2015 IL App (4th) 140875-U

NO. 4-14-0875

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 9, 2015
Carla Bender
4th District Appellate
Court, IL

WILLIAM WELTSCHEFF, D.D.S.,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Macoupin County
MACOUPIN COUNTY HEALTH DEPARTMENT,	)	No. 12L29
Defendant-Appellee.	)	
	)	Honorable
	)	Patrick Londrigan,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) affirmed the trial court's decision to vacate the default judgment; (2) affirmed the court's dismissal of plaintiff's retaliatory discharge claim; and (3) reversed the court's determination to grant defendant's motion for summary judgment.

¶ 2 In May 2012, plaintiff, William Weltscheff, entered into a contract to work as a dentist for defendant, Macoupin County Health Department. In August 2012, plaintiff filed a complaint against defendant raising claims of breach of contract (count I) and retaliatory discharge (count II). Plaintiff later added a count of age discrimination (count III). In November 2012, the trial court entered a default judgment against defendant. The following month, on defendant's motion, the court vacated the default judgment.

¶ 3 In November 2013, defendant filed a motion to dismiss count II pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)). The pleading comprised motions to dismiss under sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-

619 (West 2012)). The court later dismissed count II pursuant to section 2-619. In June 2014, defendant filed a motion for summary judgment (735 ILCS 5/2-1005 (West 2012)), which the court granted as to plaintiff's two remaining counts.

¶ 4 Plaintiff appeals, arguing that (1) the trial court abused its discretion by granting defendant's motion to vacate the default judgment; (2) the court erred by granting defendant's section 2-619 motion to dismiss plaintiff's retaliatory discharge claim; and (3) the court erred by granting defendant's motion for summary judgment. Because we disagree with plaintiff's first two contentions but agree with his third, we (1) affirm the trial court's decision to vacate the default judgment, (2) affirm the trial court's dismissal of count II, and (3) reverse the court's grant of summary judgment on counts I and III and remand for further proceedings.

¶ 5 I. BACKGROUND

¶ 6 The following facts were gleaned from the parties' pleadings and filings.

¶ 7 A. Plaintiff's Employment With Defendant

¶ 8 In May 2012, plaintiff and defendant entered into an employment contract, in which the parties agreed to the following pertinent terms:

> "[Plaintiff] will carry out the duties, responsibilities and clinic functions of the Dentist. The dentist agrees to work part-time as scheduled. Time off will be agreed upon as needed upon advance notice by the dentist. The dentist will be required to submit time-sheets to the health department the 1st and 16th of each month to ensure payment of services.
>
> The Macoupin County Public Health Department will pay for the dentist at the rate of $90.00/hr.

This contract is entered into on the 1st day of May, 2012. This contract may be terminated by either party with 90 days notice."

¶ 9 On June 24, 2012, defendant's chief executive officer, Kent Tarro, left plaintiff a phone message stating that (1) he had hired a new dentist and (2) in two weeks, defendant would cease scheduling plaintiff to work. Tarro's message contained various reasons for replacing plaintiff: (1) defendant needed to treat more dental patients; (2) the new dentist "can fly. She is young and she's hungry"; and (3) the new dentist would be paid based on the amount of revenue she brought in, not on an hourly rate. Tarro went on to state that the decision to terminate plaintiff's employment was "purely a financial decision."

¶ 10 Three days later, Tarro sent plaintiff a letter stating that defendant had the authority to determine plaintiff's work schedule and that plaintiff would be scheduled to work for one more week only. Tarro's letter stated that "[t]his *** serves as your 90 day notice of termination of the employment contract." Plaintiff's last day working for defendant was July 6, 2012.

¶ 11 B. The Default Judgment Entered Against Defendant

¶ 12 On August 29, 2012, plaintiff filed a complaint claiming (1) breach of contract (count I) and (2) retaliatory discharge (count II). The breach of contract count alleged that defendant failed to give plaintiff the required 90-day notice before terminating his employment. The retaliatory discharge count alleged that defendant terminated the contract in response to plaintiff's "refusal to violate public policy." Specifically, the retaliatory discharge claim alleged that defendant demanded that plaintiff remove all of a patient's lower teeth when it was medically unnecessary to do so. Plaintiff removed only one of the patient's teeth. As a result, plaintiff contends that defendant terminated his employment. On September 6, 2012, plaintiff served defendant with the complaint. During this same time period, plaintiff filed administrative charges

with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission asserting age discrimination by defendant.

