2019 IL App (3d) 170822-U

Order filed July 8, 2019
Modified upon denial of rehearing September 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

KATHLEEN KONICKI,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois.
	)	
v.	)	Appeal No. 3-17-0822
	)	Circuit No. 13-L-1025
TIMOTHY RATHBUN and JOHN	)	
BASSETT,	)	Honorable
	)	Sheldon R. Sobol,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice Wright specially concurred.

ORDER

¶ 1 *Held*: Summary judgment in favor of defendants in an action alleging intentional infliction of emotional distress, defamation, and invasion of privacy was upheld because the plaintiff failed to put forth any competent evidence of publication of private pictures.

¶ 2 The plaintiff, Kathleen Konicki, appealed an order of the trial court granting summary judgment in favor of the defendants, Timothy Rathbun and John Bassett, in her action seeking damages for intentional infliction of emotional distress, defamation, and invasion of privacy.

¶ 3 FACTS

¶ 4 Konicki alleged that she and Bassett had a long-term personal relationship. During that relationship, Konicki alleged that Bassett took digital pictures of Konicki that were embarrassing and/or intimate in nature. Bassett had promised Konicki that the pictures would be kept strictly private. Under an order of protection entered against Bassett in 2005, all of the pictures were to have been destroyed. Konicki alleged that, on information and belief, all of the pictures were not destroyed by Bassett, that Rathbun obtained some of the pictures from Bassett, and Rathbun showed them and/or distributed them to other persons. In her third amended complaint, Konicki alleged intentional infliction of emotional distress, defamation, and invasion privacy by both Bassett and Rathbun.

¶ 5 The trial court set dates for responsive pleadings and initial discovery dates on October 2, 2015. Bassett and Rathbun both filed answers to the initial complaint, and Konicki amended her complaint. Prior to responding to the third amended complaint, Rathbun filed a motion to issue a subpoena to a judge under the special witness doctrine pursuant to Illinois Supreme Court Rule 210 (eff. Oct. 17, 2006) to have the judge deposed by written interrogatory. That motion was granted. Thereafter, Bassett and Rathbun filed combined motions to dismiss and for summary judgment pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2016)). The trial court found that Konicki offered no proof that the pictures were ever published and granted summary judgment in favor of both defendants. The trial court denied Konicki's motion for reconsideration, and she appealed.

¶ 6 ANALYSIS

¶ 7 First, we must address the motions that Konicki has filed on appeal and that were taken with the case. The motion to strike Rathbun's appellee brief, filed July 30, 2018, is denied as the brief sufficiently complies with Illinois Supreme Court Rule 341 (eff. May 25, 2018). The motion for the court to take judicial notice, filed November 19, 2018, is denied because the subject affidavit is part of the trial court record and it is apparent from the content that it was filed as part of a prior order of protection proceeding. For that same reason, the amended motion to strike Rathbun's affidavit and award sanctions (filed February 4, 2019), and the motion to strike the objection to that motion (filed February 15, 2019), are denied. The motion for leave to amend the appellant brief to correct citations is granted.

¶ 8 Konicki argues that summary judgment was entered prematurely and that there were genuine issues of material fact. She also argues that publication was not required for two of the counts. Konicki contends that the defendants did not prove lack of publication and that whether the pictures were published was a material issue of fact that had not been resolved. The defendants contend that a showing of publication or distribution was required for each count and that Konicki failed to provide any evidence of publication since each person identified by Konicki as having seen the pictures denied seeing such pictures. We review *de novo* an order granting summary judgment. *McManus v. Richards*, 2018 IL App (3d) 170055, ¶ 15.

¶ 9 Summary judgment should be granted when the pleadings, depositions, and affidavits, if any, establish there is no genuine issue of material fact. 735 ILCS 5/2-1005(c) (West 2016). An affidavit that is filed in support of a summary judgment motion must comply with Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013). *PennyMac Corp. v. Colley*, 2015 IL App (3d) 140964, ¶ 16. Rule 191 requires that the affidavit be made on the affiant's personal knowledge,

set forth with particularity the facts on which the claim is based, have attached sworn or certified copies of all documents on which the affiant relied, be based on admissible facts and not consist of conclusions; and show affirmatively that the affiant could testify competently to the facts if sworn as a witness. The propriety of an affidavit submitted in support of a motion for summary judgment is reviewed *de novo*. *PennyMac Corp.*, 2015 IL App (3d) 140964, ¶ 17. Unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact. *Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20.

