2019 IL App (1st) 181565-U

No. 1-18-1565

Fourth Division
February 14, 2019

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

GLORIA E. SWANSON, Plaintiff-Appellant, v. JAMECA A. ROUTEN and JENA L. LEVIN, Defendants (Jena L. Levin, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County. No. 18 L 3415 The Honorable John P. Callahan, Jr., Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's dismissal of plaintiff's complaint is affirmed, where the allegedly defamatory statement was made by an attorney in the course of litigation and is therefore privileged.

¶ 2 The instant appeal arises from the trial court's dismissal of plaintiff Gloria Swanson's complaint for defamation against defendant Jena Levin, an attorney representing defendant Jameca Routen in connection with the probate of the estate of Charles Routen, Jameca's

father and plaintiff's late husband. Plaintiff alleged that defendant Levin (defendant) told plaintiff's attorney that Jameca would be requesting supervision of plaintiff's administration of the decedent's estate because plaintiff "has a gambling problem." Plaintiff filed suit against both defendant and Jameca for defamation. The trial court granted defendant's motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)), finding that her comments were absolutely privileged as occurring within the course of litigation. Plaintiff appeals. For the reasons that follow, we affirm the trial court's dismissal of the complaint.

¶ 3 BACKGROUND

¶ 4 On April 5, 2018, plaintiff filed a *pro se* complaint for defamation against defendant and Jameca Routen, in which she alleged that plaintiff was married to Charles Routen when he died on November 14, 2017, and that Jameca was the decedent's daughter; plaintiff alleged that Jameca was an adult at the time that plaintiff married the decedent in 1998. Plaintiff alleged that, on February 27, 2018, the parties attended a court hearing on plaintiff's appointment as administrator of the decedent's estate; Jameca was not present but was represented by defendant as her attorney. The probate court asked defendant if there were any objections to naming plaintiff as the administrator of the decedent's estate, and defendant responded that there was no objection but that Jameca requested supervision of plaintiff's administration of the estate. The probate court appointed plaintiff as administrator of the estate " 'with supervision.' "

¶ 5 Plaintiff alleged that, prior to the case being called, defendant approached plaintiff's counsel and spoke to him in a whisper, leading him to the hallway, where they continued to converse. After the hearing, plaintiff's counsel informed her that the reason that defendant

had requested supervision was that Jameca had informed defendant that plaintiff " 'has a gambling problem.' " Plaintiff alleged that this statement was slanderous and defamatory and that it was made with malice, with no evidence of any gambling problem, and for the purpose of hindering plaintiff's administration of the estate.

¶ 6 The record shows that defendant was served with the summons, but that service on Jameca was not effectuated, despite being attempted twice.

¶ 7 On April 30, 2018, defendant filed an appearance and on May 16, 2018, she filed a combined motion to dismiss pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2016)). With respect to the section 2-615 motion (735 ILCS 5/2-615 (West 2016)), defendant argued that the complaint should be dismissed because the statement was an opinion and not a fact that could be proven or disproven. With respect to the section 2-619(a)(9) motion (735 ILCS 5/2-619(a)(9) (West 2016)), defendant argued that the complaint should be dismissed both because the statement was made in the course of defendant's representation of Jameca in a legal matter, making the statement absolutely privileged, and because the statement was true, since plaintiff had previously written to several casinos in Illinois and Indiana and informed them that she had an " 'uncontrollable gambling problem.' " Defendant attached copies of these letters to the motion to dismiss in support of her section 2-619(a)(9) argument.

¶ 8 On June 8, 2018, plaintiff filed a response to defendant's motion to dismiss and, on July 2, 2018, defendant filed a reply. On July 13, 2018, the parties appeared before the trial court for a hearing on defendant's motion to dismiss. Prior to discussing the merits of the motion, the trial court inquired as to Jameca's status, noting that there was no appearance for her on file. Plaintiff informed the trial court that she had not been able to obtain service on Jameca,

despite attempting to serve her at her home and at her place of employment, and opined that Jameca was "dodging the service." Plaintiff also informed the court that "if I need to get a private process server I can do that." The court then proceeded to consider the motion to dismiss before it and denied the motion with respect to section 2-615, but granted the motion to dismiss with respect to section 2-619, finding that the statement was absolutely privileged because it was made in the context of a judicial proceeding, and dismissed the case with prejudice. The trial court then ordered that "[t]he case is dismissed with prejudice." Plaintiff filed a notice of appeal, and this appeal follows.