¶ 13 On October 26, 2012, plaintiff filed a motion for default judgment pursuant to section 2-1301(d) of the Code (735 ILCS 5/2-1301(d) (West 2012)), alleging that (1) defendant had failed to appear or otherwise plead within 30 days of receiving a summons and (2) plaintiff was entitled to a $75,000 judgment. On November 26, 2012, the court entered a default judgment in plaintiff's favor for $75,000.

¶ 14 C. Defendant's Motion To Vacate the Default Judgment

¶ 15 On December 6, 2012, defendant filed a motion to vacate the default judgment pursuant to section 2-1301(e) of the Code. 735 ILCS 5/2-1301(e) (West 2012). Defendant asserted that it mistakenly thought the summons was related to plaintiff's administrative claim and, therefore, did not forward the summons to defendant's attorney until November 28, 2012. In response, plaintiff contended that vacating the judgment would not further substantial justice.

¶ 16 In January 2013, the trial court, without written explanation, entered an order granting defendant's motion to vacate the default judgment. Although the order stated that a hearing was held on defendant's motion, no transcript of the hearing appeared in the record. On appeal, the parties filed a stipulated bystander's report, which provided the following description of that hearing:

> "A hearing was held on 1/8/13 before the court on defendant's Motion to Vacate plaintiff's default judgment. Attorney Lucas Dalton present for plaintiff and Attorney Brent Cain present for defendant. No testimony or evidence was heard. The attorneys argued orally consistent with their written submissions to the trial

court. The court stated he was going to grant the Motion to Vacate and he entered a docket entry dated 1/8/13."

¶ 17 D. Defendant's Motion To Dismiss Pursuant to Section 2-619.1

¶ 18 In November 2013, defendant filed a motion pursuant to section 2-619.1 of the Code to dismiss plaintiff's retaliatory discharge claim (count II) under sections 2-615 and 2-619 of the Code. Specifically, defendant argued that the retaliatory discharge claim should be dismissed under section 2-615 for failure to state a claim because plaintiff's termination was not in (1) retaliation for participation in a protected activity and (2) contravention of public policy. Defendant's motion under section 2-619 argued that the retaliatory discharge claim should be dismissed because plaintiff failed to first exhaust the administrative remedies available to him before filing his claim in the trial court.

¶ 19 In February 2013, after a hearing, the trial court, without explanation, issued a written order dismissing count II of the complaint pursuant to section 2-619 of the Code. The parties' bystander's report provided the following description of that hearing:

"A hearing was held on 2/26/13 before the court on defendant's Motion to Dismiss Count II of plaintiff's original Complaint. No testimony or evidence was heard. The attorneys argued orally consistent with their written submissions to the trial court. The court issued a docket entry dated 2/16/13."

The record does not reveal whether the court addressed defendant's section 2-615 motion to dismiss.

¶ 20 E. Plaintiff's Amended Complaint

¶ 21 In November 2013, plaintiff filed an amended complaint, adding a claim of age

discrimination (count III), while reasserting his claims for breach of contract and retaliatory discharge.

¶ 22 Shortly thereafter, defendant again filed a motion to dismiss pursuant to section 2-619.1 of the Code. Defendant again argued that plaintiff's retaliatory discharge claim should be dismissed pursuant to (1) section 2-615 for failing to state a claim and (2) section 2-619 for failing to exhaust administrative remedies. In January 2014, the trial court, without explanation, again entered a written order dismissing count II pursuant to section 2-619 of the Code. The record does not reveal whether the court addressed defendant's section 2-615 motion.

