2017 IL App (2d) 150675-U
No. 2-15-0675
Order filed January 18, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARIA FREDA,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee and Cross-Appellant,	)	
	)	
v.	)	No. 11-L-397
	)	
MICHAEL D. CANULLI,	)	
	)	Honorable
Defendant-Appellant and	)	Thomas M. Schippers,
Cross-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) While the trial court determined that plaintiff's complaint should have been filed as a counterclaim in the same case as defendant's fee petition, the court failed to address the applicability of *res judicata* in dismissing the complaint; thus, the judgment is vacated and the cause must be remanded for further proceedings; (2) because further proceedings are necessary on plaintiff's complaint, defendant's petition for sanctions was not timely or ripe for adjudication; thus, the trial court's judgment regarding sanctions must be vacated.

¶ 2 Defendant, Michael Canulli, appeals from the trial court's order denying his petition for sanctions pursuant to Supreme Court Rule 137 (eff. July 1, 2013). Plaintiff, Maria Freda, cross-appeals from the trial court's order granting Canulli's motion to dismiss Freda's amended

complaint for breach of contract and attorney malpractice pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). We vacate the dismissal of the amended complaint and the order denying sanctions, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 Canulli represented Freda (then known as Maria Maude) in her divorce case. On May 12, 2010, Canulli withdrew as counsel in that case and, shortly thereafter, filed a petition in the divorce case for attorney fees incurred from January to May, 2010. Freda filed a response to the petition in November 2010, asking the court to deny all the requested relief.

¶ 5 In May 2011, Freda filed a one-count complaint, in a separate law division proceeding, alleging attorney malpractice against Canulli. Freda sought to consolidate the fee petition and the malpractice claim before the law division judge, but her motion was denied in September 2011. The malpractice complaint was dismissed without prejudice pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) on November 17, 2011.

¶ 6 On January 18, 2012, the trial court in the divorce case held a hearing on Canulli's fee petition; Freda did not appear. The court found that the fees and costs sought by Canulli were "reasonably and necessarily incurred" and entered judgment in favor of Canulli and against Freda in the amount of $75,000, "fair compensation as between attorney & client." This order was never appealed.

¶ 7 On February 16, 2012, Freda was granted leave, over Canulli's objection, to file an amended complaint in the law division case. This she did on March 15, 2012, filing a two-count amended complaint, alleging legal malpractice and breach of contract. On April 17, Freda moved to vacate the divorce court's January 18, 2012 order granting Canulli's fee petition. This motion was eventually stricken in September 2012. In the meantime, Canulli moved to dismiss

the amended complaint on various grounds, including *res judicata*, arguing that the claims in the amended complaint were barred by the judgment in his favor on the fee petition. The trial court dismissed the amended complaint on November 13, 2012. The court stated that it had considered this court's decision in *Kasny v. Coonen and Roth, Ltd.*, 395 Ill. App. 3d 870 (2009) (which the court found distinguishable and inapplicable) and section 26(2) of the Restatement (2nd) Judgments and that it "does not find that it was clearly or convincingly shown that the policies favoring preclusion of a second action was overcome." This dismissal is the basis of Freda's cross-appeal.

¶ 8 Freda filed a notice of appeal on December 12; Canulli filed a petition for Rule 137 sanctions the following day. In that petition, Canulli alleged that Freda and her attorney, C. Jeffrey Thut, made allegations in her complaint and amended complaint that were "untrue, made without reasonable inquiry, *** not well grounded in fact nor warranted by existing law." Further, Freda filed her amended complaint, which contested attorney fees between her and Canulli, after the judgment order regarding Canulli's fees was issued in the divorce case. Canulli was required to pay a $5000 insurance deductible but then had to defend himself after his carrier later refused to defend him. He also had to defend himself in a declaratory judgment action involving the carrier's refusal to defend him. Ultimately, he lost his professional liability insurance policy as a result of this litigation and had to find higher-cost, lower-coverage insurance. Canulli sought sanctions from Freda and Thut to cover these expenses.[1]

¶ 9 After Canulli presented his proofs in an evidentiary hearing, Freda and Thut moved for a directed finding. The trial court granted the motion in part, finding that (1) Freda and Thut did not file the complaint or the amended complaint for an improper purpose; (2) the legal

[1] Thut is not a party to this appeal.

malpractice claim for existing fees was warranted by existing law; (3) filing a law division claim for malpractice while a fee petition was pending in the divorce case was warranted by existing law; and (4) Freda's motion to vacate the order on the fee petition in the divorce case was "not properly before this court and will not be considered." The hearing was continued on the issues of whether Freda and Thut violated Rule 137 by alleging that Canulli: (1) committed malpractice by filing a third-party action in Freda's divorce case; (2) charged exorbitant fees and inflated his bills; and (3) billed in excess of $200,000 for the third-party action. After Freda and Thut presented their case, the trial court found in their favor on the remaining issues and denied the motion for sanctions. This appeal and cross-appeal followed.

