App. 3d at 441-42 (finding no abuse of discretion in refusing to permit one party to argue after a late filing). In the case at bar, however, the trial court exercised its discretion and determined that no oral argument was necessary at all. We cannot find that this was an abuse of discretion or an improper *ex parte* proceeding, as plaintiff claims.

¶ 40 Similarly, we cannot find that the trial court abused its discretion in permitting defendant to file its motion to dismiss one day late. As noted, the trial court had permitted defendant until September 13, 2017, to answer or otherwise plead. However, defendant's motion to dismiss was not filed until September 14, 2017, and was set for presentment on October 4, 2017. The record does not contain any motion by defendant for leave to file a late pleading, nor is there any order granting such a motion. Instead, the next order contained in the record on appeal is a case management order dated October 4, 2017, in which the court entered and continued all pending motions to October 25, 2017.

¶ 41 The procedural failure to obtain leave of court prior to an untimely filing does not render that filing a nullity. *Parkway Bank*, 406 Ill. App. 3d at 439; *Cedzidlo v. Marriott International, Inc.*, 404 Ill. App. 3d 578, 583 (2010). While it would have been in the trial court's discretion to strike the untimely filing, it was also within the trial court's discretion to allow it. *Parkway Bank*, 406 Ill. App. 3d at 439. Here, the record shows that the trial court did not strike defendant's motion to dismiss, but instead entered and continued it to October 25, 2017. The record does not contain a report of proceedings as to the October 4, 2017, hearing at which defendant's motion was presented. Accordingly, we must presume that the trial court exercised its sound discretion in permitting the filing of the motion through its October 4, 2017, order. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) (in the absence of a sufficiently complete record to support a claim of error, it will be presumed that the order entered was in conformity with the law and had a sufficient factual basis). We cannot find that this decision to permit a filing that was one day late constituted an abuse of discretion.[11]

¶ 42 Turning to the merits of the dismissal, the trial court ultimately dismissed each count with prejudice pursuant to section 2-615 of the Code. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of the complaint by alleging defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003). The critical inquiry is whether the allegations in the complaint are sufficient to state a cause of action upon which relief may be granted. *Wakulich*, 203 Ill. 2d at 228. In making this determination, all well-pleaded facts in the complaint and all reasonable inferences that may be drawn from those facts are taken as true. *Young*, 213 Ill. 2d at 441. In addition, we

[11] We note that plaintiff also claims that the trial court erred in not considering his motion for a default judgment. Since the motion was based on his argument that no responsive pleading had timely been filed, our conclusion that the trial court properly permitted the filing of the motion to dismiss is dispositive of this argument, as well.

construe the allegations in the complaint in the light most favorable to the plaintiff. *Young*, 213 Ill. 2d at 441. We review *de novo* an order granting a section 2-615 motion to dismiss. *Young*, 213 Ill. 2d at 440; *Wakulich*, 203 Ill. 2d at 228. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 43 Count I of the complaint was for "Undue Influence," and alleged that defendant's attorneys "deprived [plaintiff] of his independent judgment" by pressuring him to sign the settlement agreement through misrepresentations concerning the probate proceedings and Kawitt's suitability as a witness. "Undue influence is an improper urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would do if left to act freely." (Internal quotation marks omitted.) *In re Marriage of Kranzler*, 2018 IL App (1st) 171169, ¶ 78 (citing *Kuster v. Schaumburg*, 276 Ill. App. 3d 220, 224 (1995)); *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993). "What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case." *Hoover*, 155 Ill. 2d at 411 (citing *Smith v. Henline*, 174 Ill. 184, 201 (1898)). However, our supreme court has recognized that the substitution of one's will over another's "may be accomplished by misrepresentations and/or concealment of facts." *Hoover*, 155 Ill. 2d at 414.

¶ 44 In the case at bar, we find no error in the trial court's dismissal of count I of the complaint. Plaintiff identified two main "misrepresentations," namely, defendant's attorneys' impressions as to the likelihood of success and plaintiff's alleged ignorance of the fact that

the probate court had already denied admission of the 2009 will to probate several times. However, plaintiff does not allege that the legal advice provided him was false, and a statement of opinion generally is not actionable. See *Antonacci v. Seyfarth Shaw, LLP*, 2015 IL App (1st) 142372, ¶ 35. Additionally, plaintiff's allegations concerning his knowledge of the probate proceedings are contradicted by the exhibits attached to his complaint, as well as by allegations within the complaint itself. Both the settlement agreement and the March 4, 2014, letter from defendant expressly note that the 2009 will had been denied admission to probate several times. Where an exhibit contradicts the allegations in a complaint, the exhibit controls. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18; *Hampton v. Chicago Transit Authority*, 2018 IL App (1st) 172074, ¶ 20. Moreover, count I alleges that defendant's attorney had informed plaintiff of a "strong probability" that the probate court would reverse its ruling as to the 2009 will, suggesting that plaintiff would have been aware that there was a ruling to reverse. Finally, plaintiff's allegations fail to account for Tamika's filing of a second amended petition for probate of the will, meaning that there was a pending court proceeding concerning the validity of the 2009 will. Accordingly, we cannot find that plaintiff's alleged ignorance as to the probate court's prior rulings supports a claim of undue influence.