¶ 23 F. The Parties' Motions for Summary Judgment

¶ 24 After discovery was conducted, defendant filed a motion for summary judgment pursuant to section 2-1005 of the Code. (We note that plaintiff also filed a motion for summary judgment, which is not at issue on this appeal.) Defendant's motion argued that counts I and III should be dismissed. After a September 2014 hearing, the trial court entered a written order granting defendant's motion for summary judgment as to both counts. The parties' bystander's report reads as follows:

> "A hearing was held on 9/9/14 before the court on both plaintiff's and defendant's Motion for Summary Judgment. No testimony or evidence was heard. The attorneys argued orally consistent with their written submissions to the trial court. The court subsequently issued a docket entry dated 9/19/14 granting defendant's Motion for Summary Judgment, holding all other motions moot and entering judgment for the defendant."

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 Plaintiff argues that (1) the trial court abused its discretion by granting defendant's motion to vacate the default judgment; (2) the court erred by granting defendant's section 2-619 motion to dismiss plaintiff's retaliatory discharge claim; and (3) the court erred by granting defendant's motion for summary judgment. We address plaintiff's contentions in turn.

¶ 28 A. The Trial Court's Decision To Vacate the Default Judgment

¶ 29 Plaintiff argues that the trial court abused its discretion by granting defendant's motion to vacate the default judgment. We disagree.

¶ 30 1. *Statutory Language and Standard of Review*

¶ 31 Pursuant to section 2-1301(e) of the Code, "[t]he court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable."

¶ 32 When a trial court evaluates a section 2-1301(e) motion to vacate, "the overriding consideration is simply whether or not substantial justice is being done between the litigants and whether it is reasonable, under the circumstances, to compel the other party to go to trial on the merits." *In re Haley D.*, 2011 IL 110886, ¶ 57, 959 N.E.2d 1108. Factors to consider when determining whether substantial justice would be done include (1) whether the movant acted with due diligence; (2) the existence of a meritorious defense; (3) the severity of the penalty as a result of the default; and (4) the attendant hardship on the nonmovant to proceed to a trial on the merits. *Jacobo v. Vandervere*, 401 Ill. App. 3d 712, 715, 930 N.E.2d 459, 461-62 (2010).

¶ 33 The law prefers deciding controversies pursuant to the substantive rights of the

parties. *Haley D.*, 2011 IL 110886, ¶ 69, 959 N.E.2d 1108. The moving party "need not necessarily show the existence of a meritorious defense and a reasonable excuse for not having timely asserted such defense." *Id.* ¶ 57, 959 N.E.2d 1108. What is just and proper must be determined on a case-by-case basis, not by a hard-and-fast rule. *Id.* ¶ 69, 959 N.E.2d 1108. "[E]ntry of default is a drastic remedy that should be used only as a last resort." *Id.* at ¶ 69, 959 N.E.2d 1108.

¶ 34 2. *The Trial Court's Decision To Vacate the Default Judgment*

¶ 35 In this case, defendant filed a timely motion to vacate the default judgment, which the trial court granted after a hearing. Neither the court's order nor the bystander's report provided the court's reasoning. Although the bystander's report states that "[n]o testimony or evidence was heard" at the hearing on the motion to vacate the default judgment, we do not know from the bystander's report if the court at that hearing (1) asked questions of counsel, (2) heard counsel's representations, or (3) made some remarks or findings in granting the motion.

¶ 36 Based on this limited record, we conclude that the trial court did not abuse its discretion by granting defendant's motion to vacate the default judgment. Although defendant's motion does not establish a compelling reason to vacate, we defer to the court's discretion. We note, as does defendant, that none of the cases plaintiff cited in his brief to the court involve an appellate court decision that reversed a trial court's determination to vacate a default judgment. Here, the trial court apparently determined that substantial justice would be done by granting the motion to vacate and deciding this controversy on the merits, and we will not reverse that decision.

¶ 37 We conclude that the trial court did not abuse its discretion by granting the motion to vacate the default judgment.

¶ 38 B. Trial Court's Granting of Defendant's 2-619 Motion To Dismiss

¶ 39 Plaintiff argues the trial court erred by granting defendant's section 2-619 motion

to dismiss plaintiff's retaliatory discharge claim.

