FOURTH DIVISION
March 16, 2017

No. 1-16-1613

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEO STOLLER and CHRISTOPHER STOLLER,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County.
	)	
v.	)	No. 15 L 856
	)	
LANCE G. JOHNSON, et al.,	)	Honorable
	)	Kathy M. Flanagan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County dismissing plaintiffs' third amended complaint with prejudice is affirmed; plaintiffs cannot state a claim based on an allegation of perjury or subornation of perjury in a prior proceeding, and plaintiffs failed to state a cause of action based on their remaining allegations.

¶ 2 The instant appeal had its origins in a complaint for defamation by Leo Stoller against

Lance G. Johnson, David Abrams, Alfred Goodman, and the law firm Roylance, Abrams, Berdo

& Goodman, LLP (hereinafter "the defamation defendants"), among others. That complaint, which was a second amended complaint, included a claim the defamation defendants aided and abetted each other in avoiding service of process and false swearing, as well as separate claims against additional defendants (hereinafter "the defamation case"). The additional defendants included J. Hayes Ryan, Ryan T. Brown, Chance L. Cooper, and the law firm Gordon & Rees, LLP, who are the attorneys for the defamation defendants (the Gordon defendants or defendants). The defamation defendants filed a motion for summary judgment in the defamation case, the trial court granted the motion, and Leo Stoller appealed (hereinafter the 2013 appeal). This court affirmed the order granting summary judgment. *Stoller v. Johnson*, 2014 IL App (1st) 131250-U. On remand from the 2013 appeal, the Gordon defendants filed a motion to dismiss Leo Stoller's second amended complaint. The trial court granted that motion with prejudice as to counts I through V against all remaining defendants, but allowed repleading of count VI sounding in aiding and abetting against the Gordon defendants.

¶ 3 Thereafter, Christopher Stoller filed a "second amended complaint" on behalf of Leo Stoller, which the trial court dismissed without prejudice as to count VI sounding in aiding and abetting. Christopher Stoller and Leo Stoller (hereinafter "plaintiffs") filed a "third amended complaint" against, *inter alia*, the Gordon defendants (who do not include the entire group of defendants named in the third amended complaint). Defendants filed a motion to dismiss for failure to state a claim and based on the statute of limitations. The trial court granted the motion to dismiss for failure to state a claim and, therefore, had no reason to reach defendants' statute of limitations argument. For the following reasons, we affirm.

¶ 4 BACKGROUND

¶ 5 Plaintiffs' complaint is in ten counts (when properly numbered) against over 35 defendants. The claims in the complaint are based on alleged actions by defendants in the defamation case. Specifically, the third amended complaint alleges that defamation defendants Alfred Goodman, Lance Johnson, and David Abrams all submitted false affidavits in the course of the defamation case related to service of process. The complaint alleges that Alfred Goodman was served with a copy of the complaint and summons for himself, Johnson, and Abrams in the defamation litigation on April 28, 2009. Goodman later filed an affidavit stating he told the process server he (Goodman) was not authorized to accept service on behalf of Johnson or Abrams. Johnson and Abrams both filed their own affidavits stating they never authorized anyone to accept service on their behalf. Plaintiffs' third amended complaint alleges all three affidavits are false. The claims against defendants in this appeal are based on defendants' role in preparing and submitting the allegedly false affidavits.

¶ 6 Count I of plaintiffs' complaint attempts to state a claim for "aiding and abetting." Count I alleges defendants provided assistance in creating and filing the false affidavits. Plaintiffs allege defendants induced Goodman, Johnson, and Abrams to execute the affidavits then filed them with the clerk of the circuit court. Count I alleges defendants' motives in doing so were to thwart the administration of justice and to falsely deny service on Goodman, Johnson, and Abrams. Plaintiffs further allege defendants had a duty to their clients not to engage in fraudulent or criminal activity, which defendants breached and thereby committed a tort against plaintiffs. Count I alleges defendants attempted to cover up their acts and continue to act "with malice, fraud, gross negligence, oppressiveness, aided and abetted, was not a result of mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or human failing, knowingly and willfully engaged in the abuse of process and willful and wanton misconduct."

