2017 IL App (1st) 162831-U

SIXTH DIVISION
June 30, 2017

No. 1-16-2831

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NICHOLAS WEBB and THAD BEVERSDORF,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiffs-Appellants,	)	
	)	
vs.	)	No. 15 CH 16375
	)	
JEFFERIES, LLC,	)	
	)	Honorable Kathleen G. Kennedy,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm the circuit court's dismissal of the complaint, but on the alternative basis that there are other actions pending between the same parties for the same cause, pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619(a)(3) (West 2014).

¶ 2 Plaintiffs Nicholas Webb and Thad Beversdorf appeal from the dismissal of their complaint against defendant Jefferies, LLC. The circuit court dismissed the complaint, finding that the plaintiffs were contractually bound to resolve their dispute by private arbitration. We

affirm the dismissal, but on the alternative basis that there is another action pending between the same parties for the same cause.

¶ 3 Jefferies is a securities and investment banking firm. Michael Frawley was Jefferies' vice chairman and global head of metals and listed products. Frawley came to Jefferies from another commodities firm, Newedge USA, LLC, and recruited the plaintiffs, who were Newedge employees, to join Jefferies with him. In June 2012, Jefferies hired the plaintiffs as employees in the firm's metal commodities group. The plaintiffs signed employment agreements with Jefferies providing that they:

> "consent[ed] that any arbitration proceeding brought with respect to matters related to your employment or this Agreement shall be brought before FINRA [Financial Industry Regulatory Authority, Inc.] * * * or if the parties are permitted to bring such action in a state or federal court, then you hereby consent to the personal jurisdiction of the state and federal courts [in New York City] with respect to matters related to your employment or this Agreement, and agree that any action with respect thereto shall be brought in such courts."

¶ 4 The plaintiffs worked at Jefferies for about a year. Jefferies terminated their employment in October, 2013. Three months later, both plaintiffs filed a nine-count "Statement of Claims" with FINRA alleging breach of contract, tortious interference with prospective business contracts, fraud, retaliation, and a claim under the Illinois Wage Payment and Collection Act, 820 ILCS 115 (West 2012). During the course of the FINRA arbitration of the plaintiffs' claims, the plaintiffs discovered that Jefferies had destroyed certain materials, such as e-mails and

telephone call recordings, which they contended were relevant to their claims. The FINRA arbitration panel denied their request for sanctions against Jefferies for this destruction. The plaintiffs ultimately withdrew their FINRA action without prejudice, stating that they did so because FINRA provided insufficient "sources of authority, tools, and procedures to the Arbitration Panel."

¶ 5 On June 16, 2015, the plaintiffs filed a complaint in the Law Division of the Circuit Court of Cook County against Frawley (Case No. 15 L 6104). In this complaint, plaintiffs alleged claims for tortious interference with contract and fraud. The complaint largely tracks the Statement of Claims which plaintiffs filed with FINRA, but later withdrew. The Law Division complaint also named Jefferies as a respondent in discovery, on the basis that the company had evidence relevant to their claims. A month after the Law Division case was filed, Frawley successfully removed it to the United States District Court for the Northern District of Illinois (Case No. 15 C 6406).

¶ 6 On November 6, 2015, while the federal case was pending, the plaintiffs filed a new complaint in the Chancery Division of the Circuit Court of Cook County against Jefferies (Case No. 15 CH 16375). Count I of this complaint sought injunctive relief against Jefferies to prevent it from destroying records relevant to the plaintiffs' claims against Frawley. Count II was a claim for damages stemming from Jefferies' alleged spoliation of evidence.

¶ 7 Jefferies filed a motion seeking dismissal of this complaint on three separate bases. First, Jefferies sought to compel arbitration of the dispute before FINRA in New York. Second, it requested dismissal pursuant to section 2-619(a)(3) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2014)), because of the other pending actions between the parties. Third, it sought dismissal under section 2-615 of the Code (735 ILCS 5/2-615 (West

2014)) because the complaint failed to state a cause of action. In particular, the section 2-615 portion of the motion argued that the State of New York, whose law would govern the dispute, does not recognize the "tort of third-party negligent spoliation"; and that even if Illinois law applied, the complaint failed to properly allege a duty to preserve the records or that the destruction proximately caused some loss to the plaintiffs. The motion also argued that Count I should be dismissed because there is no cause of action for "injunction" under Illinois law.

¶ 8 On May 16, 2016, the chancery court dismissed this complaint on the basis that the plaintiffs' claims were subject to mandatory arbitration before FINRA. The plaintiffs filed a motion to reconsider that ruling.

