

2022 IL App (2d) 210695
No. 2-21-0695
Order filed August 15, 2022

NOTICE: This order was filed under Supreme Court Rule 23(b) and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

DAVID A. BERTHA,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant.)	
)	
v.)	No. 19-L-84
)	
DAILY HERALD NEWSPAPER, ¹)	
HARRY HITZEMAN, THOMAS ZUBIK,)	
MOHAMED ALI, MUZHAR KHAN,)	
GHOUSE MOHIUDDIN, JOANNE)	
LANGLEY, NAINA DESAI, and)	
SUSAN SARKAUSKAS,)	
)	
Defendants)	
)	Honorable
(Paddock Publications, Inc., and Susan)	Thomas A. Meyer
Sarkauskas, Defendants-Appellees).)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Brennan concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Plaintiff's defamation claim against a newspaper publisher was barred by the single-refiling rule because it was essentially the same as his prior claims that had

¹Plaintiff incorrectly names the Daily Herald Newspaper rather than its publisher, Paddock Publications, Inc. (Paddock) as a defendant. Accordingly, we added Paddock.

been dismissed for want of prosecution. (2) Plaintiff's defamation claim against a newspaper writer whose article described plaintiff's altercation at a courthouse was barred by the fair-reporting rule or the substantial-truth doctrine.

¶ 2 Plaintiff, David A. Bertha, appeals from orders of the circuit court of Kane County dismissing with prejudice (1) his claim against defendant Paddock Publications, Inc. (Paddock) in his first amended complaint and (2) his claim against defendant Susan Sarkauskas in his third amended complaint. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Prior Lawsuits

¶ 5 On April 24, 2014, Bertha filed a lawsuit in the circuit court of Kane County against Paddock and Harry Hitzeman (case No. 14-L-199). Bertha alleged that an article written by Hitzeman and published by Paddock in the Daily Herald on or about November 3, 2013, defamed him. The article was entitled "Suspended Attorney Causes Stir at Kane County Jail." The court dismissed the lawsuit for want of prosecution on August 14, 2014. Bertha refiled the lawsuit (case No. 15-L-371) one year later on August 14, 2015. On June 14, 2016, the court dismissed that lawsuit with prejudice for want of prosecution. Bertha then filed successive defamation lawsuits in the circuit court of Cook County (case Nos. 17-L-13026 and 18-L-7122) against Paddock and Hitzeman, concerning the same article. Bertha failed to serve the parties with the complaint in case No. 17-L-13026, and case No. 18-L-7122 was dismissed under the single-refiling rule. See 735 ILCS 5/13-217 (West 1994).²

²The currently effective version of section 13-217 is the one codified in the Illinois Compiled Statutes of 1994; that version preceded the amendments to the Code by Public Act 89-7 (Pub. Act 89-7, § 15 (eff. Mar. 9, 1995)), which our supreme court found unconstitutional in its

¶ 6

B. Current Lawsuit - Case No. 19-L-84

¶ 7 On February 20, 2019, Bertha filed a complaint in the circuit court of Kane County against Paddock, Hitzeman, the Kane County Sheriff's Office, several Kane County sheriff's deputies,³ and several employees of the Elgin Mental Health Center⁴ (case No. 19-L-84). The complaint alleged a "Conspiracy to Intentionally Inflict Emotional Distress." On June 10, 2019, Bertha filed a first amended complaint for "Conspiracy to Intentionally Inflict Emotional Distress and to Commit Medical Malpractice." The first amended complaint omitted the Kane County Sheriff's Office and Deputies Hunger, Flowers, and Gengler as defendants, but added two mental health professionals—Naina Desai and Joanne Langley—as defendants. The claims against Paddock and Hitzeman were based on the allegedly defamatory Daily Herald article published on or about November 3, 2013. On July 11, 2019, Paddock and Hitzeman moved to dismiss the first amended complaint as to them because, *inter alia*, the claims violated the single-refiling rule. The trial court agreed and, on August 16, 2019, it dismissed with prejudice the first amended complaint as to Paddock and Hitzeman. The trial court gave Bertha leave to file an amended complaint against the remaining defendants. Bertha moved to vacate the dismissal of Paddock and Hitzeman. On September 27, 2019, the trial court denied the motion, and Bertha filed a notice of appeal. We dismissed the appeal for lack of jurisdiction because (1) there was no final judgment as to all claims

entirety. See *Hudson v. City of Chicago*, 228 Ill. 2d 462, 469 n.1 (2008).