¶ 40 1. *Statutory Language and Standard of Review*

¶ 41 Section 2-619.1 of the Code provides:

> "Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion ***. *** Each part shall *** specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part shall also clearly show the points or grounds relied upon under the Section upon which it is based." 735 ILCS 5/2-619.1 (West 2012).

Section 2-619.1 permits a movant to combine separate claims under section 2-615 and 2-619 into one proceeding, but it prohibits the comingling of those claims. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 72, 978 N.E.2d 1132. The section 2-619.1 motion combining both sections 2-615 and 2-619 "(1) *must* be in parts, (2) *must* be limited to and shall specify that it is made under either section 2-615 or 2-619, and (3) *must* clearly show the points or grounds relied upon under the section upon which it is based." (Internal quotation marks omitted and emphases in original.) *Id.* at ¶ 73. If a 2-619.1 motion does not meet these requirements, the trial court should *sua sponte* dismiss the motion and allow the moving party the opportunity to file a motion in compliance. *Id.*

¶ 42 2. *Defendant's Section 2-619.1 Motion*

¶ 43 Defendant's section 2-619.1 motion to dismiss comprised two separate parts, in which he argued for dismissal under sections 2-615 and 2-619 of the Code, respectively (735

ILCS 5/2-615, 2-619 (West 2012)). In particular, plaintiff asserted that the retaliatory discharge claim should be dismissed (1) pursuant to section 2-615 for failure to state a claim and (2) pursuant to section 2-619 for plaintiff's failure to exhaust administrative proceedings before filling his claim. The trial court dismissed the claim "pursuant to 2-619."

¶ 44 Plaintiff argues that the trial court erred by dismissing his retaliatory discharge claim under section 2-619. In response, defendant argues that we should affirm the dismissal because plaintiff failed to first exhaust the available administrative remedies before filing his claim in the trial court. Although we agree that the court erred by dismissing plaintiff's claim pursuant to section 2-619, we nonetheless affirm the dismissal as proper under section 2-615.

¶ 45 3. *Dismissal Under Section 2-619*

¶ 46 A section 2-619 movant admits all well-pleaded facts and reasonable inferences therefrom. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8, 953 N.E.2d 415. In reviewing the motion, "[t]he court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55, 962 N.E.2d 418. In a section 2-619 motion, the movant is essentially asserting, "Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984 (Internal quotation marks omitted.). A court should grant the motion only if "the plaintiff can prove no set of facts that would support a cause of action." *Snyder*, 2011 IL 111052, ¶ 8, 953 N.E.2d 415. A trial court's decision to dismiss pursuant to a section 2-619 motion is reviewed *de novo*. *Sandholm*, 2012 IL 111443, ¶ 55, 962 N.E.2d 418.

¶ 47 The Illinois Human Rights Act (775 ILCS 5/1-101 *et seq.* (West 2012)) "establish[ed] comprehensive administrative procedures governing the disposition of alleged civil

rights violations." *Blunt v. Stroud*, 232 Ill. 2d 302, 310, 904 N.E.2d 1, 7 (2009). Under the Act, "no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." 775 ILCS 5/8-111(D) (West 2012). The Act provides that a "civil rights violation" occurs when a person, *inter alia*, conspires to:

> "Retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment or sexual harassment in elementary, secondary, and higher education, discrimination based on citizenship status in employment, or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act[.]" 775 ILCS 5/6-101(A) (West 2012).

A claim of retaliation as defined by the Act must be brought first in an administrative setting.

¶ 48 In this case, plaintiff's retaliation claim was a common-law cause of action, not a civil rights violation as defined by the Act. The claim was founded on a violation of public policy unrelated to the bases enumerated in section 6-101(A) of the Act. Specifically, plaintiff's claim was based on his alleged refusal to provide unnecessary medical care, not because of unlawful discrimination, sexual harassment, or retaliation for pursuing a claim under the Act. In *Blunt*, our supreme court confirmed that a common-law claim of retaliation may be brought first in the circuit court, where the claim "established a basis for imposing liability on defendants independent of the Act." *Blunt*, 232 Ill. 2d at 315, 904 N.E.2d at 9. Therefore, plaintiff's claim was not required to be filed first as an administrative claim, and the court erred by dismissing plaintiff's claim under section 2-619.