¶ 9 While that motion to reconsider was pending, proceedings continued in the federal district court. On August 3, 2016, that court granted Jefferies' motion to compel arbitration and dismissed the case with leave to reinstate it within one year. *Webb v. Frawley*, 15 C 6406, 2016 WL 4124288 (N.D. Ill. Aug. 3, 2016). The plaintiffs appealed that ruling to the United States Court of Appeals for the Seventh Circuit.

¶ 10 On September 19, 2016, the chancery court denied the plaintiffs' motion to reconsider. This court granted the plaintiffs' motion to file a late notice of appeal from that order.

¶ 11 While briefing in this appeal was ongoing, the Seventh Circuit heard and resolved the plaintiffs' appeal from the federal district court's dismissal order. *Webb v. Frawley*, 858 F. 3d 459 (7th Cir. 2017). That court affirmed in part, reversed in part, and remanded.

¶ 12 The Seventh Circuit noted that because "FINRA is a private organization, the court could not order Webb and Beversdorf to follow its arbitration rules unless they'd agreed to do so." *Id.*, 858 F. 3d 459, ___, 2017 WL 2263012, *2. The court stated that Beversdorf had signed a "U-4" form waiving the right to trial by jury and agreeing to arbitrate any dispute between him and

Jefferies through FINRA. (No such U-4 form signed by either plaintiff appears in the record now before this court.) Because Beversdorf had agreed to arbitration by signing the U-4 form, the court affirmed the portion of the district court's ruling that Beversdorf must arbitrate his dispute. The Seventh Circuit found that unlike Beversdorf, Webb did not sign a U-4 form. The court rejected Frawley's alternative contention that the above-quoted language in the plaintiffs' employment agreement, by itself, required that their disputes be resolved through FINRA. The court characterized the contract language as being merely "a venue provision—it simply required that if Webb agrees to arbitrate his dispute with Frawley, he must arbitrate it before FINRA." *Id.* Accordingly, the court reversed the portion of the district court's order which had dismissed Webb's claims, stating "Webb's suit against Frawley may proceed in the district court." *Id.*

¶ 13 All this brings us back to the appeal pending before us. The circuit court dismissed the complaint on the sole basis that the plaintiffs were contractually required to arbitrate their claims. As noted above, no record of the U-4 form signed by either plaintiff was ever presented to the circuit court. Despite this, the circuit court specifically rejected the plaintiffs' argument that the record was insufficient to find that they had agreed to arbitrate their claims. When it denied the plaintiffs' motion to reconsider, the court explained that sufficient "evidence of a valid agreement to arbitrate" was before it, consisting of: (1) the verified complaint and "the reasonable inferences from those facts"; (2) the employment agreements (quoted above); (3) the FINRA rules; and (4) the federal district court's "persuasive ruling." Subsequent events, however, have called the circuit court's rationale into question. The Seventh Circuit partially reversed the federal district court opinion upon which the circuit court relied, and in so doing, specifically held that Webb's claims are not subject to arbitration because he did not sign a U-4 form.

¶ 14 With the web of litigation generated thus far in five different forums as our backdrop, we proceed to the merits of the appeal before us. Section 2–619.1 of the Code permits a party to combine a section 2–615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2–619 motion to dismiss based upon certain defects or defenses. 735 ILCS 5/2–619.1 (West 2012). Although not labeled as such, the motion before the circuit court was essentially a motion brought under section 2-619.1. When ruling on a motion to dismiss under either section 2–615 or section 2–619, a court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. As a result, a motion to dismiss pursuant to either section should not be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006) (section 2–615); *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8 (section 2–619).

¶ 15 Generally, the standard of review of an order granting or denying a motion to compel arbitration is whether the trial court abused its discretion. *Fed. Signal Corp. v. SLC Techs., Inc.*, 318 Ill. App. 3d 1101, 1105 (2001). However, *de novo* review applies when a lower court's dismissal of a complaint in favor of arbitration is based on documentary materials only. *Amalgamated Transit Union, Local 900 v. Suburban Bus Div. of Reg'l Transp. Auth.*, 262 Ill. App. 3d 334, 337 (1994). Likewise, we review *de novo* the trial court's decision on motions to dismiss brought under both sections 2–615 and 2–619. *Coghlan*, ¶ 24. Finally, we review the judgment, not the reasoning, of the trial court, and we may affirm on any ground in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995).

