

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).

2014 IL App (3d) 130474-U

Order filed September 22, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

TOBY MYERS,)	Appeal from the Circuit Court
)	of the 9th Judicial Circuit,
Plaintiff-Appellant,)	Knox County, Illinois.
)	
v.)	Appeal No. 3-13-0474
)	Circuit No. 12-L-31
CATHY SMITHSON, DUSTIN COURSON,)	
and KEN HUTCHENRIDER,)	
)	Honorable Paul L. Mangieri,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court correctly found that plaintiff failed to plead willful and wanton conduct on the part of defendants. Plaintiff's tort claims therefore did not overcome the immunity enjoyed by defendants pursuant to the General Not for Profit Corporation Act of 1986 (805 ILCS 105/108.70 (West 2010)) and were properly dismissed.

¶ 2 Plaintiff, Toby Myers, filed a complaint in the Knox County circuit court following his termination from his position as director of field operations of the Galesburg Hospitals Ambulance Service. Plaintiff's complaint alleged, *inter alia*, that defendants tortiously interfered with a prospective business advantage when they either terminated plaintiff without a majority

vote by a quorum of the board members, or induced the corporate entity they served to terminate plaintiff's employment. Plaintiff further alleged that such action constituted tortious interference with an employment contract.

¶ 3 Defendants filed a combined motion to dismiss pursuant to sections 2-615 and 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619 (West 2012)). The trial court denied the motion in part and granted it in part, finding that plaintiff sufficiently alleged an intentional and unjustified breach of plaintiff's employment contract, but that plaintiff failed to plead facts sufficient to support his conclusory allegation that defendants' actions constituted willful and wanton conduct. The court allowed plaintiff 21 days to file his amended complaint.

¶ 4 Ultimately, plaintiff filed a second amended complaint, alleging *ultra vires* action by the defendants, along with additional allegations that defendants' actions were made in furtherance of their own personal interests and that defendants intentionally interfered with plaintiff's employment expectancy.

¶ 5 Defendants, again, filed a motion to dismiss pursuant to sections 2-615 and 2-619 of the Code in response. The trial court granted the motion, dismissing the cause without prejudice and allowing plaintiff 14 days to file a third amended complaint. The trial court's order further stated that if plaintiff failed to file a third amended complaint within 14 days, the matter would be dismissed with prejudice.

¶ 6 Plaintiff did not file a third amended complaint. He filed the instant appeal, arguing that the trial court erred in dismissing the second amended complaint.

¶ 7 We affirm.

¶ 8 BACKGROUND

¶ 9 Plaintiff initiated this action by filing his original complaint against defendants on July 16, 2012, alleging defendants acted without authority and intentionally interfered with plaintiff's employment contract rights by initiating an *ultra vires* action.

¶ 10 On August 8, 2012, defendants jointly filed a motion to dismiss pursuant to both sections 2-615 and 2-619 of the Code. The motion sought dismissal of plaintiff's complaint on several bases, including: (1) the complaint failed to state a cause of action for tortious interference with an employment contract; (2) the claim was barred by the statute of frauds; (3) plaintiff lacked standing to allege that an action of the Galesburg Hospitals Ambulance Service's board of directors was *ultra vires*; and (4) defendants are exempt from liability under the General Not for Profit Corporation Act of 1986 (the Act) (805 ILCS 105/108.70 (West 2010)).

¶ 11 On September 26, 2012, the trial court issued an order denying in part and granting in part defendants' combined motion to dismiss. The trial court rejected all of defendants' grounds for dismissal with the exception of defendants' argument that they are immune from liability pursuant to section 108.70 of the Act (805 ILCS 105/108.70 (West 2010)). The trial court found that plaintiff failed to allege facts to support the conclusion that defendants terminated plaintiff's employment to further their own personal interests, or that defendants' actions otherwise constituted willful and wanton conduct.

¶ 12 The trial court did state, however, that plaintiff's complaint alleged the necessary facts to state a cause of action for tortious interference with an employment contract.

¶ 13 The court's September 26 order allowed plaintiff 21 days to file an amended complaint. Plaintiff amended his complaint two additional times. It is the second amended complaint before us now.

¶ 14 Defendants moved to dismiss plaintiff's second amended complaint pursuant to sections 2-615 and 2-619 of the Code. This motion, again, stated that plaintiff had failed to plead facts sufficient to support his claim for willful and wanton conduct, which is necessary to overcome the board members' immunity under the Act. Following a hearing, the trial court dismissed plaintiff's second amended complaint without prejudice. The court allowed plaintiff 14 days to file a third amended complaint, or the matter would be dismissed without prejudice.

¶ 15 Plaintiff did not replead; he appeals.