¶ 7 Count II is for "malicious abuse of process." Count II incorporates and realleges all of the previous counts, including those attempting to state a claim in count I. Count II alleged defendants "induced, conspired, colluded" with the defamation defendants (1) "in attempting to dodge service of process and [s]ummons;" and (2) to manufacture the affidavits and file them, "which was an act in the use of process not proper in the regular prosecution of a lawsuit." Count II of plaintiffs' complaint alleges defendants' purpose was to hinder, harass, and otherwise cause injury to plaintiffs. Plaintiffs further allege defendants committed an abuse of process by filing their motion to dismiss plaintiffs' second amended complaint because the motion contains misstatements of material fact—plaintiffs allege defendants willfully engaged in the abuse of process and willful and wanton misconduct by attempting to dismiss the complaint "on the false grounds of *Res Judicata*." Count II alleges defendants suborned perjury and misused the court's process. Plaintiffs also allege this claim is not barred by the statute of limitations because defendants' acts are ongoing, including the filing of their motion to dismiss the second amended complaint.

¶ 8 Plaintiffs attempted to state a claim for "inequitable conduct" in count III (which they mislabeled count II). What should therefore be count III (we will proceed with the counts in the third amended complaint renumbered accordingly) also incorporated all of the prior allegations, including those in the previous two counts. (Each successive count reincorporates and realleges all of the allegations that precede it.)[1] Count III alleges defendants made a misrepresentation of

[1] When the trial court dismissed plaintiffs' second amended complaint it warned plaintiffs this was an impermissible comingling of causes of action that violated section 2-603 of the Code of Civil Procedure. (735 ILCS 5/2-603 (West 2014)). The court stated "the Plaintiff again improperly re-alleged the entirety of each preceding count into each subsequent count." Plaintiffs persisted in this conduct despite the court's warning. This alone could warrant dismissal of plaintiffs' third amended complaint with prejudice. See *Cable America, Inc. v. Pace Electronics, Inc.*, 396 Ill. App. 3d 15, 25 (2009).

material fact when they filed the "false" affidavits and when they filed their motion to dismiss plaintiffs' second amended complaint, and that defendants did both with the intent to deceive plaintiffs and the trial court. Specifically count III alleges defendants attempted to deceive the court into believing the second amended complaint was barred by *res judicata* "when in fact it was not."

¶ 9 Count IV of plaintiffs' complaint is for "bad faith." Count IV alleges defendants breached a duty owed to plaintiffs by assisting the defamation defendants in creating and filing false affidavits. Plaintiffs allege defendants had a "dishonest purpose" to defraud the trial court "for the purpose of hindering and harassing and otherwise causing harm" to plaintiffs.

¶ 10 Count V alleged "violation of appropriate law." Count V alleged the defamation defendants violated section 32-3(q) [*sic*] and 32-2 of the Criminal Code with their false affidavits. The only allegations against defendants are that all defendants have "conspired together to cover-up said violations."

¶ 11 Plaintiffs attempted to state a cause of action for a violation of 42 U.S.C. § 1983 in count VI of their complaint. Count VI alleges, in its entirety, as follows: "Defendants deprived Stoller of his constitutional due process rights through their abuse of process in filing the false Affidavits of Goodman, Johnson and Abrams, under the color of law in order to deprive the Plaintiff of his constitutional rights of due process and equal protection under the law and took no remedial action to cure their violations."

¶ 12 Count VII of plaintiffs' third amended complaint is titled "fraud." The allegations in count VII are that defendants fraudulently represented to plaintiffs and the trial court that the Goodman affidavit was true. Plaintiffs allege that when defendants made this fraudulent representation they knew and/or later learned that the representation (as to the veracity of the

Goodman affidavit) was false "with the intent to defraud and deceive the Plaintiff and the Court with the intent to deprive the Plaintiff of his due process rights."

¶ 13 Plaintiffs alleged willful and wanton misconduct and negligence in count VIII of the third amended complaint. Count VIII alleges defendants had a duty to plaintiffs not to counsel their clients to engage in or to assist their clients in engaging in conduct defendants knew to be criminal or fraudulent. Plaintiffs alleged defendants breached that duty when they filed the Goodman, Johnson, and Abrams affidavits, and "failed to take any remedial action to cure their willful and wanton misconduct and negligence."

¶ 14 Counts IX and X are labeled "Lance Johnson Fraud Against Plaintiffs" and "David Abrams's Fraud Against Plaintiffs," respectively. Both counts allege that Johnson and Abrams made false statements in their affidavits. Count IX alleges that Johnson, in addition to allegedly falsely averring that he did not authorize Goodman to accept service on his behalf, also allegedly falsely averred that he was "unreachable" on the day Goodman was served. Count IX alleges Johnson made the false statements to deprive plaintiff of his due process rights and that defendants aided and abetted Johnson's fraud by knowingly and willfully filing the false affidavit to deprive plaintiff of his due process rights. Count X alleges Abrams made fraudulent statements in his affidavit to deprive plaintiff of his due process rights, obstruct justice, and defraud the court to avoid service of process.

