SIXTH DIVISION
February 21, 2014
Modified upon denial of rehearing March 28, 2014

No. 1- 12-3731

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

'LANRE O. AMU,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 L 1103
	)	
JAMES E. SNYDER,	)	Honorable
	)	James N. O'Hara,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Dismissal of amended complaint alleging defamation against a State employee was affirmed, where suit was barred by principals of sovereign immunity.

¶ 2 Plaintiff-appellant, 'Lanre O. Amu, filed suit against defendant-appellee, James E. Snyder, claiming defamation. The circuit court dismissed the action with prejudice based on principles of sovereign immunity, and plaintiff appealed. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In his first-amended complaint, plaintiff, "an attorney by profession," "licensed to practice law in Illinois in 1996," and "a person of good name and reputation," alleged defendant,

"an associate judge of the circuit court of Cook County," had defamed him. Specifically, plaintiff claimed in paragraphs 18 through 23 of his first-amended complaint:

> "18. On information and belief, prior to January 19, 2012, in front of numerous persons defendant in his personal capacity maliciously stated the following concerning the plaintiff: "…*attorney 'Lanre Amu is a flim flam*…"
>
> 19. On January 19, 2012, in front of numerous persons including Allen Henderson, defendant in his personal capacity maliciously stated the following concerning plaintiff: "*...attorney 'Lanre Amu is a flim flam.…" defendant again repeating to these persons:*
>
> *" 'Lanre Amu is a flim flam attorney.…"*
>
> 20. On January 19, 2012, in front of numerous persons including George Drake, defendant in his personal capacity maliciously stated the following concerning plaintiff: "*...attorney 'Lanre Amu is a flim flam.…" defendant again repeating to these persons:*
>
> *" 'Lanre Amu is a flim flam attorney.…"*
>
> 21. On January 19, 2012, in front of numerous persons including Laura M. Maul, defendant in his personal capacity maliciously stated the following concerning plaintiff: "*...attorney 'Lanre Amu is a flim flam.…" defendant again repeating to these persons:*
>
> *" 'Lanre Amu is a flim flam attorney.…"*
>
> 22. On information and belief, on or after January 19, 2012 but before February 26, 2012, in front of numerous persons defendant in his personal capacity maliciously stated the following concerning plaintiff: "*...attorney 'Lanre Amu is a flim flam.…"*
>
> 23. In making the defamatory statements, defendant intended to mean that plaintiff 'Lanre Amu is a fraudulent attorney, a swindler-an attorney who takes money from people by fraud or deceit, and a criminal." (Emphasis in original.)

¶ 5 Plaintiff alleged defendant was motivated by "defendant and his company's preexisting desires to oppress plaintiff, rubbish plaintiff, bankrupt plaintiff, and totally destroy plaintiff at the slightest opportunity." Plaintiff asserted the alleged defamation is "part and parcel of a well orchestrated scheme by the defendant and his company, motivated solely by personal animosity and personal vendetta." This scheme, plaintiff maintained, was based 'in part [on] a disagreement plaintiff had with defendant's friend(s) one of whom is named Thomas Chiola." Thomas Chiola is a retired judge of the circuit court of Cook County.

¶ 6 Although plaintiff identified defendant as an associate judge in his first-amended complaint, plaintiff also alleged the defamatory statements were not made in the course of defendant's duties, and were outside the scope of defendant's authority as a judicial officer. At the time of the purported statement, plaintiff alleged he was not a party, witness, or attorney in any proceeding before defendant. Plaintiff maintained: "Defendant [] holds the position of [an] associate judicial officer within our court system [and], objectively, the defendant is not Educationally, Ethically, or Morally plaintiff's superior."

¶ 7 Plaintiff sought compensatory damages in excess of $50,000 and punitive damages in the amount of $10,000,000.

¶ 8 The office of the attorney general of Illinois appeared on behalf of defendant, who moved to dismiss the amended complaint pursuant to sections 2-619(a)(1) and 2-619(a)(9) of the Illinois Code of Civil Procedure (the Code). 735 ILCS 5/2-619(a)(1), (9) (West 2010). Defendant argued the circuit court lacked jurisdiction to hear plaintiff's suit based on sovereign immunity principles, and that defendant was also protected by the doctrine of judicial immunity.

¶ 9 Plaintiff, in his written response to the motion, argued sovereign immunity was not applicable because the defamatory statement was not related to defendant's judicial duties.

