2012 IL App (2d) 110573-U
No. 2-11-0573
Order filed September 13, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOHN LINDVALL, Plaintiff-Appellant, v. RICHARD J. NAKON AND ASSOCIATES, RICHARD J. NAKON, and JAMES W. KAISER, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 10-L-383 Honorable Margaret J. Mullen, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

Held: The trial court properly granted defendants' motion to dismiss plaintiff's legal malpractice complaint: although plaintiff alleged that he committed certain conduct due to defendants' negligence, his criminal conviction for that conduct foreclosed him from recovering the resulting damages.

¶ 1 Plaintiff, John Lindvall, appeals from an order of the circuit court of Lake County dismissing, with prejudice, his complaint seeking recovery from defendants, Richard J. Nakon, James W. Kaiser, and Richard J. Nakon and Associates, for legal malpractice. For the reasons that follow, we affirm.

¶ 2 According to the complaint and the exhibits attached to it, Lara Larson named plaintiff executor of her will and trustee of a trust for the benefit of her husband, Robert Larson, and their children. Lara Larson died in 2004. Plaintiff retained Kaiser, an attorney with the law firm of Richard J. Nakon and Associates, to represent him in his capacity as executor and trustee. Plaintiff was legally blind and, according to the complaint, when he retained Kaiser, "he stressed his need of [the law firm's] complete and total assistance in his handling of the Estate and Trust as not only did he not have any experience in the handling of such matters, but being legally blind, he could not see any document placed before him and would need to rely upon his attorneys to explain that everything that he was doing, should be doing, or had done and to ensure everything had been done correctly and above board [*sic*]." Plaintiff was appointed to serve as the independent executor of Lara's estate (see 755 ILCS 5/28-2(a) (West 2004)). Kaiser did not suggest that, because of plaintiff's visual impairment, supervised administration of the estate (see 755 ILCS 5/1-2.16 (West 2004)) would be preferable to independent administration.

¶ 3 Plaintiff operated a group of gift shops, and he used a portion of the trust's assets to purchase equity in that business. Kaiser drafted a document entitled "Investment Waiver, Hold Harmless and Guaranty" (Investment Waiver), which recited that plaintiff was "concerned" that the investment might not be considered a prudent investment. Plaintiff signed the Investment Waiver as did Robert Larson, who signed on behalf of himself and his children with Lara. Under the Investment Waiver, Robert Larson agreed to hold plaintiff harmless "from any and all damages, claims, [and] causes of action." Plaintiff agreed to personally guaranty the value of the trust's "original investment" for a period of five years. According to the complaint, Kaiser did not advise plaintiff that investment of

trust funds in his own business was improper. The investment was lost and plaintiff lacked sufficient assets to honor his personal guaranty.

¶ 4 The complaint further alleged that, "between 2004 and 2008, *** Robert Larson[] would periodically take or retain the Trust checkbooks in his own possession, making out various checks for purposes in violation of the provisions of the Trust and causing [plaintiff] to execute those checks." Kaiser did not monitor the disbursement of funds from the trust.

¶ 5 In 2008, Robert Larson and the other beneficiaries of the trust initiated proceedings to have plaintiff removed as trustee. The proceedings resulted not only in plaintiff's removal, but in plaintiff being surcharged $167,000 for the improper disbursements from the trust. Plaintiff further alleged that he had "been forced to retain counsel to represent him in the allegations brought against him by the People of the State of Illinois through the State's Attorney of Lake County, Illinois and resulted in charges as well as in the civil proceedings brought against him, all to [his] damage *** in an amount approaching $200,000.00."

¶ 6 Defendants filed a combined motion to dismiss pursuant to sections 2-615 and 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619(a)(9) (West 2010)). Defendants sought dismissal under section 2-615 on the basis that plaintiff failed to allege facts showing that their alleged breaches of their duty to plaintiff was the cause of the damages he allegedly suffered. The portion of the motion seeking dismissal under section 2-619(a)(9) asserted that the damages were the result of criminal conduct on plaintiff's part. Defendants argued, in essence, that those who commit crimes cannot employ a theory of legal malpractice to shift the pecuniary consequences of their conduct. In support of the argument, defendants submitted a copy of a three-count indictment charging plaintiff with theft (720 ILCS 5/16-1(a)(1)(A) (West 2004)), identity theft (720 ILCS