¶ 10 II. ANALYSIS

¶ 11 We will first address Freda's cross-appeal, in which she contends that the trial court erred in dismissing her amended complaint. Canulli brought his motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)), arguing that (1) count I of the amended complaint (legal malpractice) failed to state a cause of action and should be dismissed pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)); and (2) the entire amended complaint was barred by the doctrine of *res judicata*, based on the attorney fee judgment that Canulli received in the divorce case, and must be dismissed pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). "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). We apply a *de*

novo standard of review to the dismissal of a complaint under either section 2-615 or section 2-619. *Provenzale v. Forister*, 318 Ill. App. 3d 869, 874 (2001).

¶ 12 In its written order of dismissal, the trial court stated that it "does not find that it was clearly or convincingly shown that the policies favoring preclusion of a second action was [*sic*] overcome." Thus, the court dismissed the amended complaint with prejudice.

¶ 13 This court has held that, "at least in this district, the law is settled" that an attorney's claim for fees and a client's claim for malpractice are a single cause of action; thus, *ordinarily*, a counterclaim is mandatory. (Emphasis added.) *Kasny*, 395 Ill. App. 3d at 874. "This is not to say, however, that *res judicata* necessarily applies" when such claims are not made in the same case. *Id*. As we noted in *Kasny*:

> "Indeed, some authority suggests that *res judicata* is inapplicable precisely because plaintiff did not appear in the small claims case. See Restatement (Second) of Judgments § 22, Comment a, at 186 (1982) ('Even in jurisdictions having a statute or rule making certain counterclaims compulsory, such provisions may not apply when no answer or other responsive pleading is filed'); Restatement (Second) of Judgments § 22, Illustration 2, at 186 (1982) ("A, a physician, brings an action against B for the price of medical services rendered to B. B fails to plead and judgment by default is given against him. B is not precluded from subsequently maintaining an action against A for malpractice relating to the services sued upon in the prior action')." *Id* at 876.

¶ 14 Here, the trial court determined that Freda's malpractice claim should have been filed as a counterclaim in the divorce case. However, the court failed to complete its analysis; it failed to determine whether *res judicata* applies such that Freda's malpractice claim must be dismissed. The requirements of *res judicata* go beyond whether a claim should have been filed as a

counterclaim in an existing case. "*Res judicata* applies if (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there is an identity of causes of action; and (3) there is an identity of parties or their privies." *Id* at 873. It bars not only all claims actually resolved in the former suit, but also any claims that could have been raised. *Id*. Here, the trial court has not addressed, let alone made findings of fact or conclusions of law, on these issues. While the issue of whether a subsequent claim is barred by the doctrine of *res judicata* is a question of law which this court reviews *de novo* (see *Federal Signal Corp. v. SLC Technologies, Inc.*, 318 Ill. App. 3d 1101, 1116 (2001)), we have nothing to review here; because the trial court failed to address the issue and requirements of *res judicata*, anything we could say would be a *de novo* decision, not *de novo* review.

¶ 15 Further, *res judicata* is, at its core, a doctrine of equity, not law, and should be applied only as fairness and justice require. *Kasny*, 395 Ill. App. 3d at 874. It is intended to be used as a shield, not a sword. *Federal Signal Corp.*, 318 Ill. App. 3d at 1116. " 'Although it is recommended that the doctrine receive a liberal construction and should be applied without technical restrictions, it has also been recommended that the doctrine should not be applied so rigidly as to defeat the ends of justice. [Citation.]' " *Id*, quoting *Thornton v. Williams*, 89 Ill. App. 3d 544, 546 (1980). Again, by addressing only the issue of whether the malpractice claim should have been filed as a counterclaim and failing to address the application of res *judicata*, the trial court has failed to exercise its discretion, and this court cannot review what the trial court has not done. It is the trial court's discretion, not ours, to exercise.

¶ 16 The trial court's judgment granting Canulli's motion to dismiss was premature, based on an incomplete analysis. Therefore, we must vacate that judgment and remand the cause for further proceedings on that motion.

¶ 17 Because we vacate the trial court's dismissal of the amended complaint and remand the cause for further proceedings, Canulli's petition for sanctions is premature and not ripe for adjudication. For that reason, we must also vacate the trial court's judgment denying Canulli's petition for sanctions.

¶ 18 III. CONCLUSION

¶ 19 For these reasons, we vacate the trial court's order dismissing with prejudice Freda's amended complaint and remand for further proceedings. We also vacate the trial court's orders denying Canulli's petition for Rule 137 sanctions.

¶ 20 Vacated and remanded for further proceedings.