¶ 9 ANALYSIS

¶ 10 On appeal, plaintiff claims that the trial court erred in granting defendant's motion to dismiss. Before considering the merits of her arguments, however, we are required to consider our jurisdiction to decide the matter. *A.M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2016 IL App (1st) 151087, ¶ 67. The question of whether we have jurisdiction over the instant appeal presents a question of law, which we review *de novo*. *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 25; *In re Marriage of Gutman*, 232 Ill. 2d 145, 150 (2008). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 11 In the case at bar, plaintiff's complaint was filed against both defendant and Jameca, but the motion to dismiss was brought by defendant alone. Accordingly, defendant argues that the dismissal of the complaint is governed by Supreme Court Rule 304, which provides, in relevant part:

> "If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties

> or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. *** In the absence of such a finding, any judgment that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." Ill. S. Ct. R. 304(a) (eff. Mar. 3, 2016).

¶ 12 Even though Jameca was not served with process and did not file an appearance, she is considered a "party" for purposes of Rule 304's requirements. *Mares v. Metzler*, 87 Ill. App. 3d 881, 885 (1980) (although not served, a named defendant remained a "party" within the context of Rule 304); *Odgen Group, Inc. v. Spivak*, 92 Ill. App. 3d 932, 933 (1981) (same); *Zak v. Allson*, 252 Ill. App. 3d 963, 965 (1993) (same). Thus, generally, in order for the dismissal to be appealable, a trial court would have needed to make the findings required by Rule 304(a). However, in some cases, the presence of a nonserved defendant does not render an order unappealable, even in the absence of Rule 304(a) language. In those cases, the dismissal of the complaint with respect to one defendant was found to dispose of the case with respect to all of the unserved defendants as well. See, *e.g.*, *Merritt v. Randall Painting Co.*, 314 Ill. App. 3d 556, 559 (2000) (finding that the served defendant and the unserved defendants represented "a unified tortfeasor" such that the order dismissed the complaint in its entirety); *Byer Clinic & Chiropractic, Ltd. v. State Farm Fire & Casualty Co.*, 2013 IL App (1st) 113038, ¶ 14 (finding that the trial court's order indicated that it was intended to dismiss the complaint in its entirety with respect to all defendants, including a defendant who had not appeared).

¶ 13 In the case at bar, the wording of the trial court's order indicates that the dismissal was intended to encompass plaintiff's claims against both defendants. The court granted defendant's motion to dismiss, then ordered that "[t]he case is dismissed with prejudice." The trial court stated that "the case" was dismissed both in its oral ruling and in the written order. This type of "decisive word choice" has been found instructive in the determination that a trial court's dismissal was intended to dismiss the complaint in its entirety. *Byer Clinic*, 2013 IL App (1st) 113038, ¶ 14. Accordingly, we find that the trial court's dismissal dismissed the complaint in its entirety and, consequently, we have jurisdiction over the instant appeal.

¶ 14 Turning to the merits of plaintiff's argument, plaintiff claims that the trial court erred in granting defendant's motion to dismiss. In the case at bar, defendant filed a combined motion to dismiss pursuant to section 2-619.1 of the Code, which permits a party to file a motion to dismiss based on both section 2-615 and section 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2014)). 735 ILCS 5/2-619.1 (West 2014). However, the trial court's dismissal was based only on section 2-619 of the Code. A motion to dismiss under section 2-619 admits the legal sufficiency of all well-pleaded facts but allows for the dismissal of claims barred by an affirmative matter defeating those claims or avoiding their legal effect. *Janda v. United States Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 83 (citing *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006)). When reviewing a motion to dismiss under section 2-619, "a court must accept as true all well-pleaded facts in plaintiffs' complaint and all inferences that can reasonably be drawn in plaintiffs' favor." *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). Additionally, a cause of action should not be dismissed under section 2-619 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003). For a section 2-619 dismissal, our