¶ 45 Furthermore, the relief requested by plaintiff in count I was an order barring the enforcement of the settlement agreement. The trial court found that this relief was not available in the instant action, and we agree. The settlement agreement was a part of the probate case, not the instant case, and the trial court would not have had the authority to invalidate an agreement that had been entered in connection with a completely separate court

proceeding. Accordingly, we cannot find that the trial court erred in dismissing count I of the complaint.

¶ 46 Count II of the complaint was for "Fraudulent Misrepresentation in the Inducement" and alleged that defendant's attorneys made fraudulent misrepresentations that caused plaintiff to sign the settlement agreement and failed to explain the significance of the probate proceedings or the meaning of the terms of the settlement agreement. "To plead and prove a claim for fraudulent misrepresentation, a plaintiff must show: (1) a false statement of material fact; (2) the party making the false statement knew of its falsity; (3) an intent to induce the other party to act; (4) the other party reasonably relied on the truth of the statement; and (5) the other party suffered damages resulting from such reliance." *Antonacci*, 2015 IL App (1st) 142372, ¶ 34 (citing *Neptuno Treuhand-Und Verwaltungsgesellschaft MBH v. Arbor*, 295 Ill. App. 3d 567, 571 (1998)). As with count I, plaintiff does not allege that any representations made by defendant's attorneys were false. Additionally, as noted, the attorneys' opinions as to the strength of the probate case were not actionable false statements of material fact. See *Antonacci*, 2015 IL App (1st) 142372, ¶ 35 ("A statement of opinion *** cannot form the basis of an action for fraudulent misrepresentation."). Finally, plaintiff's complaint does not include any allegations as to the elements of reliance or damages. Accordingly, we cannot find that the trial court erred in dismissing count II of the complaint.

¶ 47 Count III of the complaint was for "Fraud" and alleged that defendant's attorneys fraudulently induced plaintiff into signing the settlement agreement, which was done in order to deprive plaintiff of his property and legal rights. This count is largely duplicative of count II and we cannot find that the trial court erred in dismissing it.

¶ 48 Count IV of the complaint is for "Malpractice–Breach of Fiduciary Duty" and alleged that defendant failed to act in plaintiff's best interest with respect to the settlement agreement and failed to obtain certain records that plaintiff sought. "In an action for legal malpractice the plaintiff must plead and prove that: the defendant attorney owed the plaintiff a duty of care arising from the attorney-client relationship; that the defendant breached that duty; and that as a proximate result, the plaintiff suffered injury [citation] in the form of actual damages [citation]." *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 199 (2006). Furthermore, "[i]n cases involving litigation, no legal malpractice exists unless the attorney's negligence resulted in the loss of an underlying cause of action. Accordingly, the burden of pleading and proving actual damages requires establishing that 'but for' the attorney's negligence, the client would have been successful in the underlying suit." *Judge*, 221 Ill. 2d at 200.

¶ 49 In the case at bar, plaintiff fails to identify how defendant failed to act in plaintiff's best interest, other than his allegation that the settlement agreement was in the best interest of other parties. Plaintiff also fails to explain how defendant's failure to obtain certain documents breached any duty to him. Finally, plaintiff fails to allege any facts demonstrating that, absent the execution of the settlement agreement, plaintiff would have prevailed in the will contest and would have been in a better position.[12] Accordingly, we cannot find that the trial court erred in dismissing count IV of the complaint.

¶ 50 Finally, count V of the complaint was for "Breach of Contract" and alleged that defendant's fraudulent conduct constituted a breach of contract; plaintiff also alleged that he

[12] We note that, in the March 4, 2014, letter, defendant's attorney suggests that, even if plaintiff prevailed in the will contest, the costs of the litigation would likely consume a large percentage of the value of the estate.

was not given a complete copy of his client file. "In order to establish a claim for breach of contract, a plaintiff must allege and prove the following elements: '(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff.' " *Burkhart v. Wolf Motors of Naperville, Inc.*, 2016 IL App (2d) 151053, ¶ 14 (quoting *Henderson-Smith & Associates, Inc. v. Nahamani Family Service Center, Inc.*, 323 Ill. App. 3d 15, 27 (2001)).

¶ 51 In the case at bar, plaintiff fails to allege how defendant breached its contract with plaintiff, merely making the conclusory allegation that defendant's conduct was "fraudulent," an allegation that we found unsupported above. Plaintiff also fails to allege any injury, either from the "fraudulent" conduct or from the failure to receive the entirety of his client file. Accordingly, we cannot find that the trial court erred in dismissing count V of the complaint.

¶ 52 As noted, since the trial court properly dismissed the complaint pursuant to section 2-615 of the Code, there was no need for it to proceed to consider whether summary judgment on the complaint would be appropriate. Consequently, we find no error in the trial court's failure to do so.

¶ 53 CONCLUSION

¶ 54 For the reasons set forth above, the trial court properly dismissed each count of plaintiff's complaint with prejudice.

¶ 55 Affirmed.