¶ 16 Section 2-619(a)(3) of the Code provides for dismissal of a claim because there is another action pending between the same parties for the same cause. 735 ILCS 5/2-619(a)(3) (West 2014). The peripatetic history of the plaintiffs' dispute virtually cries out for the summary imposition of this rule. The plaintiffs present several arguments to the contrary. They contend that their federal claims, tortuous interference with contract and fraud, are of a completely different nature than the spoliation of evidence claims pending in this case. They also point out that the defendant in their federal claims is Frawley, but the defendant in this case is Jefferies, LLC. None of these arguments are persuasive.

¶ 17 The purpose of section 2-619(a)(3) of the Code is "to relieve both courts and litigants of the unnecessary burden of duplicative litigation." *Ransom v. Marrese*, 122 Ill. 2d 518, 530 (1988). Multiple actions involve the "same cause" within the meaning of section 2-619(a)(3) when relief is requested on substantially the same set of facts. *Katherine M. v. Ryder*, 254 Ill. App. 3d 479, 487 (1993). The "same parties" requirement of section 2-619(a)(3) is met where the litigants' interests are sufficiently similar, even though the litigants differ in name or number. *Skipper Marine Electronics, Inc. v. Cybernet Marine Products*, 200 Ill. App. 3d 692, 695-696 (1990). To qualify as "another action pending between the same parties for the same cause" under section 2-619(a)(3) of the Code, neither the parties nor the causes need be identical; a substantial similarity is enough. *People ex rel. Phillips Petroleum Co. v. Gitchoff*, 65 Ill. 2d 249, 255 (1976) citing *Skolnick v. Martin*, 32 Ill. 2d 55, 57 (1964) and *Baker v. Salomon*, 31 Ill. App. 3d 278, 280-82 (1975). Although the plaintiffs have brought some of their claims against Jefferies and some against Frawley, this is a distinction without a difference. Both sets of claims are ultimately against Jefferies as Frawley's employer and principal. And both essentially arise

from the same set of facts: the denouement and aftermath of plaintiffs' relatively brief employment with Jefferies.

¶ 18 The characteristics of spoliation claims under Illinois law support this analysis. Our supreme court has explained that a spoliation claim is stated under existing negligence law, including the principle that the defendant owed some particular duty to the plaintiff to preserve the evidence in question. *Boyd v. Travelers Ins. Co*., 166 Ill.2d 188, 194 (1995). In determining whether a duty to preserve evidence exists, a court must first determine whether the duty arises by agreement, contract, statute, special circumstance, or voluntary undertaking. *Id*. at 195. If so, then the court must determine whether that duty "extends to the evidence at issue—*i.e.*, whether a reasonable person should have foreseen that the evidence was material to a potential civil action." *Id.* "If the plaintiff does not satisfy both prongs, there is no duty to preserve the evidence at issue." *Dardeen v. Kuehling*, 213 Ill. 2d 329, 336 (2004). Whether Jefferies had any obligation to preserve the emails and phone records which are the subject of the spoliation claim will ultimately be determined, in part, through an analysis of the contractual obligations between plaintiffs and Jefferies. Whether Frawley is liable on the plaintiffs' contract and fraud claims will require review and analysis of the same operative facts and documents as the derivative spoliation claim.

¶ 19 The Seventh Circuit's resolution of the dispute before it, which was based on facts not included in the record before us, splits the plaintiffs' claims between two forums. Webb's main claims (tortious interference with contract and fraud) are now pending (or will soon pend) back in federal district court. Beversdorf's parallel claims will be heard in FINRA arbitration. The interests of judicial efficiency and economy command that claims arising from the same set of facts not be heard in different various forums. Allowing the spoliation claim to proceed in a

third forum—the circuit court—would exacerbate an already problematic bifurcation. We find that the spoliation claim in the complaint before us should properly be heard in the context of the plaintiffs' claims in their respective forums. We affirm the dismissal of the complaint, but on the alternative basis that there are other actions pending between the parties, pursuant to section 2-619(a)(3) of the Code.

¶ 20 Finally, we address the plaintiffs' request to strike a portion of Jefferies' brief because Jefferies cited a ruling of this court which was unpublished under Illinois Supreme Court Rule 23(e)(1) (eff. July 1, 2011). The plaintiffs are correct; the citation was improper. Litigants should exercise caution to ensure compliance with the rule. We do not, however, find that the error was sufficiently egregious to warrant striking any portion of Jefferies' brief.

¶ 21 Affirmed.