¶ 10 Konicki contends that the affidavits of Rathbun and Richard Kavanagh and the deposition testimony of Roman Okrei and John Anderson should be stricken. The defendants argue that the argument was waived because Konicki did not move to strike any of the materials until her motion to reconsider in the trial court. Issues cannot be raised for the first time in the trial court in a motion to reconsider and issues raised for the first time in a motion to reconsider cannot be raised on appeal. *American Chartered Bank v. USMDS, Inc.*, 2013 IL App (3d) 120397, ¶ 13 (citing *Caywood v. Gossett*, 382 Ill. App. 3d 124, 134 (2008)). The record shows that Konicki argued regarding the affidavits and depositions in her response to the motion for summary judgment, but she did not file any motions to strike.

¶ 11 In any event, Konicki contends that the deposition testimony of Anderson and the affidavit of Kavanagh were inadmissible because they failed to attach a copy of her affidavit, which they referred to. With respect to Anderson, the court granted leave to issue a subpoena for a deposition by written interrogatories to Anderson directed to the statements contained in the Konicki's affidavit. The affidavit was clearly identified and available in the court file, in sufficient compliance with Supreme Court Rule 191(a). Similarly, the affidavit of Kavanagh refers to Konicki's affidavit, clearly identified and available in the record.

¶ 12 Konicki also alleges that the affidavits/depositions of Okrei, Anderson, and Kavanagh did not consist of admissible facts. However, the evidence contained in those documents reflected sworn testimony. While Konicki alleged upon information and belief what the three men would say, their affidavits and depositions indicate the actual events that they would be able to testify to. Anderson testified that he spoke with Konicki in his chambers in 2013 regarding private pictures of her, where she advised him that such pictures existed and were being disseminated. Anderson told her he did not know anything about it. He testified that he never spoke with Konicki on the telephone and he never told her that someone was circulating intimate pictures of her. Attorney Roman Okrei testified that Konicki had called him alleging some private pictures of her were being circulated by Rathbun. He testified that he never checked with Jim Glasgow to determine if Glasgow had received the pictures, so he did not inform Konicki that Glasgow had deleted them immediately. He did not speak to anyone about the pictures. Kavanagh denied in his affidavit that he ever met with Jack Partelow or Rathbun, so he did not reach any agreement with Rathbun. The depositions and affidavits were based on personal knowledge and admissible facts and were properly considered on the motion for summary judgment.

¶ 13 Rathbun's affidavit, which was filed in 2014 in another order of protection action, states that Rathbun did not know Bassett and never communicated with him. Konicki contends that the affidavit contradicts previously made judicial admissions. Specifically, Konicki contends that it conflicts with Rathbun's motion to quash filed on February 10, 2014, in the order of protection case, where Rathbun's attorney argued that a subpoena was overly broad because it sought all e-mails for a year between Rathbun and anyone at the domain "@willcountyillinois.com" and was a fishing expedition because it requested e-mails exchanged between Rathbun and bassettipr@aol.com without any time limitation. Konicki also contends that the argument that e-

mails to @willcountyillinois.com could be protected by attorney client privilege and e-mails to that domain or to bassettipr@aol.com could contain protected work product, were admissions that conflicted with Rathbun's affidavit. We find no contradiction between Rathbun's statements that he did not know Bassett and never communicated with him and his attorney's legal challenges to the subpoena.

¶ 14 Rathbun also states in his affidavit that his law firm did not have electronic data storage service contracts, operational service contracts, or management service contracts for its e-mail server, a statement that Konicki contends conflicts with the deposition testimony of Frank Cservenyak, Rathbun's law partner. In a deposition in the later order of protection case, at around the same time as Rathbun's affidavit, Cservenyak testified that the law firm employed Andromeda as its information technology company. Cservenyak did not know for sure, but he thought there was an e-mail backup system in the office and that Andromeda possibly maintained a backup. While the testimony of Rathbun and Cservenyak may conflict regarding the role of Andromeda in the law firm, the affidavit was based upon personal knowledge and was admissible.

¶ 15 To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages. *Krasinski v. United Parcel Service, Inc.*, 124 Ill. 2d 483, 490 (1988).

¶ 16 As for invasion of privacy, Illinois courts recognize four ways to state a cause of action: "(1) intrusion upon the seclusion of another; (2) appropriation of another's name or likeness; (3) public disclosure of private facts; and (4) publicity placing another in a false light." *Busse v. Motorola, Inc.*, 351 Ill. App. 3d 67, 71 (2004). A plaintiff must allege the following to establish