³The Kane County Sheriff's deputies named in the complaint were Corey Hunger, Scott Flowers, and Patrick Gengler.

⁴The employees named in the complaint were Thomas Zubik, Ghouse Mohiuddin, Muzhar Khan, and Mohammed Ali.

and (2) parties and the trial court did not make a special finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 8 On August 23, 2019, Bertha filed a second amended complaint naming Zubick, Ali, Khan, Mohiuddin, Langley, and Desai as defendants. Bertha also added another Daily Herald journalist, Susan Sarkauskas, as a defendant, alleging that she defamed him in a June 24, 2019, Daily Herald article entitled “Chicago Man Charged with Assault of Deputy at Kane County Courthouse.” The article described an incident that occurred when Bertha was at the Kane County Courthouse to attend a proceeding in this case. On July 16, 2021, the trial court dismissed the claim against Sarkauskas without prejudice.

¶ 9 On August 17, 2021, Bertha filed his third amended complaint—entitled “Complaint for Conspiracy to Commit Defamation and Intentionally Inflict Emotional Distress”—against Zubik, Ali, Khan, Mohiuddin, Langley, Desai, and Sarkauskas. The third amended complaint alleged that Sarkauska defamed Bertha in the June 24, 2019, Daily Herald article by falsely writing that, according to “[a]uthorities” and a “the sheriff’s report,” (1) Bertha, without provocation, walked toward a court security officer and screamed at him, and (2) Bertha threatened the officer while being taken to the courthouse’s lockup. Bertha also claimed that Sarkauskas defamed him by writing that Bertha’s claim against the Daily Herald had been dismissed in May 2019 (Sarkauskas did not base this representation on “[a]uthorities” and “the sheriff’s report”). Sarkauskas moved to dismiss the third amended complaint as to her, contending that the article was substantially true and thus protected by the fair-report privilege. On September 24, 2021, the trial court granted the motion, dismissing with prejudice the claims against Sarkauskas. On September 27, 2021, Bertha moved to vacate the dismissal of the claims against Sarkauskas and the August 16, 2019, dismissal of the first amended complaint as to Paddock. On November 2, 2021, the trial court denied the

motion. Its order stated, “This is a final and appealable order pursuant to IL S. Ct. Rule 304(a) as to [d]efendants Sarkauskas, [Paddock], and Harry Hitzeman.” On November 23, 2021, defendant filed his notice of appeal from the orders of August 16, 2019, September 24, 2021, and November 2, 2021.

¶ 10

II. ANALYSIS

¶ 11 On appeal, Bertha challenges the dismissals of Paddock and Sarkauskas but not the dismissal of Hitzeman. Paddock and Sarkauskas have filed a joint brief.

¶ 12 Paddock and Sarkauskas brought their motions to dismiss under section 2-619 of the Code of the Civil Procedure (735 ILCS 5/2-619 (West 2020)). “[A] section 2-619 motion admits the legal sufficiency of the plaintiff’s claims but raises defects, defenses, or other affirmative matter, appearing on the face of the complaint or established by external submissions, that defeats the action.” *Jaros v. Village of Downers Grove*, 2020 IL App (2d) 180654, ¶ 35. We review *de novo* a section 2-619 dismissal. *Id.*

¶ 13 Bertha first challenges the August 16, 2019, order dismissing Paddock as a defendant in Bertha’s first amended complaint. The trial court concluded that the single-refiling rule barred the claims against Paddock. Section 13-217 of the Code of Civil Procedure (Code) (735 ILCS 5/13-217 (West 1994)) provides that if an action is dismissed for want of prosecution, the plaintiff “may commence a new action within one year or within the remaining period of limitation, whichever is greater.” “Our supreme court has interpreted section 13-217 of the Code as ‘expressly permit[ting] one, and only one, refiling of a claim even if the statute of limitations has not expired.’” *Bank of New York Mellon v. Dubrovay*, 2021 IL App (2d) 190540, ¶ 22 (quoting *Flesner v. Youngs Development Co.*, 145 Ill. 2d 252, 254 (1991)).

