2015 IL App (4th) 150015-U

NO. 4-15-0015

FILED
November 17, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

STEPHANIE JANE BOND, Plaintiff-Appellant, v. CHAMPAIGN COUNTY SHERIFF DAN WALSH, SHERIFF DEPUTY DAVID A. COFFEY, SHERIFF DEPUTY RICHARD COLEMAN No. 545, SHERIFF SERGEANT KEITH CUNNINGHAM No. 548, SHERIFF DEPUTY RICHARD FERRIMAN No. 556, SHERIFF DEPUTY MARK GOODWIN, SHERIFF DEPUTY SETH HERIG No. 541, SHERIFF DEPUTY DUSTIN D. HEUERMAN No. 554, SHERIFF LIEUTENANT ALLEN E. JONES, SHERIFF DEPUTY NICK R. NEEVES No. 524, SHERIFF SERGEANT RICHARD QUICK No. 536, SHERIFF DEPUTY CAREY SCHALBER No. 534, SHERIFF DEPUTY ERIC L. SHUMATE No. 529, SHERIFF DEPUTY JEFF VERCLER, and SHERIFF DEPUTY ROBERT D. WESTON No. 519, Defendants-Appellees.	)	Appeal from Circuit Court of Champaign County No. 13L206 Honorable Jeffrey B. Ford, Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in dismissing this case pursuant to section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(3) (West 2012)).

¶ 2 On December 12, 2014, the trial court dismissed this case with prejudice pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619(a)(3)

(West 2012)). Plaintiff appeals, arguing the trial court abused its discretion in dismissing her complaint. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 10, 2010, plaintiff, Stephanie Jane Bond, filed a *pro se* complaint in case No. 10-L-228 against the County of Champaign, a municipal corporation, Champaign County Sheriff Daniel Walsh, Lieutenant Allen Jones, and deputies David Coffey, Richard Coleman, and "John Doe." (Although filed *pro se*, the complaint appears to have been prepared by an attorney.) The complaint sought damages pursuant to the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60-101 through 401 (West 2008)). According to the allegations in the complaint, plaintiff's husband, Gabriel Omo-Osagie, made threats by telephone to kill both plaintiff and plaintiff's father on November 8, 2009, and then fired a handgun into the receiver of his phone. On November 9, 2009, Omo-Osagie battered and unlawfully detained plaintiff in their marital home. Their home contained approximately 80 firearms at that time and Omo-Osagie's firearm owner's identification (FOID) card had been revoked.

¶ 5 On November 10, 2009, plaintiff applied for and received an emergency order of protection (case No. 09-OP-549) against Omo-Osagie, which was served on Omo-Osagie while he was in the Champaign County jail. That same day, plaintiff called the Champaign County sheriff's department to her home in order to remove approximately 80 firearms from the home. Deputies Coffey, Coleman, and "Doe" came to her home but refused to assist her in removing the 80 firearms from the marital residence. Plaintiff alleged this violated section 304 of the Act (750 ILCS 60/304 (West 2008)).

¶ 6 On February 27, 2010, Omo-Osagie shot plaintiff three times before killing himself. Plaintiff alleged she had reason to believe Omo-Osagie used one of the guns the

deputies refused to remove. According to plaintiff's complaint, defendants' failure to remove the 80 firearms from the marital residence at her request showed utter indifference and conscious disregard of her safety.

¶ 7 The named defendants were never served with this complaint. On March 1, 2011, plaintiff filed a motion to voluntarily dismiss her complaint without prejudice. However, this motion was never ruled on by the trial court and the *pro se* complaint was never dismissed.