Plaintiff also argued defendant was not protected by judicial immunity because plaintiff was not a litigant or attorney in a case before defendant at the time the statement was made. Plaintiff filed an affidavit as an exhibit to his response to the motion to dismiss, in which he reiterated both these assertions and the allegations of the first-amended complaint that the purported defamatory statement had "nothing whatsoever to do with any judicial proceeding before [defendant]," and was a "personal vendetta that stems from [defendant's] extra judicial activities." Plaintiff's affidavit was purportedly filed pursuant to Illinois Supreme Court Rule 191(b) (Ill. S. Ct. R. 191(b) (eff. July 1, 2002)), and it further averred that the depositions of defendant, Ms. Maul, Mr. Henderson, and Mr. Drake would be required to "further establish these facts and fully respond to the Section 2-619 motion to dismiss." Finally, plaintiff averred that he could not obtain affidavits from these people without a deposition.

¶ 10 In an affidavit attached to a written rely in support of his motion to dismiss, defendant stated that "at all times relevant" he was a duly appointed and sworn associate judge of the circuit court of Cook County. He further asserted that on or about January 19, 2012, he presided over a lawsuit captioned *Allen Henderson v. World Hyundai Motors of Matteson, et al.* (case number 10 L 1103). Laura Maul was counsel for defendant, World Hundai Motors of Matteson. Defendant asserted any statements he may have made in front of, or to Mr. Henderson, Mr. Drake, or Ms. Maul on January 19, 2012, or at any other time as alleged in the first-amended complaint, "were made during court proceedings" in the *Henderson* case. Defendant further explained that it "is the normal course of business for an Associate Judge of the Circuit Court of Cook County to assist litigants in moving their cases forward." As to the claims set forth in the first-amended complaint, defendant contended: "Never did I act outside my official capacity as Associate Judge of the Circuit Court of Cook County."

¶ 11 There is no indication in the record that plaintiff's request to take the depositions of defendant, Ms. Maul, Mr. Henderson, and Mr. Drake was ever ruled upon. The record does reflect that, after the briefing on defendant's motion to dismiss was completed, that motion was before the court for consideration on September 27, 2012. The matter was continued to October 30, 2012, on which date a three-page written order was entered by the circuit court. Therein, the circuit court granted defendant's motion to dismiss after concluding that it had no jurisdiction to hear the case. The circuit court further noted that, even if it had jurisdiction, defendant was nevertheless fully protected from the suit by judicial immunity. Plaintiff has appealed.[1]

¶ 12 II. ANALYSIS

¶ 13 Before this court, plaintiff argues the circuit court erred in dismissing his complaint because defendant was acting in a personal capacity when he allegedly made the statements at issue and, therefore, sovereign immunity and judicial immunity are inapplicable. Defendant, in turn, argues the circuit court properly found it had no jurisdiction and—in any event—judicial immunity protected defendant from this suit.

¶ 14 "A dismissal under section 2-619 of the Code is proper where the plaintiff's claim against defendant is barred by an affirmative matter which avoids the legal effect of or defeats the claim." *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 13 (citing *Schrager v. Bailey*, 2012 IL App (1st) 111942, ¶ 18). A section 2-619 motion "admits the legal sufficiency of the plaintiff's cause of action." *Id.* When deciding a section 2-619 motion, a court

[1] We note that on appeal, defendant has asked this court to take judicial notice of the fact that plaintiff's law license is now subject to an interim suspension due to the pendency of disciplinary proceedings involving allegations plaintiff made "false statements concerning the qualifications and integrity of judges." Plaintiff objects to this request, contending this fact is irrelevant to the instant suit and appeal. Because we resolve this matter on grounds wholly independent of the disciplinary proceedings involving plaintiff, we need not further consider this matter.

accepts all well-pleaded facts in the complaint as true and will grant the motion when it appears no set of facts can be proved which would allow the plaintiff to recover. *Wilson v. Quinn*, 2013 IL App (5th) 120337, ¶ 11. The court will not admit as true unsupported conclusions of law or conclusory allegations of fact. *Aliano v. Ferris*, 2013 IL App (1st) 120242, ¶ 20. Sovereign immunity (*Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 15), and judicial immunity (*Vlastelica v. Brend*, 2011 IL App (1st) 102587, ¶ 17-18), are affirmative matters which may be raised in a section 2-619 motion. Our review of an order granting a section 2-619 motion is *de novo*. *Wilson*, 2013 IL App (5th) 120337, ¶ 11.

¶ 15 We first consider whether principles of sovereign immunity barred plaintiff from bringing his suit against defendant in the circuit court of Cook County.