5/16G-15(a)(1) (West 2006)), and unlawful use of a credit card (720 ILCS 250/8 (West 2006)). The count charging theft alleged that plaintiff "knowingly obtained unauthorized control over property of the Estate of Lara M. Larson, being United States Currency, having a total value in excess of $100,000.00, but not in excess of $500,000.00, intending to deprive the Estate of Lara M. Larson, permanently of the use of the property."[1]

¶ 7 In his response to the motion, plaintiff argued, *inter alia*, that the part of defendants' motion seeking dismissal under section 2-619(a)(9) "[flew] in the face of the allegations in the Complaint," which established that defendants were responsible for plaintiff's "predicament." In their reply, defendants noted that plaintiff had pleaded guilty to a reduced charge of misdemeanor theft. A copy of the sentencing order attached to the reply shows that the trial court ordered plaintiff to pay $191,488 in restitution in accordance with a settlement agreement between plaintiff and "Carleen Larson as trustee for the estate of Lara Larson." The order noted that "to date, $26,000.00 has been paid," which would leave a balance of $165,488. Despite the relatively small discrepancy between this amount and the $167,000 in surcharges alleged in plaintiff's complaint, there is no dispute that the criminal conviction and the surcharges in the civil matter arise from the theft or misappropriation of the same funds. Indeed, at oral argument, plaintiff's attorney conceded that the same funds were at issue in both the criminal prosecution and the civil action against plaintiff.

¶ 8 On January 6, 2011, the trial court dismissed the complaint pursuant to section 2-615, but granted plaintiff leave to file an amended complaint on or before February 3, 2011. The court

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[1]A transcript of the testimony before the grand jury that indicted plaintiff is included in the record on appeal. It is apparent from the testimony that the theft charge pertains to funds misappropriated from the trust created by Lara Larson, rather than from her estate *per se*.

reserved ruling on defendant's request for dismissal pursuant to section 2-619(a)(9). On April 14, 2011, plaintiff moved for leave to file an amended complaint *instanter*. On May 17, 2011, the trial court denied the motion on the basis that the proposed amended complaint failed to cure the original complaint's deficiencies. The trial court dismissed the complaint with prejudice. This appeal followed.

¶ 9 As noted, defendant sought dismissal pursuant to section 2-615 and section 2-619 of the Code. "A section 2-615 motion attacks the legal sufficiency of the plaintiff's claims, while a section 2-619 motion admits the legal sufficiency of the 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." *Aurelius v. State Farm Fire & Casualty Co.*, 384 Ill. App. 3d 969, 972-73 (2008). As explained below, we conclude that the complaint was subject to dismissal under section 2-619 based on the affirmative matter that plaintiff's criminal conduct precludes recovery, in a legal malpractice action, of damages resulting from that conduct. Accordingly, we need not consider the legal sufficiency of the complaint.[2]

¶ 10 Section 2-619(a) provides that, within the time for pleading, a defendant may move for involuntary dismissal of a claim on the basis of any of various enumerated defenses or, under subsection (a)(9), on the basis of "other affirmative matter avoiding the legal effect of or defeating the claim" (735 ILCS 5/2-619(a)(9) (West 2010)). For purposes of section 2-619(a)(9), affirmative

[2]Although the trial court dismissed the complaint under section 2-615, our review of the trial court's ruling on a combined motion under sections 2-615 and 2-619 is *de novo*, and we may affirm the trial court's order on any grounds appearing in the record. *Gatreaux v. DKW Enterprises, LLC*, 2011 IL App (1st) 103482, ¶ 10.

matter "is something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). However, the affirmative matter "must *** be something more than evidence offered to refute a well-pleaded fact in the complaint." *Heller Equity Capital Corp. v. Clem Environmental Corp.*, 232 Ill. App. 3d 173, 178 (1992).