¶ 16 The "facts" set forth below are those pled in plaintiff's second amended complaint, as this case is before us on the pleadings. We find it necessary to include plaintiff's pleading in its entirety, with the exception of paragraphs relating to jurisdiction, venue and damages in order to assist in the understanding of our analysis.

"5. Galesburg Hospitals Ambulance Service is in the business of providing ambulatory services for the Galesburg area. The Galesburg Hospitals Ambulance Service is governed by a Board of Directors consisting of eight members. An Administrative Director oversees the entire business operation and employees, and is directly accountable to the Board of Directors. The Administrative Director manages five officers called directors, who are not on the Board. The [*sic*] are (1) The Controller (accountant), (2) Director of Human Resources, (3) Director of Field Operations, (4) Director of Education

(employee trainer), and (5) Director of Buildings, Fleet, and Equipment (Maintenance).

6. The Director of Field Operations is the management position responsible for the essential service provided by Galesburg Hospitals Ambulance Service — Emergency Medical Technician response and urgent medical care transportation. The Director of Field Operations is the only management position, besides the Administrative Director, who manages more than 5 employees. Three shift supervisors, 70 part-time and full-time Emergency Medical Technicians/Paramedics, two office staff employees, and one mechanic all report to the Director of Field Operations.

7. Myers was employed as the Director of Field Operations for Galesburg Hospitals Ambulance Service from July 29, 1996 thru [sic] March 10, 2008. The individual Board Members of the Board of Directors for the Galesburg Hospitals Ambulance Service knew Myers and the employment contract existing between Myers and Galesburg Hospitals Ambulance Service.

8. While employed as the Director of Operations, Mr. Myers was responsible for planning, developing, implementing and administering the activities for delivering excellent pre-hospital and inter-facility patient

care. During Myers' 13 year tenure at Galesburg Hospitals Ambulance Service he did not have a single performance related deficiency. Myers was never reprimanded during his 13 year employment at the Ambulance Service prior to his termination.

9. During Myers tenure as Director of Field Operations, Rick Gower was employed as the Administrative Director of Galesburg Hospitals Ambulance Service. While Gower was Administrative Director, Galesburg Hospitals Ambulance Service paid to educate Myers by sending Myers to Accelerated Ambulance Managers Courses and conferences for continuing education. Myers substantial experience and training enabled him to serve on several administrative bodies, including the Illinois Ambulance Board of Directors.

10. On February 24, 2008 members of the Board of Directors gave Rick Gower the choice to resign his position as Administrative Director or the Board would terminate his employment. Gower accepted the ultimatum and resigned his position as Administrative Director, which he held for close to 5 years. After Gower's resignation, Myers was the senior, most experienced, and most knowledgeable employee at Galesburg Hospitals Ambulance Service. As

Director of Field Operations, Myers' experience was superior compared to any other employee as to the management and operation of Galesburg Hospitals Ambulance Service. Rick Gower was forced to resign by the Board of Directors 16 days prior to the termination of Myers employment.

11. After Gower's resignation, the Board voted to promote Mike Boggs from Controller (accountant) to Administrative Director. Mike Boggs had been the Controller (accountant) for Galesburg Hospitals Ambulance Service approximately nine months prior to his promotion to Administrative Director. The Board made this decision despite Myers 13 years of training and experience at Galesburg Hospitals Ambulance Service as Director of Field Operations.

12. Galesburg Hospitals Ambulance Service is governed by a Board of Directors consisting of eight members. The Board of Directors may not take any action without a vote, as required by its articles of incorporation.

13. Contrary to its articles of incorporation, board members Cathy Smithson, Dustin Courson, Kim Hutchenrider of the Galesburg Hospitals Ambulance Service terminated the employment contract of Myers on

March 12, 2008 without a majority vote by a quorum of the board members.

14. Cathy Smithson, Dustin Courson, and Ken Hutchenrider terminated Myers' employment by acting without authority because a majority vote of a quorum of the board was not obtained to terminate Myers' contract. The three Board Members had no management authority over Myers' employment, and the Board was not consulted.

15. Smithson, Courson, and Hutchenrider initiated an ultra vires action by the Board of Directors. The three met outside the presence of the full board, and outside the location in which the Board usually conducts its business. Their decision to terminate Myers' employment was made in the late evening on March 12, 2008. This meeting and decision was made without informing the other members of the Board or any attempt to obtain a quorum.

16. Smithson, Courson, and Hutchenrider knew they were acting without authority because,

(1) it was a unilateral decision made only by them, without consultation with other board members,

(2) no previous employment decision by the Board had been conducted in the manner in which the three acted,

(3) the meeting was held without the knowledge of any other members of the full board,

(4) the decision was made without consulting the Administrative Director.