¶ 16 Sovereign immunity was recently discussed in the following way:

> "Sovereign immunity, as it existed at common law, barred lawsuits against the government unless the government consented to be sued. [Citation.] Section 4 of article XIII of the Illinois Constitution of 1970 states sovereign immunity is abolished in Illinois, except as the General Assembly may provide by law. [Citation.] Pursuant to the constitutional grant of authority in article XIII, the Illinois General Assembly enacted the State Lawsuit Immunity Act ***. [Citation.] Section 1 of the Immunity Act provides the State shall not be named as a defendant or a party in any court, except as provided in the Illinois Public Labor Relations Act [citation], the Court of Claims Act [citation], the State Officials and Employees Ethics Act [citation], and section 1.5 of this Act. [Citation.] The Court of Claims Act confers in the Court of Claims exclusive jurisdiction of '[a]ll claims against the State founded upon any law of the State of Illinois

or upon any regulation adopted thereunder by an executive or administrative officer or agency.' [Citation.]." (Citations omitted.) *Wilson*, 2013 IL App (5th) 120337, ¶ 12.

¶ 17 The determination of whether an action is against the State of Illinois and, thus, one which cannot be brought in the circuit court, "does not depend on the formal identification of the parties as they appear in the record; it depends on the issues involved and the relief sought." *Id.* ¶ 13. A plaintiff may not evade the prohibitions against bringing suit against the State "by bringing an action against a State employee in his individual capacity when the actual claim is against the State or when the State is directly and adversely affected by the suit." *Id.*; see also *Carmody v. Thompson*, 2012 IL App (4th) 120202, ¶ 21 (an " 'action brought nominally against a state employee in his individual capacity will be found to be a claim against the State where a judgment for the plaintiff could operate to control the actions of the State or subject it to liability.' " (quoting *Currie v. Lao*, 148 Ill. 2d 151, 158 (1992))).

¶ 18 Generally, courts use a three-factor test to determine whether an action against a State employee is actually against the State. *Jackson v. Alvarez*, 358 Ill. App. 3d 555, 560 (1990). The factors to be considered are: "(1) whether the official allegedly acted beyond the scope of his authority; (2) whether the duty the official allegedly breached is owed solely by virtue of State employment; and (3) whether the action of the official allegedly took involved matter within his normal and official functions." *Welch v. Heiple*, 322 Ill. App. 3d 345, 351 (2001). "Even when these criteria are not met, a court must consider the relief sought." *Id.* "Sovereign immunity will apply whenever a judgment for the plaintiff could operate either to control the actions of the State or subject it to liability." *Id.*

¶ 19 We first note the parties do not dispute an associate judge of the circuit court of Cook County is a State employee, operating under the supervision of the Illinois Supreme Court. See

Ill. Const. 1970, art. VI, § 8 (providing for the appointment of associate judges to serve in the circuit court of Cook County); Ill. Const. 1970, art. VI, § 16 (providing general administrative and supervisory authority over all courts is vested in the Supreme Court); and Ill. Const. 1970, art. VI, § 14 (providing, subject to additional compensation provided by the county, all salaries and expenses of associate judges shall be paid by the State).

¶ 20 We next make the following observations about the amended complaint. Plaintiff alleged defendant was acting in his personal capacity and outside of his employment as an associate judge. However, the amended complaint identified and referred to defendant as an associate judge and maintained defendant's position as an "associate judicial officer within our court system" does not make him more superior to plaintiff. Plaintiff further contended defendant was motivated by defendant's "*company's"* preexisting desires to oppress plaintiff, and there was a scheme by "the defendant and his *company*." (Emphasis added.) Plaintiff contended defendant made the comment against him because plaintiff had a "disagreement" with "defendant's friend[s]," including a retired judge, Thomas Chiola.

¶ 21 Despite plaintiff's protestations that his suit deals with defendant in his personal capacity, the amended complaint is crafted to veil the fact plaintiff believed he was defamed by defendant in his capacity as an associate judge and defendant was acting as part of a broader court-based scheme against him. That plaintiff was attempting to obviate the true meaning of his suit is supported by his discovery requests. For example, plaintiff, in his interrogatories, sought information about defendant's personal *and* professional relationships with retired Judge Chiola, and his relationships with current judges of the circuit court of Cook County—Judge Eileen Brewer and Judge Lynn Egan. In his interrogatories, plaintiff also sought discovery about discussions defendant may have had with these current or former members of the judiciary

regarding plaintiff. Plaintiff cannot avoid sovereign immunity by merely identifying his suit as one brought against defendant in his personal capacity. See *Wilson*, 2013 IL App (5th) 120337, ¶ 13; *Carmody*, 2012 IL App (4th) 120202, ¶ 21.