¶ 15 The trial court entered a written order dismissing plaintiffs' third amended complaint with prejudice. The court noted that in a prior order it stated plaintiffs would be allowed one more opportunity to attempt to amend and found that plaintiffs had failed to state the claims set forth.

¶ 16 This appeal followed.

¶ 17 ANALYSIS

¶ 18 Before reaching the merits of the appeal, we must address whether plaintiffs have forfeited any argument to this court by failing to comply with Illinois Supreme Court Rule 341(h) (eff. Jan. 1, 2016). Rule 341(h) requires the appellants' brief to contain, *inter alia*:

> "Argument, which shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on. *** Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).[2]

Defendants argue plaintiffs' opening brief simply states in perfunctory fashion that the trial court committed reversible error in dismissing plaintiffs' complaint in its entirety. Defendants assert plaintiffs' arguments are not sufficiently supported by reference to the record and fail to discuss the law in any meaningful manner, and that the failure to properly develop such arguments does not merit consideration on appeal. See *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009). In *Lyles*, the court wrote:

> "It is a rudimentary rule of appellate practice that an appellant may not make a point merely by stating it without presenting any argument in support. [Citation.] Plaintiff's brief also fails to comply with Supreme Court Rule 341(e)(7) ([citation]), which provides that the argument section of an appellant's brief 'shall

[2]Defendants raised additional deficiencies in plaintiffs' opening brief—specifically plaintiffs' failure to include the applicable standard of review for each issue, a statement of facts with reference to pages of the record, and a copy of the judgment appealed from— and argued that cumulatively these deficiencies warranted dismissal of plaintiffs' appeal. Plaintiffs attempted to cure one of those defects by filing a motion for leave to file the order that is the subject of the appeal, which this court allowed. In light of our ruling on plaintiffs' violation of Rule 341(h)(7), we have no need to address these additional deficiencies.

> contain the contentions of the appellant and the reasons therefor, with citation of the authorities.' Arguments that do not satisfy Rule 341(e)(7) do not merit consideration on appeal and may be rejected for that reason alone. [Citation.]" *Id.*

¶ 19 We agree with defendants that plaintiffs' opening brief fails entirely to comply with Rule 341(h)(7) and that such failure warrants a finding plaintiffs have forfeited all of their issues for appeal. *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 20 ("we find that plaintiff's opening brief is completely deficient and fails to comply with Rule 341. Although we seldom enter an order dismissing an appeal for failure to comply with supreme court rules, our sound discretion permits us to do so. [Citation.]"). The following is plaintiffs' entire argument in their opening brief:

> "The Illinois Supreme Court in an unanimous opinion in *Cower* [*sic*] *v. Nyberg*, 2015 Ill. 117811 (filed March 19, 2015), tice [*sic*] reiterated that a Complaint should not be dismissed under Section 2-616 [*sic*] of the Illinois Code of Civil Procedure unless it is clearly apparent that no set of fact [*sic*] can be proved that would entitle the Plaintiff to recovery.
>
> A plain reading of the Court's June 14, 2016 final order (CO3571-CO3575) dismissing the Appellant's third amend [*sic*] complaint (CO 3384-CO3437) will reveal that the Court committed clear error and reversible error in that it is 'clearly apparent that there are certain facts which can be proved, in the appellant's third amended complaint (CO 3384-CO3437) which would have entitled plaintiff to recovery."

¶ 20 Although plaintiffs raise arguments in opposition to the trial court's judgment granting defendants' motion to dismiss in his reply brief, "Rule 341(h)(7) provides that '[p]oints not

argued [in the opening brief] are waived and *shall not be raised in the reply brief*.' (Emphasis in original.) [Citation.] Plaintiff did not argue the merits of his underlying claim in his opening brief and has, therefore, waived consideration of the merits on appeal." *Id.* ¶ 19. Although plaintiffs failed to argue the issue at all in their opening brief, they mention in their reply brief that they provided "a concise set of facts as to the issues involving the Trial Court's failure to grant Appellant's Motion to Disqualify the Defendants' attorneys by incorporating by reference Appellant's initial Motion to Dismiss the [defamation defendants'] attorney." The trial court's ruling on a motion to disqualify defendants as attorneys for the defamation defendants is not listed on plaintiffs' notice of appeal. Regardless, to the extent plaintiffs rely on incorporation of any documents, an attempt to incorporate arguments by reference is a violation of Rule 341. *Wilson v. Department of Professional Regulation*, 344 Ill. App. 3d 897, 907 n. 4 (2003); *Stenger v. Germanos*, 265 Ill. App. 3d 942, 952-53 (1994). Plaintiffs did not argue the merits of their claims in their opening brief and, therefore, have forfeited consideration of the merits of the appeal.