17. The actions by Smithson, Courson, and Hutchenrider were in furtherance of their own personal interests and [*sic*] disregard to the corporate interests of Galesburg Hospitals Ambulance Service. The termination of Myers' employment harmed Galesburg Hospitals Ambulance Service by,

(1) preventing it to receive the continued benefit of the training and courses it paid for Myers and the 13 years experience he had in conducting the actual operations,

(2) left it without a single employee with the qualifications or experience to manage the essential service it provided,

(3) denied the benefit to the corporation, without justification, of the services from a 13 year employee with an impeccable performance record.

The ultra vires termination of Myers' employment by Smithson, Courson, and Hutchenrider was in complete disregard of the corporate interests of Galesburg Hospitals

Ambulance Service, which it was their fiduciary duty to advance with loyalty, care, and diligence.

18. The damage to the corporate interests of Galesburg Hospitals Ambulance Service described in ¶17, was confirmed by the newly appointed Administrative Director, Mike Boggs, who stated 'I do not agree with your termination, this was not my decision; it was the executive board.'

19. Due to Meyers' 13 year employment and experience with the Galesburg Hospitals Ambulance Service without a single reprimand or citation for a deficiency in his performance, as specifically alleged in ¶7-9, Myers had a reasonable expectation of continued employment with the Galesburg Hospitals Ambulance Service.

20. The individual defendants each knew of Myers' reasonable expectation of continued employment with Galesburg Hospitals Ambulance Service because of their position on the Board of Directors of the Galesburg Hospitals Ambulance Service and Myers' 13 year employment without reprimand or performance deficiency, as specially alleged in ¶ 5-18.

21. Cathy Smithson, Dustin Courson, and Ken Hutchenrider intentionally interfered with Myers' employment expectancy by wrongfully using their positions on the Board of Directors by acting without authority on behalf of Galesburg Hospitals Ambulance Service to terminate Myers' employment, who was [sic] 13 year employee without a single reprimand or performance deficiency, as specifically alleged in ¶5-18. Smithson, Courson, and Hutchenrider, through their improper and ultra vires actions, without justification induced the corporate entity they served as individual Members of its Board of Directors, Galesburg Hospitals Ambulance Service, to terminate Myers' employment.

22. The intentional ultra vires actions by defendants, as specifically alleged in ¶21, improperly and unjustifiedly [sic] caused the termination of Myers' employment which terminated Myers' reasonable expectation of continued employment with Galesburg Hospitals Ambulance Service.

23. As a direct and proximate result of the ultra vires termination of Myers' employment caused by board members Cathy Smithson, Dustin Courson, and Ken Hutchenrider, Myers lost income in the amount of \$33,416.67 plus \$16,280.00 in lost benefits for a total of

\$49,696.67 in lost wages and benefits. A true copy of the Excel spreadsheet containing the damage calculation is attached as Ex:1."

¶ 17

ANALYSIS

¶ 18

At the outset, we attempt to clarify plaintiff's arguments on appeal. First, plaintiff argues that his second amended complaint stated a claim for interference with a prospective business advantage. He contends that after the trial court's September 26, 2012, order denying in part and granting in part defendants' motion to dismiss, the trial court specifically found that his allegations satisfied the *prima facie* elements for interference with a prospective business advantage.

¶ 19

We note that it appears the trial court found that plaintiff had set forth sufficient facts to support a claim for intentional interference with an employment contract, not for tortious interference with a prospective business advantage. Regardless, the trial court's September 26 order addressed plaintiff's original complaint, not his second amended complaint. It matters not what the trial court said in the September 26 order; that order was interlocutory. Plaintiff replied. Plaintiff's "Law of the Case" arguments are without merit. By definition, an interlocutory order cannot be the law of the case. See *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 368 Ill. App. 3d 734, 742 (2006); see also *People v. Patterson*, 154 Ill. 2d 414, 468 (1992). The court granted defendants' motion to dismiss on plaintiff's second amended complaint in its entirety on May 15, 2013. It is that dismissal of the second amended complaint at issue in this appeal.

¶ 20

A motion to dismiss pursuant to section 2-615 tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint,

but asserts an affirmative defense that defeats the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 578-79 (2006). When reviewing a decision to grant a motion pursuant to section 2-615, our inquiry is whether the allegations of the complaint, construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief may be granted. *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1086 (2010). When reviewing a section 2-619 motion to dismiss, we must consider whether a genuine issue of material fact exists that precludes dismissal, and whether an affirmative matter negates the plaintiff's cause of action completely or refutes critical conclusions of law or conclusions of material unsupported fact. *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892 (2005). Our review under either section is *de novo* and we can affirm on any basis present in the record. *Brooks v. McLean County Unit District No. 5*, 2014 IL App (4th) 130503, ¶ 14.