¶ 22 We reach the same conclusion about the true nature of plaintiff's suit by applying the three-part test for determining whether an action is, in actuality, one against the State. Defendant submitted his affidavit in support of his argument that affirmative matters—sovereign and judicial immunities—required dismissal under section 2-619. We initially recognize "evidence which merely refutes [an] ultimate fact and well-pled allegation is not an 'affirmative matter' under section 2-619." *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 724 (1997) (citing *Longust v. Peabody Coal Co.*, 151 Ill. App. 3d 754, 757 (1986)). However, a defendant's section 2-619 motion only admits well-pled facts in the complaint which are necessary to state a plaintiff's claim. *Barber-Coleman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992). A defendant "does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the [section] 2-619 motion." *Id.* Thus, defendant's motion does not accept as true any of plaintiff's conclusory allegations in his first-amended complaint that defendant was not acting within his judicial role when the purported statement was made.

¶ 23 Defendant, in his affidavit, averred that the statements at issue in the first-amended complaint could only have been made during proceedings in the *Henderson* case as part of his official duties as an associate judge. He further averred as to the matters set forth in the first-amended complaint that he was acting within the course of the business of an associate judge "to assist litigants in moving their cases forward" and at no time did he act outside his judicial duties. Defendant's affidavit thus raised affirmative matters showing plaintiff's claim could not

be brought in the circuit court pursuant to defendant's sovereign immunity, and that defendant was also protected from suit under judicial immunity. Defendant's affidavit sufficiently set forth these affirmative matters in support of his motion to dismiss, and thus placed a burden upon plaintiff to contradict those affirmative matters. See *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 835 (2006) ("If a party moving for dismissal or summary judgment supplies facts which, if not contradicted, would entitle the party to a judgment as a matter of law, the opposing party cannot rely on bare allegations alone to raise issues of material fact.").

¶ 24 Plaintiff's own affidavit was not sufficient to refute defendant's affidavit. Indeed, we find that plaintiff's affidavit failed to comply with the requirements of Illinois Supreme Court Rule 191. Specifically, Illinois Supreme Court Rule 191(a), provides:

> "[A]ffidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill S. Ct. R. 191(a) (eff. July 1, 2002).

¶ 25 Here, other than the specific averments that plaintiff was not a litigant or attorney in a case before defendant at the time the allegedly defamatory statements were made, plaintiff's affidavit merely contained general assertions that the purported defamatory statements had "nothing whatsoever to do with any judicial proceeding before [defendant]," and resulted from a "personal vendetta that stems from [defendant's] extra judicial activities." Such averments were conclusory, were not facts admissible in evidence, and the affidavit did not affirmatively show

that plaintiff could testify competently with respect to those averments. We therefore will not consider these assertions in determining whether plaintiff's suit was properly dismissed. See *Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp.*, 336 Ill. App. 3d 572, 579 (2002) (noting that affidavits or portions thereof that do not meet the requirements of Supreme Court Rule 191(a) are not to be taken as true).

¶ 26 We acknowledge that plaintiff filed his affidavit before defendant filed his, and plaintiff's affidavit was purportedly filed pursuant to Illinois Supreme Court Rule 191(b) (Ill S. Ct. R. 191(b) (eff. July 1, 2002)). Thus, plaintiff specifically requested that the depositions of defendant, Ms. Maul, Mr. Henderson, and Mr. Drake be allowed to further establish the factual allegations in plaintiff's affidavit and to fully respond to defendant's motion to dismiss. Plaintiff further averred that he could not obtain affidavits from these people without a deposition. There is no indication in the record that plaintiff's request was ever ruled upon prior to the dismissal of his suit, nor is there any indication that plaintiff attempted to file any additional affidavits to directly respond to the specific assertions in defendant's affidavit. In his petition for rehearing on appeal, plaintiff contends that it was improper for the circuit court to dismiss his suit without first providing him an opportunity to rebut the allegations contained in defendant's affidavit by way of taking the requested depositions.

¶ 27 We disagree. Illinois Supreme Court Rule 191(b) specifically provides:

> "If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just,

> either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so furnished, shall be considered with the affidavits in passing upon the motion." (Ill S. Ct. R. 191(b) (eff. July 1, 2002)).