¶ 21 If this court were to forgive plaintiffs' completely deficient opening brief and consider the merits of the appeal, we would find that the trial court properly dismissed plaintiffs' third amended complaint with prejudice. We review an order granting a motion to dismiss for failure to state a claim *de novo*, "and we may affirm the trial court's dismissal for any reason supported by the record, regardless of the trial court's reasoning. [Citation.]" *Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶ 11.

> "Illinois is a fact-pleading jurisdiction, requiring plaintiff to allege facts, rather than mere conclusions, to demonstrate that his claim constitutes a viable cause of action. [Citation.] To survive a motion to dismiss, the plaintiff must allege

> specific facts supporting each element of his cause of action and the trial court will not admit conclusory allegations and conclusions of law that are not supported by specific facts." *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 21.

"While this does not require the plaintiff to set forth evidence in the complaint, it does demand that the plaintiff allege facts sufficient to bring a claim within a legally recognized cause of action." *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 26.

> "In ruling on a motion to dismiss pursuant to section 2-615 of the Code, a court must accept as true all well-pleaded allegations of fact in the complaint and all reasonable inferences therefrom. [Citation.] The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. [Citation.] The court must construe pleadings liberally when ruling on a motion to dismiss. [Citation.]" *Aliano v. Ferriss*, 2013 IL App (1st) 120242, ¶ 20.

"A litigant does not have an absolute right to amend under section 2-615, and we will not disturb a trial court's decision dismissing a complaint with prejudice absent an abuse of discretion. [Citation.] In exercising his discretion, the trial court may consider 'the ultimate efficacy of the claim and whether plaintiff had prior opportunities to amend.' [Citation.]" *Hume & Liechty Veterinary Associates v. Hodes*, 259 Ill. App. 3d 367, 370 (1994).

¶ 22 Defendants first argue plaintiffs can never satisfy the pleading requirements for an abuse of process claim, therefore counts I (aiding and abetting), II (malicious abuse of process), and (what should be) count V (violation of 720 ILCS 5/32-2, 32-3) were properly dismissed with

prejudice. Defendants argue plaintiffs can never satisfy the pleading requirements of these claims because the claims are based on an allegation of perjury, and civil actions for damages caused by perjury are not permitted. Defendants also argue plaintiffs failed to plead they were deprived of property or arrested due to the allegedly fraudulent affidavits, and, therefore, they cannot plead a claim for abuse of process. Plaintiffs argue (for the first time in their reply brief, therefore this and all of plaintiffs' arguments are forfeited) that they pled a proper aiding and abetting claim because their claim is that defendants aided and abetted the defamation defendants "in creating three false Affidavits which were filed with the Clerk of the Court and this caused injury to the Plaintiff" and they "plead all the necessary elements" of that claim. Plaintiffs argue this claim was not a subject of the 2013 appeal, in an attempt to argue that count I is not barred by *res judicata*. Plaintiffs state the aiding and abetting claim is the primary claim "surrounded by 8 derivative claims." As to count II, substantively plaintiffs argue the third amended complaint "has plead all of the necessary elements for establishing abuse of process." Specifically, the "existence of both an ulterior purpose and motive for the use of the [regular] court process" and a "clear misuse, misapplication of process for an end other than that which it was designed to accomplish." Plaintiffs also argue that the claims in count II are not time-barred. Plaintiffs argue that the trial court erred in dismissing count IV because they "incorporate[d] 111 Paragraphs in support of the allegations contained in Count IV," and the trial court failed to accept all well-pled facts as true and failed to draw all reasonable inferences in favor of plaintiffs.

¶ 23 Claims Based on Filing of Allegedly False Affidavit

¶ 24 Plaintiffs' first claim based on defendants allegedly inducing or cooperating with the defamation defendants to file a false affidavit in the defamation case is based in aiding and

abetting. Illinois recognizes the tort of aiding and abetting. "Although Illinois courts have never found an attorney liable for aiding and abetting his client in the commission of a tort, the courts have not prohibited such actions." *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 28 (2003).