¶ 8 On February 25, 2011, plaintiff filed a complaint on behalf of herself and her children in federal district court. In addition to the defendants named in the *pro se* complaint, the federal complaint named Deputies Richard Ferriman, Mark Goodwin, Seth Herrig, Dustin D. Heuerman, Nick R. Neeves, Carey Schalber, Eric L. Shumate, Jeff Vercler, Robert D. Weston, Sergeant Richard Quick, and Illinois State troopers, including Master Sergeant Michael R. Atkinson, Special Agent Kim A. Cessna, Trooper Robert Kotcher, and Master Sergeant Troy R. Phillips. According to the federal complaint, the defendants knew the following: plaintiffs were victims of domestic violence; Omo-Osagie had control of 60-90 firearms at the marital residence, including stolen guns, without a FOID card; Omo-Osagie had a history of hiding guns on his person, in his vehicle, and in his marital residence; and Omo-Osagie had repeatedly threatened plaintiffs with guns. However, defendants would not remove the guns from the marital residence.

¶ 9 Defendants also knew plaintiffs were the subject of an emergency order of protection between November 10, 2009, and December 14, 2009; Omo-Osagie repeatedly violated orders of protection and was criminally charged with domestic violence; and Omo-Osagie had been under investigation for domestic violence and for possession of stolen weapons.

The federal complaint contained counts alleging equal-protection violations, willful and wanton violations of defendants' duties under the Act, and intentional infliction of emotional distress.

¶ 10 Plaintiff's federal complaint was ultimately dismissed. The Seventh Circuit Court of Appeals affirmed the dismissal but directed the district court to allow plaintiff 30 days to file a motion for leave to file an amended complaint or a motion to dismiss her federal claim in which the district court would relinquish supplemental jurisdiction over her state law claims. On October 17, 2013, the federal district court entered an order on plaintiff's motion, dismissing the federal claim, relinquishing supplemental jurisdiction over the state law claims, and granting plaintiff leave to refile in state court.

¶ 11 On November 8, 2013, plaintiff filed the complaint in the instant case against Sheriff Walsh, Lieutenant Jones, Sergeant Quick, and Deputies Coffee, Coleman, Ferriman, Goodwin, Herrig, Heuerman, Neeves, Schalber, Shumate, Vercler, and Weston. The complaint stated the case was previously brought in federal court, but the federal court dismissed the case with leave to refile in state court. This complaint related to defendants' failure to remove guns from the marital residence.

¶ 12 On June 6, 2014, defendants filed a motion to dismiss plaintiff's complaint in the case *sub judice*. The motion noted count I of plaintiff's complaint attempted to state a cause of action against the individual named defendants, with the exception of Sheriff Walsh, for violations of the Act. Count II was against Sheriff Walsh based on *respondeat superior* liability. According to the motion:

> "Plaintiff's Complaint fails because Plaintiff fails to identify which duties in the [Act] applied to each individual defendant, and how each individual defendant allegedly failed to comply with any duty

> at any time. Further, the individual Defendants did not owe Plaintiff an ongoing duty and were not enforcing the [Act] up to and at the time of the shooting, and therefore benefit from absolute immunity afforded by sections 4-102 and 4-107 of the Tort Immunity Act and the limited immunity provision of the [Act] is inapplicable. Count II must be dismissed because there can be no *respondeat superior* or liability on the part of the Sheriff if the individual officers cannot be held liable. For these reasons and those set forth below, Plaintiff's Complaint should be dismissed."

¶ 13 On July 28, 2014, defendants asked for leave to file a supplement to their motion to dismiss. Defendants stated they learned on July 23, 2014, plaintiff previously filed this lawsuit not only in federal court but also in state court prior to the federal suit. According to the supplement to the motion to dismiss, plaintiff filed a motion to voluntarily dismiss her prior state court claim and the case was dismissed without prejudice. (However, in actuality, no dismissal order had ever been entered.) Defendants argued section 13-217 of the Procedure Code (735 ILCS 5/13-217 (West 1994)) barred the instant complaint because section 13-217 expressly permits only one voluntary dismissal as of right and only one refiling of a claim even if the statute of limitations has not yet expired. According to defendants, plaintiff's federal suit constituted that one refiling of her claim, and the instant complaint was "unauthorized, untimely, and improper."