¶ 14 In *Bank of New York Mellon*, we explained that, to determine whether claims are the same for purposes of the single-refiling rule, courts use the transactional test that applies in *res judicata* cases. *Id.* ¶ 23. We said:

“The transactional test treats separate claims as the same cause of action ‘ “if they arise from a single group of operative facts.” ’ [Citation.] Courts should approach this inquiry ‘ “ ‘pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.’ ” ’ [Citation.]” *Id.* ¶ 23.

Although the first amended complaint framed the cause of action as a conspiracy to intentionally inflict emotional distress and to commit medical malpractice, the theory of recovery against Paddock was essentially that it defamed Bertha by publishing Hitzeman’s article. Under the transactional test, that claim is the same as the claims in Bertha’s prior lawsuits based on Hitzeman’s article.

¶ 15 To avoid the impact of the single-refiling rule, Bertha argues as follows:

“The lower court did not properly apply existing law when it dismissed [Paddock] as a defendant from plaintiff’s first amended complaint. Plaintiff states a claim against [Paddock] for repeatedly publishing false information regarding his arrests causing him severe emotional distress. Illinois[’s] single refiling rule does not apply when a ‘continuing or repeated tort’ occurs. The statute of limitations for a ‘continuing or repeated tort’ does not begin to run until the last act of misconduct. *Bank of Ravenswood v. City of Chicago*, 307 Ill. App. 3d 161, 167 (1999). *** [Paddock’s] last act of misconduct occurred when they published an article written by Sarkausas [*sic*] that include false information regarding

the plaintiff's arrest for aggravated assault in June 2019. This is the first time that the plaintiff has filed a lawsuit seeking damages for the severe emotional distress that their second defamatory article caused."

¶ 16 The argument fails for two reasons. First, defendant cites no authority for the proposition that "Illinois[]" single refiling rule does not apply when a 'continuing or repeated tort' occurs." It is well established that "[a]rguments without citation of authority are forfeited." *Porter v. Cub Cadet LLC*, 2020 IL App (2d) 190823, ¶ 9. We grant Bertha that *Bank of Ravenswood*, 307 Ill. App. 3d at 167, stands for the proposition that "[w]here a tort involves a continuing or repeated injury *** the statute of limitations does not begin to run until the date of the last injury or when the tortious acts cease." However, the statute of limitations is not at issue here. Bertha's failure to cite pertinent authority forfeits his argument. *In re Marriage of Gabriel and Shamoun*, 2020 IL App (1st) 182710, ¶ 74. Second, defendant contends that he was subject to a continued or repeated tort based on the Daily Herald's publication of Sarkauskas's June 2019 article. However, as Paddock and Sarkauskas note, Bertha's first amended complaint contained no allegations relative to the June 2019 article. Therefore, we fail to see what bearing that article has on the trial court's decision to dismiss the first amended complaint. Accordingly, the trial court correctly dismissed Bertha's first amended complaint as to Paddock.

¶ 17 Bertha next challenges the September 24, 2021, order dismissing the third amended complaint as to Sarkauskas. In the complaint, Bertha maintained that Sarkauskas defamed him by writing in her June 24, 2019, Daily Herald article that (1) Bertha approached a court security officer and started screaming at him without provocation; (2) Bertha threatened the officer while being taken to the courthouse's lockup; and (3) Bertha was at the courthouse for his lawsuit, from which the Daily Herald had been dismissed in May 2019. Paddock and Sarkauskas contend that

the court properly dismissed the claims against Sarkauskas because the fair-report privilege protects her. As we have explained:

“ ‘[T]he fair report privilege has two requirements: (1) the report must be of an official proceeding; and (2) the report must be complete and accurate or a fair abridgement of the official proceeding.’ [Citation.] The fair-report privilege is a qualified privilege and courts have consistently held that news reports based on the records and utterances of police and other law enforcement officers are the types of official proceedings protected by this privilege. [Citations.] For a publication to be considered a fair abridgment, the report must convey to readers a substantially correct account of the official proceedings. [Citation.] A reporter is not privileged to make additions of his own that would convey a defamatory impression or to indict expressly or by innuendo the veracity or integrity of any of the parties. [Citation.] Finally, it is the accuracy of the summary, not the truth or falsity of the information being summarized, that is the ‘benchmark of the privilege.’ [Citation.] A defamatory statement is not actionable if it is privileged; this is a question of law. [Citation.]” *Eubanks v. Northwest Herald Newspapers*, 397 Ill. App. 3d 746, 749-50 (2010).