> "[A] claim for aiding and abetting includes the following elements:
>
> '(1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.' [Citation.]" *Id.* at 27-28.

¶ 25 Liability for aiding and abetting is a species of liability "under a concert of action theory." *Wolf v. Liberis*, 153 Ill. App. 3d 488, 495 (1987). "[T]he Restatement (Second) of Torts controls recovery under the theory of concert of action in Illinois." *Thornwood, Inc.*, 344 Ill. App. 3d at 28 (citing *Wolf*, 153 Ill. App. 3d at 496). Section 876 of the Restatement (Second) of Torts provides:

> "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." Restatement (Second) of Torts § 876 (1979).

¶ 26 The elements of aiding and abetting set forth in *Thornwood, Inc.* are drawn from the Restatement (Second) of Torts § 876(b). *Halberstam v. Welch*, 705 F.2d 472, 477-78 n. 8 (D.C. Cir. 1983). Plaintiffs' allegations in count I of the third amended complaint also contain aspects of the standard for liability stated in the Restatement (Second) of Torts § 876(c). Plaintiffs allege defendants assisted their clients in conduct they knew was fraudulent and separately breached a duty to plaintiffs "not to counsel their clients to engage in perjury, fraud, filing false affidavits." See Restatement (Second) of Torts § 876(c) (1979). Plaintiffs' allegations are insufficient under either standard. As to the elements of aiding and abetting drawn from § 876(b), plaintiffs pled defendants (1) "aided and abetted" the defamation defendants "to create and file *** three false Affidavits," (2) defendants "were regularly aware of their role as part of the overall tortious activity," and (3) defendants "assisted the principal violation of manufacturing three false affidavits" and then filed them. The allegations based on § 876(c), to the extent plaintiffs intended to state them separately, are that defendants (1) owed a duty to plaintiffs "not to counsel their clients to engage in perjury or fraud" and (2) defendants breached that duty.

¶ 27 Plaintiffs have done no more than paraphrase the elements of aiding and abetting in conclusory terms.

> "[A] pleading that merely paraphrases the elements of a cause of action in conclusory terms is insufficient. [Citations.] Furthermore, absent the necessary allegations, even the general policy favoring the liberal construction of pleadings will not satisfy the requirement that a complaint set forth facts necessary for

> recovery under the theory asserted. [Citation.]" *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 735 (2009).

Plaintiffs have failed to plead any specific facts to support the elements of the cause of action. Compare *Thornwood, Inc.*, 344 Ill. App. 3d at 29 (reversing dismissal of complaint for aiding and abetting and setting forth specific alleged acts of the defendants and specific knowledge of the defendants while perpetrating those acts).

¶ 28 Further, plaintiffs' third amended complaint alleges defendants' acts of preparing and filing the allegedly false affidavits "caused cognizable injury." Plaintiffs also allege defendants' conduct "deprived the Plaintiffs of their rights, privileges and immunities secured by the Constitution and law of the United States." Plaintiffs prayed for relief of one million dollars in compensatory damages plus punitive damages. Defendants argue, and we agree, plaintiffs have failed to plead facts that would demonstrate that defendants' allegedly wrongful acts caused a cognizable injury. "A complaint fails to state a cause of action if it does not contain factual allegations in support of *each element of the claim* that the plaintiff must prove in order to sustain a judgment. [Citation.] Furthermore, a complaint may not rest on mere unsupported factual conclusions." (Emphasis added.) *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1037 (1998). Plaintiffs have not identified what rights they were deprived of or any specific harm from the filing of the affidavits. Plaintiffs contend the purpose of the filing was to thwart service of process against the defamation defendants, but plaintiffs have not alleged any effect of the filings.[3] Moreover, plaintiffs claim defendants aided and abetted perjury and fraud by the

[3] Defendants filed a motion to quash service by certified mail in the defamation case. On June 26, 2009, the trial court granted defamation defendants' motion to quash service by certified mail. Leo Stoller appealed. This court found that while the motion was pending in the trial court, Leo Stoller "attempted to interpose personal service on [defamation] defendants and submitted purported affidavits of a process server to that effect." *Stoller v. Johnson, et al.*, No.

defamation defendants. Count VII of plaintiffs' third amended complaint is expressly based on a claim of fraud. Although the main thrust of plaintiffs' complaint is that defendants' alleged misconduct was directed at the trial court in an effort to thwart service of process, to the extent count VII attempts to allege a fraud directly on plaintiffs, we hold it fails to state a cause of action.