¶ 49 4. *Dismissal Under Section 2-615*

¶ 50 The record does not include a decision by the trial court on defendant's section 2-615 motion to dismiss. Nor does the bystander's report address defendant's section 2-615 motion. Defendant argues that plaintiff has forfeited argument as to section 2-615 by failing to adequately raise those arguments on appeal. According to defendant, plaintiff raised his section 2-615 arguments by adopting and incorporating arguments raised in his response to defendant's 2-615 motion in the trial court. Defendant argues further that a party on appeal may not raise an argument merely by incorporating or adopting an argument made in the trial court.

¶ 51 We agree with defendant that "[a] party on appeal may not adopt by mere reference the arguments of his trial pleading." *In re Marriage of Dann*, 2012 IL App (2d) 100343, ¶ 9, 973 N.E.2d 498. However, despite plaintiff's failure to properly raise his arguments on appeal and the record's lack of any decision on the section 2-615 motion by the trial court, we choose to address the section 2-615 issue on appeal because this court may address any issue of law that is fully briefed and argued by the parties. *Puffer-Hefty School District No. 69 v. Du Page Regional Board of School Trustees of Du Page County*, 339 Ill. App. 3d 194, 200, 789 N.E.2d 800, 807 (2003).

¶ 52 A section 2-615 motion to dismiss challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint. *Sandholm*, 2012 IL 111443, ¶ 54, 962 N.E.2d 418. In determining the legal sufficiency of a complaint, all well-pleaded facts are taken as true and all reasonable inferences from those facts are drawn in favor of the plaintiff. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 490, 675 N.E.2d 584, 588 (1996).

¶ 53 Defendant's claim was a common-law claim of retaliatory discharge. To state a common-law claim for retaliatory discharge, a plaintiff must show (1) that the former employer

discharged the employee (2) in retaliation for the employee's activities and (3) in violation of a clear mandate of public policy. *Ulm v. Memorial Medical Center*, 2012 IL App (4th) 110421, ¶ 20, 964 N.E.2d 632. Whether the discharge violated public policy is an issue of law. *Id.*

¶ 54 The supreme court has mandated an "adherence to a narrow definition of public policy, as an element of a retaliatory discharge action." *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 507, 911 N.E.2d 369, 378 (2009). "To qualify as a clear mandate of public policy, a matter must strike at the heart of a citizen's social rights, duties, and responsibilities." (Internal quotation marks omitted.) *Ulm*, 2012 IL App (4th) 110421, ¶ 21, 964 N.E.2d 632. The public policy must also be "sufficiently specific to put employers on notice that employment decisions relating to the policy may expose them to liability." *Id.* Examples of public policies too general to be enforced in an action for retaliatory discharge are "promoting quality health care" (internal quotations omitted) (*id.*) and "patient safety" (*Turner*, 233 Ill. 2d at 508, 911 N.E.2d at 378).

¶ 55 In the present case, plaintiff claimed he was discharged for refusing to overtreat a patient. He extracted only one tooth from a patient's mouth despite being instructed to extract all of the patient's lower teeth. Here, plaintiff's claim did not establish a violation of a "clear mandate of public policy." *Ulm*, 2012 IL App (4th) 110421, ¶ 21, 964 N.E.2d 632. We abide by the supreme court's direction that "public policy" receive a "narrow definition." *Turner*, 233 Ill. 2d at 507, 911 N.E.2d at 378. We therefore decline to expand the tort of retaliatory discharge to include plaintiff's claim. Any such expansion will need to come from the General Assembly.

¶ 56 C. Defendant's Motion for Summary Judgment

¶ 57 Plaintiff argues that the trial court erred by granting defendant's motion for summary judgment. We agree.

¶ 58 1. *Statutory Language and Standard of Review*

¶ 59 Summary judgment is appropriate only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005 (West 2012). "In order to survive a motion for summary judgment, a plaintiff need not prove her case, but she must present a factual basis that would arguably entitle her to a judgment." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12, 21 N.E.3d 684.

