

2012 IL App (2d) 111024-U
No. 2-11-1024
Order filed June 21, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JOSEPH JOHNSON,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellant,)	
)	
v.)	No. 10-L-1020
)	
NIEW LEGAL PARTNERS, INC.)	
and KATHLEEN I. NIEW,)	Honorable
)	Patrick J. Leston,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hutchinson concurred in the judgment.

ORDER

Held: The trial court properly dismissed plaintiff's second-amended complaint with prejudice for inadequately pleading a cause of action for legal malpractice; affirmed.

¶ 1 Plaintiff, Joseph Johnson, purchased an insurance policy and an annuity from defendants, Niew Legal Partners, Inc., and Kathleen I. Niew (collectively Niew), who is an insurance agent and an attorney licensed to practice law in Illinois. When the financial products recommended by Niew did not perform to plaintiff's expectations, plaintiff filed a one-count complaint against Niew on August 18, 2010, seeking damages arising from Niew's alleged legal malpractice. The trial court

dismissed plaintiff's initial complaint and first-amended complaint, and, finally, dismissed the second-amended complaint with prejudice. Each time, the court found that plaintiff had not pled sufficient facts to state a cognizable legal malpractice claim against Niew for the recovery of plaintiff's alleged investment loss, pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)). Plaintiff appeals the trial court's dismissal of his second-amended complaint. We affirm.

BACKGROUND

¶ 2 The initial complaint alleged the following. Over a period of approximately 20 years, plaintiff and Niew had an ongoing, attorney-client relationship, and during that time period, Niew represented plaintiff in a dissolution of marriage proceeding, real estate transactions, and financial planning. While under the guise of legal advice, Niew convinced plaintiff to purchase a \$300,000 life insurance policy from Pan American Life Insurance Company (Pan American). At the time, Niew was acting as an agent for Pan American and would benefit through commissions for the sale of the policy to plaintiff. Niew misrepresented to plaintiff the value of the Pan American policy and what its performance would be. Upon discovery of the poor performance of the policy, Niew, still acting as plaintiff's attorney, advised and convinced plaintiff to surrender the policy and purchase an annuity from Allianz Life Insurance Company of North America (Allianz). Due to surrendering the Pan American policy, plaintiff incurred a loss of \$14,364.

¶ 3 Subsequent to purchasing the Allianz policy, which was sold while Niew acted as an agent for Allianz, plaintiff learned that the statements made by Niew as to the performance of Allianz were incorrect. Not only were there "caps" on the potential percentage of profit, there was no enhanced withdrawal benefit amount to be provided until the eleventh year of the policy. Additionally, Niew

never advised that she would be profiting from the commissions. Plaintiff did not learn of the discrepancies as to what Niew had advised him, both legally and as an insurance agent, until November 2009. At the time plaintiff withdrew the Allianz annuity, he suffered a surrender charge of \$33,093.

¶ 4 Plaintiff alleged that Niew breached a duty to comply with the standard of care “constituting professional negligence” by (1) misrepresenting that the insurance funds she recommended plaintiff purchase possessed guaranteed performance rates; (2) failing to advise plaintiff that she would profit through commissions from the sale of the policies to plaintiff; (3) failing to advise plaintiff of the conflict of interest between her duty as an attorney and that as an insurance agent; (4) failing to advise plaintiff of the discrepancies between what she had stated versus the reality of the contents of the insurance policies; and (5) perfecting a scheme to utilize her attorney-client relationship to benefit financially from an insurance endeavor. As a result of Niew’s conduct, plaintiff alleged that he suffered loss of surrender charges totaling \$47,457, loss of investment profits, and “loss” of commissions earned by Niew.

¶ 5 Niew filed a motion to dismiss plaintiff’s complaint pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)), arguing that (1) the facts alleged did not support a claim for legal malpractice; (2) plaintiff’s claim for misrepresentation of the insurance policy value and performance were not actionable; and (3) any well-pled claim against Niew arising from her duties as an insurance agent were barred as a matter of law.

¶ 6 In his opposing brief and during argument on Niew’s motion, plaintiff asserted that his claim sounded in legal malpractice and was brought against Niew in her capacity as a lawyer, not as an insurance agent. Plaintiff argued that the attorney-client relationship between plaintiff and Niew

created a duty of care, which she then breached. According to plaintiff, there was a conflict of interest for Niew as an attorney to profit from her “scheme of convincing plaintiff” to transfer his funds so that she could sell him insurance and annuity policies.