standard of review is *de novo*. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006); *Morr-Fitz, Inc.*, 231 Ill. 2d at 488. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan*, 408 Ill. App. 3d at 578. Additionally, even if the trial court dismissed on an improper ground, a reviewing court may affirm the dismissal if the record supports a proper ground for dismissal. See *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) (when reviewing a section 2-619 dismissal, we can affirm "on any basis present in the record"); *In re Marriage of Gary*, 384 Ill. App. 3d 979, 987 (2008) ("we may affirm on any basis supported by the record, regardless of whether the trial court based its decision on the proper ground").

¶ 15 As an initial matter, plaintiff argues that defendant's motion should not have been granted because the trial court "violated" its own standing orders in permitting defendant to file a combined motion to dismiss and in permitting her to file a reply brief. We do not find either of these arguments persuasive. First, with respect to plaintiff's argument concerning the filing of the reply brief, plaintiff's position is not factually accurate. Plaintiff claims that the standing order provides that " 'there will be no reply brief for § 2-615 and § 2-619 motions.' " However, the standing order actually provides that "[t]here will be no reply brief for § 2-615 *and § 2-622* motions." (Emphasis added.) Judge John P. Callahan, Jr., Law Motions, Calendar C Standing Order, no. 17, http://www.cookcountycourt.org/Portals/0/Law%20Divison/Standing%20Orders/callahan.4.19.17.pdf (last visited Jan. 23, 2019). As defendant points out, her reply brief was solely focused on her section 2-619 motion and, therefore, did not violate the trial court's standing order.

¶ 16 With respect to the filing of the combined motion, the trial court's standing order provides that litigants should "NOT bring combined § 2-615 and § 2-619 motions.

Sequentially, the court will resolve § 2-615 issues first. Section 2-619 motions are not ripe while a § 2-615 motion is pending." Judge John P. Callahan, Jr., Law Motions, Calendar C Standing Order, no. 18, http://www.cookcountycourt.org/Portals/0/Law%20Divison/Standing%20Orders/callahan.4.19.17.pdf (last visited Jan. 23, 2019). When the parties appeared before the trial court, the trial court noted that it disfavored combined motions and indicated that it would consider the section 2-615 motion first, which it then proceeded to do. We find no error in this procedure. A trial court has the inherent authority to control its docket and impose sanctions for the failure to comply with court orders. *Cronin v. Kottke Associates, LLC*, 2012 IL App (1st) 111632, ¶ 39. However, plaintiff points to no authority requiring it to do so. In the case at bar, the trial court chose to consider defendant's motion in spite of the fact that it was filed as a combined motion, and we can find no error in that decision.

¶ 17 We also can find no error in the trial court's grant of defendant's motion to dismiss. The basis for the trial court's decision was its finding that the alleged statement made by defendant was absolutely privileged. The privilege at issue is the attorney litigation privilege, which is based on section 586 of the Restatement (Second) of Torts. *O'Callaghan v. Satherlie*, 2015 IL App (1st) 142152, ¶ 24. Section 586 provides:

> "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." Restatement (Second) of Torts § 586 (1977).

¶ 18 "The privilege is based upon the 'public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients.' " *Kurczaba v. Pollock*, 318 Ill. App. 3d 686, 701-02 (2000) (quoting Restatement (Second) of Torts, § 586, comment *a*, at 247 (1977)). The privilege also "furthers an attorney's need to fully and fearlessly communicate with his client [citation] and the free flow of truthful information to the courts [citation]." *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 24. The privilege applies to communications made before, during, and after litigation, and applies to out-of-court communications between an attorney and her client regarding pending litigation as well as out-of-court communications between the litigants' attorneys. *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 26.