> "Damage is an essential element of fraud. [Citations.] Absolute certainty about the amount of damage is not necessary to justify a recovery if damage is shown, but damages may not be predicated on 'mere speculation, hypothesis, conjecture or whim.' [Citation.] The evidence must show a basis for computing damages with a 'fair degree of probability.' [Citations.]" *City of Chicago v. Michigan Beach Housing Co-op.*, 297 Ill. App. 3d 317, 323 (1998).

To state a claim for aiding and abetting, the alleged wrongful act must cause an injury. *Thornwood, Inc.*, 344 Ill. App. 3d at 27. The same is true of a claim of fraud. *Michigan Beach Housing Co-op.*, 297 Ill. App. 3d at 323. Plaintiffs have not pled facts in support of an allegation the filing of the affidavits or a statement that the averments therein were true injured them. Therefore, count I and count VII fail to state a cause of action for this reason as well.

¶ 29 Plaintiffs' allegations in the "background" section of their pleading, which they did incorporate into count I, contain additional allegations of defendants' conduct with regard to the

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1-09-1868 (unpublished order under Supreme Court Rule 23) (contained in the record on appeal). "With court approval, [defamation] defendants filed cross-affidavits, essentially denying service." *Id.* This court also found that the question raised by the cross-affidavits was never resolved by the trial court. *Id.* at 10. Defamation defendants would later file a motion to dismiss the complaint pursuant to Illinois Supreme Court Rule 103(b) (eff. eff. July 1, 2007) asserting, in part, that, despite his attempt at personal service, Leo Stoller had "not yet effectuated proper service of the Complaint on any of the [defamation] Defendants." The trial court found that by filing the motion pursuant to Rule 103(b), the defamation defendants "lost their right to assert lack of *in personam* jurisdiction."

preparation and filing of the affidavits that, liberally construed, state specific acts by defendants in support of some (but not all—specifically injury) of the elements of the cause of action. The specific allegations of fact in support of an act of aiding and abetting are plaintiffs' allegations that Goodman informed defendants he had accepted service on behalf of his law firm and partners, that defendants informed Goodman they would prepare an affidavit that Goodman had only accepted service for himself, and that defendants drafted and filed affidavits on behalf of Goodman, Johnson, and Abrams knowing their statements therein to be false. However, plaintiffs' complaint still fails to state a cause of action.

¶ 30 Illinois bars claims where the gravamen of the charge is that the defendants "have been guilty of perjury or have suborned or attempted to suborn perjury." *John Allan Co. v. Brandow*, 59 Ill. App. 2d 328, 333 (1965). In *John Allan Co.*, the "complaint charged substantially that [the] Defendants conspired to illegally deprive [the plaintiff] of its property; [and] that as part of the conspiracy, [the] Defendants committed perjury in a prior lawsuit." *Id.* at 330. The complaint further alleged that in furtherance of the conspiracy the defendants filed affidavits and gave testimony in court they knew to be false. *Id.* at 331. The court held that:

> "such an action may not be maintained and is against public policy. [Citation.] As stated by the Court in *Ruehl Bros. Brewing Co. v. Atlas Brewing Co.*, 187 Ill. App. 392, 398 [(1914)] '*** no action can be maintained on account of the false testimony of witnesses, or of a false statement filed in a judicial proceeding. It is recognized by the authorities that there may be individual cases in which great injustice may be done by this rule of law. The weight of such an argument, however, is overcome in the opinion of the courts asserting the rule, by the mischief of retrying every case in which the judgment or decree rendered or

> secured on false testimony, *or false affidavits*, or on contracts or documents whose genuineness or validity was in issue and which may afterwards be ascertained to be forged or fraudulent.' " (Emphasis added.) *Id.* at 333-34.

¶ 31 The *John Allan Co.* court also held that an allegation that the defendants conspired to have another defendant file a petition and "swear falsely and commit perjury in that proceeding" was within the scope of that rule. *Id.* at 334. The court concluded that:

> "Perjury if proven to be involved in legal proceedings, is punishable in prosecution under criminal procedures. Civil actions following such litigation have not been favored by the courts, principally on the premise that even though there may be recognized injustice in many cases, the public interest in avoidance of interminable retrial of issues for civil damages or relief overrides the claimant's claim for civil relief unless asserted in the original action. [Citation.]" *Id.* at 336 (citing *Ruehl Bros. Brewing Co. v. Atlas Brewing Co.*, 187 Ill. App. 392 (1914)).