¶ 7 Following oral argument, the court granted the motion to dismiss for failure to state a claim for which relief could be granted, pursuant to section 2-615 of the Code, with leave to amend. In granting the motion, the court explained:

“Basically the complaint in essence alleges that [Niew] sold *** an annuity and an insurance policy and took a commission. Just because she’s an attorney does not preclude her from doing it. It doesn’t preclude her from taking a commission.

* * *

And, this does not appear to be the exercise of legal services in your complaint. Although the defendant was an attorney, it appears to be the sale of an annuity and an insurance policy. The client got what [he] bought, and then [he] didn’t like it. I don’t see any malpractice there. If you can figure out another way to plead, I’ll take a look at it again.”¹

¶ 8 Plaintiff filed an amended complaint on March 16, 2011. The amended complaint, nearly identical to the initial complaint, did not plead any further facts against Niew. Instead, plaintiff offered two additional allegations as to how he alleged Niew’s actions constituted a violation of rules

¹The trial court did not reach Niew’s section 2-619 argument that any claim against her as an insurance agent was barred by law or otherwise deficient.

1.7 and 1.8 of the Illinois Rules of Professional Conduct (Ill. Rs. Prof'l Conduct Rs. 1.7, 1.8) (eff. Aug. 1, 1990) (conflict of interest).²

¶9 Niew filed a motion to dismiss the amended complaint, pursuant to section 2-619.1, arguing that the additional purported violation of certain ethical rules did not transform the first pleading into a cognizable claim for legal malpractice, and the complaint should be dismissed for the same reasons the trial court dismissed the initial complaint, as plaintiff simply re-filed the same factually deficient pleading.

¶10 At the hearing, plaintiff explained that the inclusion of the Rules of Professional Conduct was to set the standard of care for Niew, and, also that there was “clearly a conflict” of interest “between the legal advice versus the selling of the insurance,” as plaintiff was induced, “under the guise of legal advice,” to come in and give plaintiff legal advice on estate planning. The trial court disagreed and granted the second motion to dismiss, with leave to amend. In making its ruling, the court explained:

“I don’t believe that the Complaint states a cause of action.

* * *

I do not believe the Complaint alleges [Niew] was rendering legal services at the time she sold the-in selling these insurance policies to the client.

²The Illinois Rules of Professional Conduct, adopted February 8, 1990, and effective August 1, 1990, which were in effect at the time of the conduct alleged, have been repealed and replaced by the Illinois Rules of Professional Conduct of 2010, effective January 1, 2010.

Now, there may be some theoretical level where you can-may be something you can get out of your [1.7 and 1.8 violations]. *** Misrepresented the insurance funds or failed to advise of discrepancies between what [Niew] had stated to [plaintiff] versus the reality. But those are just conclusory. There are no facts in your complaint to support those two conclusions.

The fact that there's a surrender charge, that's stated in the policy. That doesn't create legal malpractice or legal negligence of any type. You have alleged that-learned that the statements made by Niew as to the performance of [Allianz] were incorrect but [you] failed to allege any statements made by Niew when they were made and to whom they were made and how they were incorrect. So that's conclusory and let's disregard that, too.

* * *

I think that the negligent acts are not alleged with specificity to conclude-to be able to conclude that they were done in the rendering of legal services.

* * *

I don't believe the attorney/client relationship is sufficiently pled at the time of the sale of the insurance policy. You may be able to correct that, I don't know."

¶ 11 Plaintiff filed his final amended complaint on July 22, 2011. Again, this pleading was substantially the same as the first two pleadings and asserted the same one-count claim. This time, however, plaintiff inserted three additional allegations. First, plaintiff alleged that, under the guise of Niew's advice, and on the date of the real estate transaction, Niew convinced plaintiff to expend the \$300,000 that he had obtained in the real estate transaction to purchase the Pan American policy. Second, plaintiff alleged that, in advising plaintiff to purchase the Allianz annuity, Niew represented

that the policy would never make less than 7%, which plaintiff later learned was false. Third, plaintiff inserted the claim that Niew was “still acting as plaintiff’s personal attorney relative to financial matters” at the time she advised plaintiff to surrender his Pan American policy and purchase the Allianz annuity.