¶ 60 We review a trial court's entry of summary judgment *de novo*. *Essig v. Advocate BroMenn Medical Center*, 2015 IL App (4th) 140546, ¶ 39, 33 N.E.3d 288.

¶ 61 2. *The Trial Court's Decision in the Present Case*

¶ 62 Here, the trial court entered an order granting defendant's motion for summary judgment on plaintiff's claims of breach of contract and age discrimination. Although a hearing was held on the motion, no transcript of the hearing appears in the record. Instead, the bystander's report provided the following description of the hearing: "No testimony or evidence was heard. The attorneys argued orally consistent with their written submissions to the trial court. The court subsequently issued a docket entry dated 9/19/14 granting defendant's Motion for Summary Judgment[.]"

¶ 63 We consider the trial court's grant of summary judgment of plaintiff's two claims in turn.

¶ 64 3. *Plaintiff's Claim of Breach of Contract*

¶ 65 Plaintiff's complaint alleged that defendant breached the contract by failing to give defendant at least 90 days' notice before terminating his employment. Defendant, in its motion for summary judgment, argued that the case presented no issue of material fact because Tarro's phone message and letter constituted notice, and plaintiff's employment was not terminated

until more than 90 days after plaintiff received that notice. The crux of defendant's argument is that plaintiff was not terminated when defendant stopped scheduling him to work. According to defendant, the contract authorized defendant to schedule plaintiff to work as much or as little as defendant chose, including not scheduling plaintiff at all.

¶ 66 When interpreting a contract, a court must attempt to give effect to the parties' intentions. *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶ 12, 22 N.E.3d 1. The best indication of the parties' intent is the contract's language, given its plain meaning. *Id.* When a contract's language is unambiguous, the court may not resort to extrinsic evidence to interpret it. *Id.* However, extrinsic evidence may be used to interpret an ambiguous contract. *Id.*

¶ 67 Here, an issue of material fact existed as to when plaintiff's employment was terminated. Defendant argues that plaintiff was not immediately terminated when he was removed from the work schedule because it was defendant's decision under the contract whether to schedule plaintiff at all. Plaintiff, on the other hand, argues that he was terminated when he was removed from the schedule. The date of defendant's termination is material to determining whether a breach of the contract occurred. Therefore, the trial court erred by granting defendant's motion for summary judgment.

¶ 68 4. *Plaintiff's Claim of Age Discrimination*

¶ 69 The Illinois Human Rights Act prohibits an employer from discriminating against an employee on the basis of age. 775 ILCS 5/2-102(A) (West 2012). To establish a *prima facie* case of age discrimination based on disparate treatment, a plaintiff must show (1) he is at least 40 years old and works for an employer to whom the Act applies; (2) his work performance was satisfactory; (3) the employer took adverse action against him, despite his satisfactory work performance; and (4) a similarly situated employee, who was not a member of the protected class, was

not subjected to the same adverse action. *Owens v. Department of Human Rights*, 356 Ill. App. 3d 46, 52, 826 N.E.2d 539, 544 (2005). If a plaintiff establishes a *prima facie* case, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its decision. *Id.* If the defendant succeeds in articulating such a reason, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the defendant's articulated reason was merely a pretext for unlawful discrimination. *Id.* The ultimate factual inquiry is whether the defendant intentionally discriminated against the plaintiff.

¶ 70 Here, an issue of material fact existed as to whether defendant's reasons for terminating plaintiff's employment were a pretext for unlawful discrimination. Plaintiff alleges that defendant stated it was replacing plaintiff with a "young" and "hungry" new dentist. Defendant claims that plaintiff was replaced because of job performance and financial reasons. This factual dispute is a contested issue of fact necessary to determining whether defendant committed age discrimination. The court therefore erred by granting defendant's motion for summary judgment on plaintiff's claim of age discrimination.

¶ 71 III. CONCLUSION

¶ 72 For the foregoing reasons, we (1) affirm the trial court's judgment vacating its default judgment, (2) affirm the court's judgment dismissing count II; and (3) reverse the court's judgment dismissing counts I and III. We remand for further proceedings on counts I and III.

¶ 73 Affirmed in part and reversed in part; cause remanded for further proceedings.