The determination of whether a news report is a fair abridgement “is made by comparing the gist or sting of the alleged defamation in the official report or proceedings with the gist or sting in the news account; if it is the same, then the news item is a fair abridgement of the proceedings and is covered by the reporting privilege.” *Harrison v. Chicago Sun-Times, Inc.*, 341 Ill. App. 3d 555, 572 (2003).

¶ 18 Bertha argues that the fair-report privilege does not apply because the article was not a fair abridgement of the arresting officer’s report. The record shows that Officer Richard Malott of the

Kane County Sheriff's Office arrested Bertha. Malott was the alleged victim of the assault described in Sarkauskas' article in the Daily Herald. Malott described the incident to Officer Hoyt of the Kane County Sheriff's Office and both officers wrote reports concerning the incident. Their reports have a few discrepancies. Sarkauskas's article is consistent with Hoyt's secondhand account of the incident but deviates from Malott's account in some of the same ways Hoyt's account does. Bertha argues that the discrepancies between Malott's account and Sarkauskas' make the fair-report privilege unavailable. First, Bertha notes that the article states: "Authorities said Bertha 'without provocation' walked toward a court security officer and screamed at him." Bertha contends that, according to Malott's report, Bertha said nothing when he first approached him. However, Malott also reported that he asked Bertha not to stand so close to him. When Malott started to move away from Bertha, Bertha moved closer. Several times, Malott told defendant that he "needed to stay away from [Malott] or [he] would arrest [Bertha]." Bertha uttered obscenities and called Malott a " 'white racist faggot.' " As Malott walked away from Bertha, "Bertha aggressively came towards [Malott] with his hands raised and his chest pushed out." Malott reported that he pushed Bertha away and Bertha came at him "yelling 'or what you gonna fuckin do.' " Although Bertha was not screaming when he first approached Malott, he yelled an obscenity at Malott without provocation. Thus, Malott's report and the allegedly defamatory statement in Sarkauskas's article have the same "sting." Accordingly, the fair-report privilege applies to that statement.

¶ 19 Bertha also contends that the article was not a fair abridgement of Malott's report because the article stated that Bertha threatened the arresting officer "[w]hile being taken to the courthouse's lockup." Malott's report indicated that, *before* Bertha was arrested, Bertha told Malott that he would kill Malott and his whole family. Paddock and Sarkauskas argue, and we

agree, that the “sting” is the same regardless of whether Bertha made the threat before or after being arrested.

¶ 20 Defendant also claims the statement in Sarkauskas’s article—that his claim against the Daily Herald had been dismissed in May 2019—defamed him. This statement did not appear in the police reports Sarkauskas relied on, so the fair-report privilege does not protect it. Nonetheless, the statement was substantially true and, therefore, not actionable. As explained in *Hardiman v. Aslam*, 2019 IL App (1st) 173196, ¶ 7:

“[T]he substantial truth doctrine is a defense to a defamation claim. [Citation.] So long as the alleged defamatory statement is substantially true, the statement is not actionable. [Citation.] To be substantially true does not mean that every detail of the statement needs to be accurate. [Citation.] The defendant bears the burden of establishing the substantial truth of the assertions[,] which can be accomplished by showing that the ‘gist’ or sting’ of the defamatory material is true. [Citation.]”

¶ 21 Although Paddock (the publisher of the Daily Herald) was not dismissed from the lawsuit in May 2019 and was still a party in June when Sarkauskas’ article was published, Paddock was dismissed two months later in August. We thus agree with Paddock and Sarkauskas that “the ‘sting’ of the allegedly defamatory material—that [Paddock] was dismissed from this action—is true, and the timing of [Paddock’s] dismissal is immaterial to the alleged defamatory statement.”

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 24 Affirmed.