¶ 11 Here, plaintiff alleged that he had been "forced to retain counsel" to represent him in a criminal prosecution. As noted, there is no dispute that the acts giving rise to the charges arose from the same misconduct that led to the surcharges for which plaintiff seeks recovery, to wit, the misappropriation of trust assets, including those assets ostensibly invested in plaintiff's business with plaintiff's personal guaranty against a loss in value. See *People v. Lopez*, 129 Ill. App. 3d 488 (1984) (trustee who used trust assets for personal purposes was guilty of theft even though he did not conceal his misappropriation of funds, he executed promissory notes to the trust, and he partly repaid the amounts he misappropriated). The affirmative matter identified by defendants as a bar to plaintiff's lawsuit is the outcome of the criminal prosecution. Plaintiff was convicted of theft for knowingly obtaining unauthorized control of trust assets with the intent to permanently deprive the trust of those assets. We agree with defendants that, under the holding of *Buttitta v. Newell*, 176 Ill. App. 3d 880 (1988), surcharges that arose from plaintiff's criminal misconduct are not recoverable as damages in a legal malpractice lawsuit.

¶ 12 In *Buttitta*, the plaintiff brought a legal malpractice action alleging that the negligence of the defendant, attorney Arthur Newell, had resulted in a judgment being entered against plaintiff for usury. That judgment had been affirmed in *Saskill v. 4-B Acceptance*, 117 Ill. App. 3d 336 (1983).

The loan was usurious because the stated interest rate was the maximum allowed by law—11%—and the lenders charged points on the loan, which qualified as interest. The *Saskill* court rejected the argument that the addition of points was a *bona fide* error, inasmuch as Newell did not realize that points would affect the interest calculation. The court reasoned that "although Newell may have been mistaken about the computation of interest rates, the evidence set forth above which was before the trial court makes it clear that defendants and Newell knew that plaintiff was being charged more for the use of defendants' money than the statute permits." *Id.* at 340-41. We note that "[i]n general, knowledge is the awareness of the existence of facts that make a defendant's conduct unlawful." *People v. Hinton*, 402 Ill. App. 3d 181, 184 (2010). Thus, the salient question in *Buttitta* was simply whether the lenders knew that the stated rate of interest plus the points charged exceeded 11%, not whether they (or Newell) understood that the points qualified as interest or that the addition of points violated the usury laws. In *Buttitta*, the court concluded that, because the plaintiff had intentionally charged interest at an illegal rate, he would not be not permitted to seek indemnification from Newell for the damages the plaintiff suffered as a result of the judgment in the usury lawsuit. *Buttitta*, 176 Ill. App. 3d at 884. This was true even though, under the facts described in *Buttitta* and *Saskill*, it does not appear that the plaintiff acted in bad faith and his alleged misconduct might not have occurred but for Newell's alleged malpractice.

¶ 13 By means of the same reasoning, plaintiff's criminal conviction of theft from the trust precludes him from arguing that the damages he suffered were the result of his attorneys' negligence. The conviction establishes that plaintiff *knowingly* obtained unauthorized control over trust property. By pleading guilty to theft, plaintiff necessarily admitted that he exercised control over trust property and that he did so with knowledge of facts (*i.e.*, that the property was to be used for impermissible

purposes) that vitiated his authority to do so. Whether defendants were negligent in failing to monitor plaintiff's use of trust funds is of no moment; pursuant to *Buttitta*, because plaintiff was aware of the facts that made his conduct a crime, he cannot shift any resultant pecuniary loss to his attorneys. As in *Buttitta*, it makes no difference whether plaintiff was aware that his conduct violated the law or whether the exercise of due care by defendants would have prevented that conduct from occurring.

¶ 14 Finally, we are aware that a conviction entered upon a guilty plea does not always foreclose a party in a civil matter from relitigating whether a crime occurred. See *Talarico v. Dunlap*, 177 Ill. 2d 185 (1997). However, plaintiff's conviction is, at the very least, *prima facie* evidence of the criminality of his conduct. Thus, plaintiff bore the burden of presenting evidence that, despite his guilty plea, he committed no crime. *Cf. Griffin v. Universal Casualty Co.*, 274 Ill. App. 3d 1056, 1063-64 (1995) ("Once the defendant [seeking dismissal under section 2-619] meets its burden of presenting affirmative matter through sufficient affidavits *** the burden shifts to the plaintiff, and unless the plaintiff then files a counteraffidavit to refute evidentiary facts in the defendant's supporting affidavit, those facts are deemed admitted."). Because plaintiff failed to meet this burden, defendants were entitled to dismissal under section 2-619(a)(9).

¶ 15 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 16 Affirmed.