¶ 14 On August 25, 2014, plaintiff filed a motion to strike false and erroneous statements from defendants' motion. According to plaintiff's motion, contrary to defendants' allegation, plaintiff's original complaint was never dismissed. Plaintiff's motion stated:

"The case was never dismissed. There is no Order of Dismissal. The Record for 2010-L-228 does not show any ruling at all on [plaintiff's] *pro se* Motion to Voluntarily Dismiss as is appropriate for a *pro se* case that was never served and for which the parties never joined and for which the parties were sued as 'Unknowns.' *** It is inaccurate to state that 2010-L-228 has been dismissed as the Record does not reflect any Order of Dismissal. There is no Order of Dismissal, and therefore, any statement that the case has been dismissed is false and erroneous and should be stricken and ignored."

¶ 15 On September 2, 2014, plaintiff filed objections to defendants' motion and a response to defendants' supplement to their motion to dismiss. According to plaintiff:

"As a threshold matter, a Court Order is necessary for a dismissal to occur such that Section 13-217 even applies. The plain language of Section 13-217 requires a dated Court Order in that it applies to an action that is 'voluntarily dismissed by the plaintiff.' 735 ILCS 5/13-217. The past tense of 'dismissed' used in the statute requires a Court Order be entered on a date certain. A pending Motion to Dismiss which has never been ruled on, such as exists from March 1, 2011, onward in [plaintiff's] *pro se* case, cannot constitute a 'dismissed' action."

Plaintiff also argued her *pro se* complaint is so defective it is a legal nullity and section 13-217 does not apply at all.

¶ 16 On September 18, 2014, the trial court allowed defendants' motion to supplement their motion to dismiss. On September 24, 2014, defendants filed their supplement to their motion to dismiss and memorandum of law in support thereof. In addition to defendants' arguments with regard to section 13-217 of the Procedure Code, assuming plaintiff argued her *pro se* case remained pending, defendants argued the instant complaint should be dismissed pursuant to section 2-619(a)(3) of the Procedure Code (735 ILCS 5/2-619(a)(3) (West 2012)). On September 30, 2014, plaintiff filed a motion to strike the new paragraphs of defendants' supplement to their motion to dismiss, which the trial court denied on October 1, 2014.

¶ 17 On October 15, 2014, plaintiff filed a response to defendants' supplement to their motion to dismiss. Plaintiff argued no court ever obtained jurisdiction over the 2010 *pro se* lawsuit and that lawsuit was a total nullity.

¶ 18 On December 12, 2014, the trial court dismissed the instant case pursuant to section 2-619(a)(3) of the Procedure Code, stating:

> "There is no issue here with either (1) comity or (2) likelihood of obtaining relief in the foreign jurisdiction; both the *pro se* case and the current case were filed in the Champaign County Circuit Court. However, the factor addressing the prevention of multiplicity, vexation and harassment weighs heavily in favor of dismissal. Because [plaintiff] is raising the argument that the *pro se* filing is still pending to get around the limitations on multiple filings in [section] 13-217, it is clear that the multiplicity of the filings constitutes vexation. Further, the effect

of a ruling in the *pro se* case would bar this proceeding in its entirety as an excessive refiling.

This court does not need to take up the issues raised by defendants in their June 6, 2014[,] filing. From the above it is abundantly clear that [case No.] 10-L-228 remains pending and that [case No.] 13-L-206 is basically the same cause of action. Both cannot exist at the same time. Pursuant to 735 ILCS 5/2-619(a)(3), [case No.] 13-L-206 is dismissed with prejudice."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 We first address plaintiff's argument section 13-217 of the Procedure Code (735 ILCS 5/13-217 (West 1994)) has no application in this case because her *pro se* complaint was never dismissed. Section 13-217 states:

"In the actions *** where the time for commencing an action is limited, if *** the action is voluntarily dismissed by the plaintiff, *** then, whether or not the time limitation for bringing such action expires during the pendency of such action, the plaintiff, his or her heirs, executors or administrators may commence a new action within one year or within the remaining period of limitation, whichever is greater, *** after the action is voluntarily dismissed by the plaintiff." 735 ILCS 5/13-217 (West 1994).