¶ 12 Niew filed a motion to dismiss the second-amended complaint pursuant to section 2-615. Niew argued that the additional facts and allegations asserted in the second-amended complaint did not cure the factual deficiencies the trial court previously determined to be dispositive of the initial and first-amended complaints. Niew argued that the fact that she may have recommended purchasing the Pan American policy following a real estate closing, at which she represented plaintiff, did not demonstrate or suggest that Niew was acting as plaintiff’s attorney and providing him with legal services when she made the recommendation. Niew also pointed out that the summary allegations that she acted as plaintiff’s “personal attorney relative to financial matters” could and should be ignored as conclusory because the complaint was devoid of any facts to support such an allegation. Niew further argued that the additional allegations regarding Niew’s alleged misrepresentations of the Allianz policy’s terms still did not meet the burden of pleading required, and it provided no basis for the imposition of liability upon Niew.

¶ 13 Plaintiff did not file a written response in opposition to the motion to dismiss and elected to stand on the arguments he asserted in response to Niew’s motion to dismiss his first-amended complaint.

¶ 14 On September 21, 2011, the trial court once again dismissed plaintiff’s complaint, but this time with prejudice. In so concluding, the court stated:

“I went back and re-read the movant’s motion to strike, and basically I continued to agree with virtually all the arguments made in the motion to strike. I think that although [plaintiff] knew [Niew] was an attorney, the pleading does not establish that she was acting in a role as an attorney during the course of conduct complained of. That is to say, the annuity, or the sale of the insurance policy.

An attorney by admission to the Bar or being licensed to practice law in Illinois, does not have the right to sell securities, annuities or insurance. The sale of those products are governed by other statutes, both on a federal and a state level. And the allegation does not allege that there was double billing or secret billing or anything of that nature which might have given rise to a fiduciary relationship.

So other than that, I believe that although the defendant was an attorney while doing these acts, that the complaint does not sufficiently establish legal malpractice *** . If the negligence arises from the sale of insurance or the sale of securities or the hybrid, which is the sale of annuities, then the statute required to be breached or the duties required to be breached should arise under those licensing statutes and that has not been pled.

So I agree generally with the arguments made by the defendant and I grant the motion to dismiss.”

¶ 15 Plaintiff did not file a motion to consider, seek leave to file an amendment, or object to the dismissal of his second-amended complaint with prejudice. Plaintiff timely appeals.

¶ 16 ANALYSIS

¶ 17 Plaintiff contends that the trial court erred by dismissing his complaint for legal malpractice pursuant to section 2-615. We disagree.

¶ 18 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). In reviewing the sufficiency of a complaint, we must determine whether the complaint, when viewed in the light most favorable to the plaintiff, alleges facts sufficient to establish a cause of action upon which relief may be granted. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 61. We review *de novo* an order granting or denying a motion to dismiss. *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009); *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003).

¶ 19 In his reply brief, plaintiff cites *Kling v. Landry*, 292 Ill. App. 3d 329, 340 (1997), for the rule that a well-pled complaint must contain ultimate facts to support the cause of action the plaintiff purports to plead, but plaintiff omits the remainder of the rule that “legal conclusions unsupported by allegations of specific facts are insufficient.” *Kling v. Landry*, 292 Ill. App. 3d 329, 340 (1997). Illinois is a fact-pleading jurisdiction (see, *e.g.*, *Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 451 (2004)), and while plaintiff is not required to set forth evidence in the complaint (*Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348 (2003)), plaintiff must allege facts sufficient to bring his claim within a legally recognized cause of action (*Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997)), not simply conclusions (*Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996)). Conclusions of law and fact that are not supported by allegations of specific facts which form the basis of such conclusions are not admitted and should be ignored. *Towne v. Town of Libertyville*, 190 Ill. App. 3d 563, 566 (1989). If, after deleting the conclusions that are pleaded, there are not sufficient allegations of fact to state a cause of action, dismissal is proper. *Towne*, 190 Ill. App. 3d at 567.

¶ 20 To establish a cause of action for legal malpractice, plaintiff must plead actual facts that establish the following elements: (1) the existence of an attorney-client relationship; (2) a negligent act or omission that breached a duty the attorney owed to the client; (3) proximate cause that establishes that, but for the attorney's negligence, the plaintiff would not have suffered an injury; and (4) damages. *Timothy Whelan Law Associates, Ltd. v. Kruppe*, 409 Ill. App. 3d 359, 363 (2011); *Cripe v. Leiter*, 291 Ill. App.3d 155, 158 (1997). Even construing the complaint in the light most favorable to plaintiff, we find the complaint fails to allege facts sufficient to show a cause of action for legal malpractice.