¶ 21 As mentioned earlier, the exact cause or causes of action plaintiff is attempting to plead is somewhat unclear. The elements of tortious interference with a prospective business advantage and intentional interference with an employment contract differ markedly. However, it is unnecessary for us to untangle plaintiff's claims or determine if those claims pass section 2-615 muster, as the trial court correctly dismissed plaintiff's complaint for failure to plead willful and wanton conduct on the part of defendants.

¶ 22 Defendants assert that the Act (805 ILCS 105/101.01 *et seq.* (West 2010)) applies to their actions as board members of the Galesburg Hospitals Ambulance Service. As such, they are, absent willful and wanton misconduct, immune from liability. That section specifically provides that "no cause of action may be brought, for damages resulting from the exercise of judgment or discretion in connection with the duties or responsibilities of such director or officer unless the act or omission involved willful or wanton conduct." 805 ILCS 105/108.70(a) (West 2010).

Plaintiff, therefore, must sufficiently plead willful and wanton conduct on the part of defendants in order for his complaint to survive the motion to dismiss.

¶ 23 Plaintiff responds with cases relating to the common law "business judgment rule." What plaintiff fails to appreciate or even discuss is the fact that the Act provides these defendants with a layer of protection above and beyond that provided by the business judgment rule: immunity for actions falling short of willful and wanton misconduct.

¶ 24 Whether a defendant's breach of a legal duty amounts to willful and wanton conduct is ordinarily a question of fact. *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 326 (1995). Illinois is a fact-pleading state (*Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 22), thus, plaintiff must allege facts which, if proven, would show that defendants acted with either a deliberate intention to harm or an utter indifference to or conscious disregard for the welfare of the plaintiff. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 518 (1989); see also *O'Brien v. Township High School District 214*, 83 Ill. 2d 462 (1980). While well-pled facts are taken as true and all reasonable inferences from such facts are drawn in favor of plaintiff (*Calloway*, 168 Ill. 2d at 325), conclusions of law and conclusory allegations unsupported by specific facts are not deemed admitted for purposes of a motion to dismiss. *Coghlan*, 2013 IL App (1st) 120891, ¶ 35. After reviewing plaintiff's second amended complaint, we find that plaintiff failed, as a matter of law, to plead willful and wanton conduct on the part of defendants.

¶ 25 Plaintiff's second amended complaint is rife with conclusory allegations unsupported by specific facts. Without more, these bare-boned statements do not sufficiently plead willful and wanton conduct. See, e.g., *Spencer v. Community Hospital of Evanston*, 87 Ill. App. 3d 214, 220 (1980) (stating that "[w]ords such as 'falsely' and 'maliciously' used to describe the acts or intent of the defendants are 'pure conclusions of the pleader ***, are meaningless and add nothing to

the complaint without some further allegations of specific facts.' "). Basically, plaintiff alleges he was terminated without justification. He concedes that he was an employee at will. His employer needed no justification to fire him. Plaintiff alleges no facts to support the allegations that defendants acted only to advance their own personal interests or with a deliberate intent to harm.

¶ 26 Rather, based on plaintiff's allegations as a whole and his legal arguments, it seems readily apparent to this court that plaintiff feels he was wronged not only by his termination, but also by the fact that Mike Boggs was promoted to administrative director over him. The allegations that plaintiff worked for the ambulance service for 13 years without reprimand, or that he was the most qualified employee following the resignation of Rick Gower, do not establish willful and wanton conduct on the part of defendants in agreeing to terminate him.

¶ 27 Furthermore, plaintiff's allegations in his second amended complaint, and particularly in paragraph 17, *supra*, contend that defendants acted contrary to the Galesburg Hospitals Ambulance Service's interests in denying the corporation the benefit of plaintiff's continued experience. Plaintiff appears to make these arguments on behalf of the Galesburg Hospitals Ambulance Service as a corporation, not as an individual alleging tortious interference. If the corporation or its board members believe that plaintiff's termination was detrimental to the corporation's interests, then that is a different lawsuit brought by different plaintiffs. See *In re Huron Consulting Group, Inc., Shareholder Derivative Litigation*, 2012 IL App (1st) 103519, ¶ 16 (citing *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 95 (1991)).

¶ 28 The plaintiff failed to plead sufficient facts to support his conclusions that defendants were willful and wanton in exercising their judgment or discretion in connection with their duties and responsibilities as board members of the Galesburg Hospitals Ambulance Service.

Accordingly, we find that the trial court correctly granted defendants' motion to dismiss, as plaintiff's claim, as pled, is barred by the Act. Likewise, plaintiff failed to plead sufficient facts to support the allegation that defendants' actions were *ultra vires*.

¶ 29 We, therefore, find that plaintiff also failed to plead facts sufficient to establish a cause of action for either tortious interference with an employment contract or tortious interference with a prospective business advantage. The trial court did not err in granting defendants' motion to dismiss.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed.

¶ 32 Affirmed.