¶ 32 In this case the essence of plaintiffs' complaint is that defendants aided and abetted perjury, or suborned perjury; for that reason the complaint fails to state a cause of action. Count V of the third amended complaint specifically alleges defendants either committed perjury (720 ILCS 5/32-2 (West 2014)) or suborned perjury (720 ILCS 5/32-3 (West 2014)) and does not state a claim for civil damages. Plaintiffs allege defendants, as part of a conspiracy or plan with the defamation defendants, "actively suborned perjury and knowingly and willfully prepared a false pleading." See *John Allan Co.*, 59 Ill. App. 2d at 331. Such an action may not be maintained. *Id.* at 333.

¶ 33 Plaintiffs also alleged that defendants "engaged in the abuse of process and willful and wanton misconduct" (count II) and made a misrepresentation of fact (count III) in attempting to

have plaintiff's second amended complaint dismissed on *res judicata* grounds, which plaintiffs allege defendants knew did not apply.[4] We find these allegations fall within the rule stated in *Ruehl Bros. Brewing Co.* See also *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 822 (1978) ("public interest demands that we reject any effort to extend the tort liability for the wrongful filing of a lawsuit beyond the ambit of an action for malicious prosecution or abuse of process. These considerations apply with equal force, not only to a party litigant, but to his counsel ***. [W]e refuse to recognize a rule which would render a litigant and his attorney liable in tort for negligently (or even, willfully and wantonly) failing to determine in advance that which, ultimately, only the courts could determine."). Accordingly, we hold counts I, III, IV, V, VII, VIII, IX and X fail to state a claim as a matter of law; therefore, the trial court properly dismissed those counts of plaintiff's third amended complaint with prejudice.

¶ 34 Count II: Malicious Abuse of Process

¶ 35 Plaintiffs' third amended complaint alleges defendants committed a malicious abuse of process when they filed perjured affidavits to thwart service of process and when they moved to dismiss plaintiff's second amended complaint on *res judicata* grounds.

[4]After this court affirmed the trial court's judgment granting summary judgment in favor of defamation defendants, defendants filed a motion to renew and supplement their motion to dismiss the complaint, which remained pending as to 11 defendants. Defendants sought to add two additional grounds for dismissal: *res judicata* and law of the case. Defendants argued the complaint was barred by *res judicata* and law of the case because "[e]very count stems from the publication of that same article," therefore plaintiff would have to present the same evidence he would have had to present to sustain his failed claim, which the trial court held was not actionable as a matter of law, against the defamation defendants. The complaint in the defamation case alleged the Gordon defendants aided and abetted the defamation defendants "while conspiring to intentionally and deliberately slander and defame Plaintiff;" the complaint also alleged the Gordon defendants aided and abetted the defamation defendants "in avoiding service of process *** and in false swearing" (count VI). It is this latter count the trial court granted plaintiffs leave to replead.

> "Two elements are required to plead a cause of action for abuse of process: (1) the existence of an ulterior purpose or motive for the use of regular court process, and (2) an act in the use of process not proper in the regular prosecution of a suit. [Citations.] 'The test for sufficiency of the allegation pertaining to the second element is whether process has been used to accomplish some result which is beyond the purview of the process or which compels the party against whom it is used to do some collateral thing which he could not legally be compelled to do.' [Citation.]" *McGrew v. Heinold Commodities, Inc.*, 147 Ill. App. 3d 104, 111 (1986).

"[T]he mere existence of an ulterior motive in performing an otherwise proper act does not constitute abuse of process." *Id.* at 112. "Institution of frivolous proceedings is insufficient conduct to support a claim of abuse of process." *Id.* " 'Process' is defined as any means used by the court to acquire or to exercise its jurisdiction over a person or over specific property. [Citation.] Process is issued by the court, under its official seal and must be distinguished from pleadings, which are created and filed by the litigants." *Doyle v. Shlensky*, 120 Ill. App. 3d 807, 816 (1983).

¶ 36 Plaintiffs' complaint fails to state a cause of action because plaintiffs have not alleged misuse of the court's process. The affidavits were "not issued by the court and cannot be considered a process of the court." *Id.* "To constitute an abuse of the process in the legal sense, there must be some act in use of the process which is not proper in the regular course of the proceedings. This element has been generally defined by the courts of Illinois as existing only in instances in which plaintiff has suffered an actual arrest or a seizure of property. [Citations.]" *Holiday Magic, Inc. v. Scott*, 4 Ill. App. 3d 962, 969 (1972). Plaintiffs have not alleged they

suffered an arrest or seizure of property. See also *Ruehl Bros. Brewing Co.*, 187 Ill. App. at 397 ("The affidavit of defendant in error filed in the suit was appropriate to that action and in furtherance thereof, and, therefore, did not, *whether true or false*, furnish any basis for this claim for malicious abuse of process." (Emphasis added.)).