(We note "[t]he version of section 13-217 in effect is the version that preceded the amendments to Public Act 89-7 (Pub. Act 89-7, eff. March 9, 1995), which our supreme court found

unconstitutional in its entirety." *Domingo v. Guarino*, 402 Ill. App. 3d 690, 698 n.3, 932 N.E.2d 50, 58 n.3 (2010).)

¶ 22 We agree with plaintiff on this point. Plaintiff's *pro se* complaint was never dismissed. As a result, section 13-217 of the Procedure Code does not apply to this case.

¶ 23 We next turn to plaintiff's argument the trial court abused its discretion in dismissing her complaint in the case *sub judice* pursuant to section 2-619(a)(3) of the Procedure Code (735 ILCS 5/2-619(a)(3) (West 2012)). We will only disturb a trial court's dismissal pursuant to section 2-619(a)(3) if the court abused its discretion. *Hapag-Lloyd (America), Inc. v. Home Insurance Co.*, 312 Ill. App. 3d 1087, 1091, 729 N.E.2d 36, 39 (2000). Section 2-619(a)(3) allows for the dismissal of a claim when "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2012). Plaintiff concedes her *pro se* complaint and her November 2013 complaint probably qualify as "the same cause" as both complaints arise out of the same transaction or occurrence under the Act. However, she argues her *pro se* complaint and the November 2013 complaint do not involve the same parties and her *pro se* complaint is not pending. We disagree. (We note plaintiff argues the 2010 complaint was never dismissed for purposes of section 13-217 but then argues the 2010 complaint is not pending for purposes of section 2-619(a)(3).)

¶ 24 With regard to the parties in the two cases, plaintiff notes she named 11 additional deputies as defendants in the November 2013 case that were not named in her *pro se* complaint. According to plaintiff:

> "[T]he fact that there is some overlap doesn't necessarily mean the parties are similar enough to fulfill the requirement of 'same parties for the same cause.' An addition of eleven new and additional

> individual wrongdoers sued for willful and wanton misconduct raises differences in the parties. Recall, under the [Act], liability is based on 'any act of omission or commission by any law enforcement officer acting in good faith in rendering emergency assistance . . .' 750 ILCS 60/305. Since 'any law enforcement officer' acting 'willfully and wantonly' can bring [Act] liability, it makes sense that eleven new individual Defendants would change the nature of the action and change the nature of the parties."

However, defendants cite *Doutt v. Ford Motor Co.*, 276 Ill. App. 3d 785, 788, 659 N.E.2d 89, 92 (1995), for the proposition the "same parties" requirement does not require identical litigants. It only requires litigants with sufficiently similar interests. The named defendants in both plaintiff's *pro se* complaint and the complaint in the case *sub judice* have sufficiently similar interests to qualify as the "same parties." All the named defendants in both complaints were law enforcement officers, and they were all being sued for their alleged willful and wanton violations of the Act, which plaintiff alleged led her to be shot by Omo-Osagie.

¶ 25 As for plaintiff's argument her *pro se* complaint was not pending when the trial court dismissed her complaint in this case, we note plaintiff relies on her failure to serve the defendants with the *pro se* complaint. However, she also acknowledges her *pro se* complaint was never dismissed. In fact, as the trial court noted, plaintiff relied on the absence of an order dismissing her case to avoid the effects of section 13-217 of the Procedure Code (735 ILCS 5/13-217 (West 1994)).