¶ 19 In the case at bar, there can be no question that defendant's communication to plaintiff's counsel falls within the scope of this privilege. "The only requirement for the application of the attorney litigation privilege is that the communication must pertain to proposed or pending litigation." *Scarpelli v. McDermott Will & Emery LLP*, 2018 IL App (1st) 170874, ¶ 19. "As long as it related to the litigation and is in furtherance of representation, the privilege applies." *Scarpelli*, 2018 IL App (1st) 170874, ¶ 19. Here, the purpose of the communication, according to plaintiff's counsel, was to inform counsel of the reason why Jameca was requesting supervision of plaintiff's administration of the estate. This communication is clearly related to the probate litigation and in furtherance of defendant's representation of Jameca. We are not persuaded by plaintiff's contention that any gambling problem was irrelevant because the decedent's estate contained only real property and no liquid assets. An alleged gambling problem could certainly still impact an individual's management of an estate, even if there were no liquid assets. Additionally, the privilege is applicable "even

when the communication is not confined to specific issues related to the litigation." *Scarpelli*, 2018 IL App (1st) 170874, ¶ 19. Finally, even if plaintiff's argument had merit, the pertinency requirement "is not strictly applied [citation] and we resolve all doubts in favor of pertinency [citation]." *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25.

¶ 20 We are also not persuaded by plaintiff's arguments that the statement was made simply because Jameca resented plaintiff and because defendant was Jameca's friend. In applying the privilege, "an attorney's motives are irrelevant [citation], and she is not required to investigate her client's claim for legal sufficiency before taking action [citation]." *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25. Additionally, "no liability will attach even at the expense of uncompensated harm to the plaintiff." *O'Callaghan*, 2015 IL App (1st) 142152, ¶ 25. Thus, defendant's motives are irrelevant in determining whether the privilege should apply.

¶ 21 Finally, we are unpersuaded by plaintiff's attempts to argue that the privilege did not attach because the communication occurred prior to the first hearing in the case and because defendant did not file her appearance in the probate case until after the hearing. First, despite plaintiff's contention to the contrary, the fact that the communication occurred prior to the first hearing does not mean that the communication occurred prior to the commencement of litigation. In civil litigation, the filing of the complaint, not the first court hearing, commences the action. 735 ILCS 5/2-201(a) (West 2016); see also 755 ILCS 5/1-6 (West 2016) (the Civil Practice Law applies to proceedings under the Probate Act of 1975). In the context of a probate proceeding, the first pleading in the case of an intestate decedent would be the petition for letters of administration. See 755 ILCS 5/9-2 (West 2016); 755 ILCS 5/9-4 (West 2016). Thus the litigation would have "commenced" upon plaintiff's filing of such a

petition. Furthermore, even if the statement had been made prior to the commencement of litigation, communications preliminary to a judicial proceeding are encompassed by the privilege. *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 832 (2006); *Popp v. O'Neil*, 313 Ill. App. 3d 638, 643 (2000). For the same reason, it is irrelevant that defendant did not file her appearance until after the hearing. The privilege does not apply only to attorneys who have filed appearances in court. Indeed, our courts have found that even a preliminary legal consultation between an attorney and a potential client is privileged, "as long as the statements are pertinent to a possible future legal proceeding." *Popp*, 313 Ill. App. 3d at 643. There is no dispute that defendant was representing Jameca in the probate litigation. Thus, the issue of the timing of her appearance has no effect on the applicability of the privilege.

¶ 22 As a final matter, plaintiff makes much of the fact that the trial court first read her response to the motion to dismiss, as well as defendant's reply, on the day of the hearing during a recess. Plaintiff suggests that this indicates that the trial court did not fully consider her arguments. However, there is no evidence to suggest that the trial court was not fully informed of the issues before it. As set forth above, the attorney litigation privilege is well-settled law in this state, and the trial court properly concluded that it encompassed the communication at issue in this case.

¶ 23 CONCLUSION

¶ 24 For the reasons set forth above, the trial court properly found that the statement made by defendant to plaintiff's counsel was absolutely privileged under the attorney litigation privileged and, accordingly, properly dismissed plaintiff's complaint.

¶ 25 Affirmed.