¶ 37 Further, in *McGrew*, the alleged abuse of process was the issuance of garnishment summonses against the plaintiff when he did not owe the defendants any money. *McGrew*, 147 Ill. App. 3d at 106. The pertinent allegations of the dismissed complaint claimed that the defendants "had an ulterior purpose for the use of regular court process *** to harass and cause economic injury to the plaintiff and damage to his personal and professional reputation" and that the defendants knew or should have known the plaintiff's account had been paid in full. (Internal quotation marks omitted.) *Id.* at 107-08. The defendants noted "that the garnishment summonses in this case were used to collect money, the very purpose for which the process was created. According to defendants, the validity of the underlying debt is simply irrelevant to an abuse of process claim." *Id.* at 111. This court agreed and affirmed the dismissal of the plaintiff's complaint. *Id.* at 111, 115. The court found that "all that [the] plaintiff has alleged in the instant case is that [the] defendants instituted garnishment proceedings when there was no debt. He has not alleged that the garnishment summonses were used for an improper purpose *after* they were issued." (Emphasis in original.) *Id.* at 111-12. Moreover, "no damage was asserted other than that necessarily incident to the filing of a lawsuit." *Id.* at 112.

¶ 38 In this case, plaintiffs have alleged no damage from the filing of the allegedly false affidavits. Plaintiffs have also failed to allege that the false affidavits were used for an improper purpose after they were filed, or that the filing of the affidavits compelled plaintiffs to do some collateral thing they could not legally be compelled to do. We hold that count II of plaintiffs'

third amended complaint fails to state a cause of action. We also hold count II was properly dismissed with prejudice. No amendment will permit plaintiffs to allege defendants' pleadings, whether true or not, were an abuse of the court's process. *Doyle*, 120 Ill. App. 3d at 816; *Ruehl Bros. Brewing Co.*, 187 Ill. App. at 397.

¶ 39 Count VI: Civil Rights Violation

¶ 40 Plaintiffs allege defendants deprived Stoller of his constitutional due process rights through their abuse of process in filing the false affidavits under the color of law. "A section 1983 action can be maintained against [e]very person who, under color of any statute *** of any State *** subjects *** any citizen *** to deprivation of any rights, privileges, or immunities secured by the Constitution and laws. [Citation.] The purpose of such an action is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights. [Citation.] While the more typical section 1983 action is brought against a state officer, a private person may also be subject to liability under section 1983 if state action is found. [Citation.]" *Reuben H. Donnelley Corp. v. Brauer*, 275 Ill. App. 3d 300, 303 (1995).

> "The color-of-state-law requirement is 'identical' to the fourteenth amendment's 'state action' requirement ([citation]), and excludes from the reach of section 1983, claims for 'merely private conduct, no matter how discriminatory or wrongful.' [Citation.] To satisfy the color of law requirement, '[t]he person charged must either be a state actor or have a sufficiently close relationship with state actors such that a court would conclude that the non-state actor is engaged in the state's actions.' [Citations.] '[T]here is "no specific formula" for determining whether state action is present. [Citation].' [Citation.] Rather, the question of whether a sufficiently close relationship exists 'is a matter of normative judgment,

> and the criteria lack rigid simplicity.' [Citation.] A court's determination is ultimately informed by the totality of the circumstances and turns on whether the state is sufficiently involved in the alleged activity to justify treating the conduct of a private individual as state action. [Citation.]" *Dempsey v. Johnson*, 2016 IL App (1st) 153377, ¶ 36.

"[A] private misuse of a statute or procedure, as alleged here, does not describe conduct which is actionable under § 1983." *Winterland Concessions Co. v. Trela*, 735 F.2d 257, 262 (7th Cir. 1984).

¶ 41 Plaintiffs' third amended complaint contains no allegations of state involvement in the filing of the allegedly false affidavits. Plaintiffs do not allege any relationship between defendants and the state and allege only private action. The complaint alleged at most a misuse of procedure. We hold count VI of the third amended complaint fails to state a cause of action and was properly dismissed with prejudice.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 44 Affirmed.