It is well recognized that a circuit court is afforded considerable discretion in ruling on matters pertaining to discovery, and that a circuit court does not abuse its discretion or err in granting a defendant's motion to dismiss when a plaintiff's Rule 191(b) affidavit is facially defective and fails to contain the necessary disclosures required by the rule. *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 11-12 (2009).

¶ 28 Here, plaintiff's Rule 191(b) affidavit did nothing more than baldy assert that plaintiff needed to take the depositions of defendant, Ms. Maul, Mr. Henderson, and Mr. Drake to establish the other factual allegations in plaintiff's affidavit, and that plaintiff could not obtain affidavits from them without a deposition. Nowhere in his affidavit did plaintiff identify exactly why affidavits from these individuals could not be procured, what they would testify to if sworn, or plaintiff's reasons for these beliefs. The circuit court therefore did not error in granting defendant's motion to dismiss despite the filing of plaintiff's defective Rule 191(b) affidavit. *Id.*; see also *Chrichton v. Golden Rule Insurance Co.*, 358 Ill. App. 3d 1137, 1151 (2005) ("The plaintiff's failure to comply with Rule 191(b) defeats his objection on appeal that the trial court allowed insufficient time for discovery.").

¶ 29 In sum, because they were not properly refuted by plaintiff, we can take the statements in defendant's affidavit as true, notwithstanding the conclusory allegations in the first-amended complaint which were repeated in plaintiff's affidavit. See *Marriage of Kohl*, 334 Ill. App. 3d 867, 877 (2002); *Atkinson*, 369 Ill. App. 3d at 835.

¶ 30 Returning to the three-part test for determining whether there is an action against the State, we find that defendant's affidavit satisfies the first two criteria. The affidavit established defendant's purported action was done within the scope of his authority and as part of his normal and official functions as an associate judge. Further, as to the third factor, plaintiff has not alleged defendant owed him a duty independent of his State employment. Indeed, his amended complaint as to duty states only plaintiff *knows of no duty* breached by defendant in the context of his judicial duties. The first-amended complaint does not allege the existence of any independent duty which defendant owed to plaintiff which gave rise to plaintiff's cause of action or was breached by defendant. Under the three-part test articulated in *Welch*, we determine plaintiff's suit was one against the State.

¶ 31 Even if the three-part test was not met here, we must still consider whether a judgment for plaintiff would operate to control the actions of the State. *Welch*, 322 Ill. App. 3d at 351. We find a judgment for plaintiff would have an adverse impact against the State. Such a judgment would invade the provinces of the judiciary and impede defendant's ability, as an associate judge and an employee of the State's judicial system, to control his docket and preside over his cases without fear of suit. Again, it is clear this suit is one which, under sovereign immunity principles, must be considered to have been brought against the State.

¶ 32 For the reasons stated, we conclude the circuit court properly found it lacked jurisdiction to hear this suit based on sovereign immunity principles and affirm the dismissal. Moreover,

even if the circuit court did have jurisdiction, we would find the circuit court also properly concluded defendant was protected by judicial immunity.

¶ 33 "The Supreme Court has recognized that the common law provides for absolute immunity for judges ***." *Vlastelica*, 2011 IL App (1st) 102587, ¶ 21 (citing *Brisco v. LaHue* 460 U.S. 325, 334-35 (1983)). "A judge is *absolutely* immune from liability for acts committed while exercising authority vested in him." (Emphasis in original.) *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1038 (1998) (where court found immunity for statements made by judge during court proceedings). The doctrine of judicial immunity has two exceptions. *Generes v. Foreman*, 277 Ill. App. 3d 353, 355 (1995). The immunity does not apply to actions which are nonjudicial or are taken by a judge in the complete absence of all jurisdiction. *Id.*

¶ 34 As to the first exception, defendant averred in his affidavit the alleged defamatory statement was made during court proceedings, and at all times alleged in the first-amended complaint he was acting within his judicial duties. As discussed, plaintiff offered no evidentiary facts to contradict defendant's affidavit. The fact plaintiff was not a participant in the *Henderson* case does not mean defendant was not acting within his judicial capacity. Therefore, the first exception to judicial immunity does not apply.

¶ 35 With respect to the second exception, it is simply not relevant to this matter. Plaintiff 's suit does not allege defendant took some judicial action beyond his jurisdiction. See, *e.g.*, *Generes*, 227 Ill. App. 3d at 354 (plaintiff alleged defendant was without authority to enter orders in a prior case after he had recused himself). Defendant is, therefore, protected by absolute judicial immunity from plaintiff's action.

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, the circuit court properly dismissed plaintiff's action with prejudice.

¶ 38 Affirmed.