¶ 26 In her brief to this court, plaintiff argues:

> "The trial court quotes Black's Law Dictionary['s] definition of 'pending' as 'remaining undecided; awaiting decision.' [Citation.] Plaintiff does not disagree with that definition, but argues that her *pro se* failure to serve Defendants and place the parties at issue precludes the *Pro Se* Complaint pending against any Defendants and against these Defendants for purposes of supporting a trial Court's discretion to dismiss under Section 2-619(a)(3).
>
> As a threshold matter, [plaintiff's] inept *pro se* lawsuit from 2010 was never acted on by any Court because no Court ever obtained jurisdiction over the parties. As every lawyer knows (and presumably [plaintiff] did not know when acting *pro se*), personal jurisdiction over the parties is a necessary prerequisite for any Court action. 'Proper service is a prerequisite for a court to acquire personal jurisdiction over a party.' [Citation.] As Defendants admit, they were never served with the 2010 *Pro Se* Complaint. [Citation.] The trial Court's subject matter jurisdiction remains, but the trial Court lacks power to take action effecting parties over whom it has no personal jurisdiction."

While the trial court may not have possessed personal jurisdiction over the named defendants in the *pro se* complaint, plaintiff does not explain how the court did not have personal jurisdiction over her. Plaintiff filed suit and submitted herself to the jurisdiction of the court. Plaintiff acknowledges the court's subject matter jurisdiction over the claim was not impacted by her failure to serve the defendants named in her *pro se* complaint. Plaintiff's *pro se* complaint was

still pending. As a result, section 2-619(a)(3) (735 ILCS 5/2-619(a)(3) (West 2012)) applied in this case.

¶ 27 Regardless of whether this case could technically be dismissed pursuant to section 2-619(a)(3) of the Procedure Code, plaintiff argues the trial court abused its discretion in failing to weigh the prejudice she would suffer by dismissing the instant complaint. In *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 447-48, 493 N.E.2d 1045, 1053 (1986), our supreme court stated:

> "[E]ven when the 'same cause' and 'same parties' requirements are met, section 2-619(a)(3) does not mandate automatic dismissal. Rather, the decision to grant or deny defendant's section 2-619(a)(3) motion is discretionary with the trial court. [Citation.] 'The more reasonable construction [of section 2-619(a)(3)] is that the circuit court possesses some degree of discretion in ruling upon the motion and that multiple actions in *different jurisdictions*, but arising out of the same operative facts, may be maintained where the circuit court, in a sound exercise of its discretion, determines that both actions should proceed.' *A.E. Staley Manufacturing Co. v. Swift & Co.*, 84 Ill. 2d 245, 252-53, 419 N.E.2d 23 (1980).
>
> The factors that a court should consider in deciding whether a stay under section 2-619(a)(3) is warranted include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign

jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum." (Emphasis added.)

Three of these four factors have little relevance in a case like this, where the two cases were filed in the same county.

¶ 28 However, according to plaintiff, the trial court erred in only considering one of these four factors, *i.e.*, the prevention of multiplicity, vexation, and harassment. Plaintiff contends the other factors weighed in her favor. We disagree. The trial court clearly did not err in focusing on the only relevant factor in this situation, *i.e.*, the existence of multiple claims. Further, this factor clearly weighed against plaintiff. Plaintiff herself filed both of the cases at issue here.

¶ 29 Plaintiff also argues the trial court did not consider how the dismissal of the instant case would prejudice her. Defendants argue "plaintiff's predicament is entirely of her own making." We agree. Plaintiff filed both complaints in this case. We are not dealing with a situation where opposing parties filed suits in different venues or jurisdictions for strategic purposes. Based on the particular facts in this case, the trial court did not abuse its discretion in dismissing this case pursuant to section 2-619(a)(3) of the Procedure Code (735 ILCS 5/2-619(a)(3) (West 2012)).

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated above, we affirm the trial court's order dismissing this case pursuant to section 2-619(a)(3) of the Procedure Code (735 ILCS 5/2-619(a)(3) (West 2012)).

¶ 32 Affirmed.