the tort of intrusion upon seclusion: "(1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) an intrusion that is [highly] offensive or objectionable to a reasonable person; (3) the matter upon which the intrusion occurs is private; and (4) the intrusion causes anguish and suffering." *Schmidt v. Ameritech Illinois*, 329 Ill. App. 3d 1020, 1030 (2002). An action for public disclosure of private facts provides a remedy for the dissemination of true, but highly offensive or embarrassing, private facts. *Poulos v. Lutheran Social Services of Illinois, Inc.*, 312 Ill. App. 3d 731, 739 (2000). In order to recover under such an action, a plaintiff must establish: "(1) that a defendant gave publicity to a private fact, (2) that such a fact would be highly offensive to a reasonable person, and (3) that such a fact was not of legitimate public concern." *Id.* at 739-40. To establish a claim of publicity placing the plaintiff in a false light, "the plaintiff must plead and prove: (1) that defendant placed him in a false light before the public, (2) that the false light in which he was placed would be highly offensive to a reasonable person, and (3) that defendant acted with actual malice." *Id.* at 739. Both causes of action are closely related, and the public element has been analyzed the same for both. *Id.* at 740. The communication must be to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge, except if the communication is disclosed to a person or persons with whom a plaintiff has a special relationship. *Id.* at 740; see also *Miller v. Motorola, Inc.*, 202 Ill. App. 3d 976, 980 (1990) ("the required communication must be more than that made to a small group; rather, the communication must be made to the public at large").

¶ 17 Thus, to prevail on any of the above claims, Konicki had the burden on summary judgment of presenting some evidence to support her claim that distribution or publication occurred. See *Bank Financial, FSB v. Brandwein*, 2015 IL App (1st) 143956, ¶ 40. With respect to distribution or publication by Rathbun, there is no genuine issue of material fact. Konicki

alleged such distribution or publication on information and belief, but she failed to come forward with any facts to support that claim. While Konicki disagrees with the testimony contained in the depositions and affidavits of the individuals she identified in her third amended complaint, her information and belief is not sufficient to overcome the averments of fact. See *Fooden v. Board of Governors of State Colleges and Universities*, 48 Ill. 2d 580, 587 (1971). No witness identified by Konicki had seen or indicated that they received pictures of her. With respect to Bassett, Konicki alleged that he distributed or published the pictures to only one person: Rathbun. However, Bassett submitted an affidavit that states that the pictures were destroyed in compliance with the court order in 2006. Although Konicki states in her affidavit filed in support of her opposition to the defendants' motion that she saw an email from Bassett to Rathbun, and it contained a picture of her, she also states that the email was prior to the events alleged in the complaint and does not allege that the picture was of a private nature. The remainder of her allegations were made on information and belief, which were contradicted by the affidavits and depositions submitted by the defendants. Therefore, we affirm the trial court's grant of summary judgment on the defamation and invasion of privacy claims.

¶ 18 A plaintiff must prove three elements to prevail on a claim of intentional infliction of emotional distress:

> "a claim of intentional infliction of emotional distress, the plaintiff must prove the following three elements: (1) that the defendant's conduct was truly extreme and outrageous, (2) that the defendant either intended that his conduct would cause severe emotional distress or knew that there was a high probability that his conduct would do so, and (3) that the defendant's conduct did in fact cause severe emotional distress." *Taliani v. Resurreccion*, 2018 IL App (3d) 160327, ¶ 26.

Publication is not always an element, but it is in this case because the conduct alleged by Konicki is the publication of the pictures. As we have already found, Konicki has not presented any facts to support an allegation of publication. Thus, summary judgment on the claims of intentional infliction of emotional distress is also affirmed.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Will County is affirmed.

¶ 21 Affirmed.

¶ 22 JUSTICE WRIGHT, specially concurring:

¶ 23 I concur in all respects with the majority's decision. However, I write this separate concurrence because I disagree with appellant's argument that the trial court should have stayed the ruling on summary judgment and afforded her an opportunity to conduct discovery. This issue was raised in the petition for reconsideration of our decision in this appeal.

¶ 24 The decision in *Rogers v. Robson, Masters, Ryan, Brumund and Belom* is very instructive to me and is also binding on this court. See 74 Ill. App. 3d 467, 471 (1979). In *Rogers*, this court held that the absence of a Rule 191(b) affidavit in the trial court is fatal to appellant's challenge to the timing of the summary judgment ruling with respect to discovery. *Id.*

¶ 25 The record in this appeal does not contain a Rule 191(b) affidavit from appellant. Further, appellant requested and received continuances for the hearing on the motion for summary judgment, but did not mention that additional time was needed to obtain the affidavits of hostile affiants through discovery. Appellant's mid-hearing, unsworn, verbal request for discovery to begin before the court's ruling on summary judgment does not suffice.

¶ 26 The *Rogers* decision states that when the procedure set forth in Rule 191(b) is not followed, a party may not "complain of an inability to conduct discovery before summary

judgment was ordered." *Id*., *US Bank, National Ass'n v. Avdic*, 2014 IL App (1st) 121759, ¶ 39 (citing *Parkway Bank & Trust*, 2013 IL App (1st) 130380, ¶ 48 (quoting *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 225, 268 (2002)).

¶ 27 For this additional reason, together with the rationale expressed in the majority's decision, I would affirm the trial court's ruling granting summary judgment in defendants' favor and therefore specially concur.