¶ 21 In all three motions to dismiss, the trial court held that plaintiff failed to plead the existence of an attorney-client relationship or, more specifically, that any of the activity alleged in the complaint related to legal representation. Plaintiff maintained in his appellate brief that he alleged the existence of an attorney-client relationship between himself and Niew, but he did not reference any specific allegations to support this assertion.

¶ 22 During oral argument, plaintiff referred to the allegations in the second-amended complaint that Niew convinced plaintiff to purchase the Pan American policy "under the guise of legal advice" at the time she was representing plaintiff in a real estate closing and that Niew advised and convinced plaintiff to purchase an annuity from Allianz while she was "still acting as plaintiff's personal attorney relative to financial matters" to support his contention that he properly pled a cause of action for professional malpractice. We find these allegations are only conclusions of law and plaintiff failed to allege facts to support his claim that Niew's sale of insurance products to plaintiff arose in the context of an attorney-client relationship. Although plaintiff alleged that Niew discussed the purchase of insurance products on the date that she represented him in an August 2003 real estate

transaction, he fails to allege when the policy at issue was purchased or what legal services Niew provided in connection with the policy sale other than the bare allegation that it was under the guise of legal advice at the time Niew represented plaintiff in a real estate closing. That Niew discussed the Pan American policy with plaintiff on the same day as a real estate closing does not establish Niew rendered legal advice in connection with the sale of the policy at issue. The allegation that Niew advised and convinced plaintiff to purchase an annuity from Allianz while she was “still acting as plaintiff’s personal attorney relative to financial matter” suffers the same deficiency as the first allegation; it is conclusory and is not supported by any facts from which one could find that Niew was acting in the capacity as plaintiff’s counsel when she convinced him to purchase the Allianz policy.

¶ 23 While pleadings are to be liberally construed, a complaint must, nevertheless, contain facts necessary to state a cause of action. *Ritchey v. Maksin*, 71 Ill. 2d 470, 474 (1978). A complaint fails to state a cause of action when it omits facts the existence of which are necessary for plaintiff to recover. *Ritchey*, 71 Ill. 2d at 474-75. Here, the second-amended complaint does not plead sufficient facts to establish the first element required for a cause of action for legal malpractice—the existence of an attorney/client relationship. Accordingly, we find the trial court properly dismissed the second-amended complaint. Because plaintiff failed to plead sufficient facts to establish the first element of a legal malpractice action, we need not address the remaining elements of breach or proximate cause.

¶ 24 We next consider whether dismissal of the complaint with prejudice was warranted. Although plaintiff elected to stand on the arguments he previously made in opposition to the motion to dismiss, he did not seek leave to file an amendment or otherwise object before the trial court, and

does not object on appeal to the dismissal of his second-amended complaint with prejudice. The general rule is that where a trial court dismisses a complaint and plaintiff does not seek leave to amend, the cause of action must stand or fall on the sufficiency of the stricken pleading. *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill. 2d 414, 435 (2004).

¶ 25 The right to amend a complaint is not absolute. Generally, a trial court should exercise its discretion liberally in favor of allowing amendments to pleadings if doing so will further the ends of justice. *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113, 128 (2010). Where the party seeking to amend does not attach a proposed amended pleading to its motion or otherwise specify the new allegations that it would include, a trial court has no basis on which to consider whether the amendment would cure the defects in the current pleading. Here, plaintiff has not submitted a proposed amended pleading or identified any new allegations that he wished to make.

¶ 26 Additionally, a complaint may be dismissed with prejudice if it furthers the ends of justice. Thus, the court may determine the ultimate efficacy of a claim and whether plaintiff had previous opportunities to assert his claim. *B.T. Explorations, Inc. v. Stanley*, 187 Ill. App. 3d 23, 26 (1989). Plaintiff's second-amended complaint was his second opportunity to re-plead in order to satisfy the noted deficiencies, and the series of complaints did not differ substantially from one another. Plaintiff has had adequate opportunity to state a cause of action against Niew for legal malpractice and has failed to do so. Accordingly, we find the trial court's dismissal of the second-amended complaint with prejudice was not an abuse of discretion.

¶ 27 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 28 Affirmed.