2017 IL App (3d) 160779-U

Order filed November 1, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

STEVE S. YUN,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-16-0779
	)	Circuit No. 16-L-333
	)	
JERRY RILEY, BLITT AND GAINES, P.C., and BANK OF AMERICA, N.A.,	)	Honorable
	)	Michael J. Powers,
	)	Judge, Presiding.
Defendants-Appellees.	)	

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The court did not err in dismissing plaintiff's complaint for fraud upon the court and motion for default judgment.

¶ 2 Steve S. Yun, plaintiff, appeals from the dismissal of his complaint for fraud upon the court against Jerry Riley, Blitt and Gaines, P.C. (Blitt and Gaines), and Bank of America, N.A. (Bank of America) (collectively defendants), arguing that the court erred in dismissing the complaint and motion for default judgment. We affirm.

¶ 3 FACTS

¶ 4 In August 2015, Bank of America filed a complaint to collect money owed by Yun. On September 18, 2015, a hearing was held. Yun proceeded *pro se*. Riley was an attorney at Blitt and Gaines and represented Bank of America in court. The court told Yun he had 28 days to respond to the complaint. Yun asked, "Can I just make a motion for a bill of particulars?" The court gave Yun leave to file a demand for a bill of particulars. The parties discussed that Bank of America would have 28 days to respond to that motion when it was filed and determined that Yun still needed to file an answer to the complaint and file his appearance within 28 days. The court then set a status date. Riley stated that he wrote on the first page of the order that Yun needed to file a motion for leave to file a demand for a bill of particulars, but Riley and the court agreed that he did not. Therefore, they agreed to dispose of the first page of the order and only file the second page. The second page of the order was a form in which Riley had filled in that the cause was continued to November 13, 2015, for status. The court signed the order.

¶ 5 On September 22, 2015, Yun filed a motion for leave to file a demand for a bill of particulars, but did not file the actual demand for a bill of particulars. On October 13, 2015, Yun filed a motion for extension of time to answer the complaint, stating that Bank of America had not filed the bill of particulars. On November 19, 2015, Yun filed a motion to dismiss the complaint arguing that Riley "intentionally excluded the Judge's order in the written order to avoid filing the Bill of Particulars." The court denied the motion. Yun then filed a second motion to dismiss in May 2016, alleging "fraud upon the court." The motion stated that Riley "produced fraudulently the written court order as if the granted and filed Motion for Bill of Particulars did not exist." The court denied the motion.

¶ 6 Yun then filed a separate one-count complaint, which is the subject of this appeal. The complaint solely argued fraud upon the court in that defendants through Riley "independently prepared the written order where he ignored the granted Motion and Notice to file Bill of Particulars and intentionally excluded the Judge's order to file bill of particulars within 28 days and submitted the written order to the Judge without conferring with [Yun]." On August 19, 2016, Riley and Blitt and Gaines had not yet filed an appearance or answer to the complaint, so Yun filed a motion for default judgment.

¶ 7 On September 1, 2016, Bank of America moved to dismiss the complaint, alleging, *inter alia*, that they did not commit fraud and that, even accepting Yun's allegations, it did not rise to the level of fraud upon the court. On September 14, 2016, Blitt and Gaines filed their appearance. They joined Bank of America's motion to dismiss. On October 17, 2016, Yun filed another motion for default judgment only against Riley. Though the record is incomplete, an order was entered on October 24, 2016, continuing the case for a hearing on the motion to dismiss and the motion for default for November 28, 2016. Yun was to show proof of service on Riley at the hearing.

¶ 8 At the hearing, the court asked Yun to present the filed demand for a bill of particulars, noting that the record only showed that Yun filed a motion for leave to file a demand for particulars. Yun said that he did not have it. The court allowed the motion to dismiss, stating:

> "There is nothing in the record to indicate that you did what you were allowed to do by the Court. And that's fine, but what it comes down to is whether or not you have pled a cause of action against the defendants for fraud upon the Court. And I am going to grant the 619 motion with prejudice. There has been nothing pled indicating a cognizable cause of action as a matter of law[.]"

¶ 9 The court further granted costs pursuant to section 5-110 of the Code of Civil Procedure (Code) (735 ILCS 5/5-110 (West 2016)). An attorney for Blitt and Gaines then stated:

> "As a matter of clarification and housekeeping, the defendant, Blitt & Gaines, has a piggyback motion on the motions that's been ruled on. The third defendant, the individual, Jerry Riley, was an attorney in our law firm, Blitt & Gaines, has not been served. I am just hoping that the order today dismisses the complaint with prejudice so that there is no issue that Mr. Riley—"

Yun interrupted and stated that he did serve Riley. The record shows that Riley was served on October 31, 2016. The court confirmed that it was a one-count complaint that "lumped all the defendants into one count" and then stated that he was granting the motion to dismiss, with prejudice, as to all defendants.

¶ 10 ANALYSIS

¶ 11 We note, at the outset, that the genesis of this procedural morass is the failure to create and provide a court order following the September 18, 2015, hearing which accurately reflected the court's directives and clearly advised Yun what he was required to do. More particularly, Riley at first indicated that Yun had to secure leave to file the motion for bill of particulars. The court and Riley then agreed Yun need not get leave, but should just file the demand for bill of particulars. The court also advised Yun orally that he had to answer the complaint within 28 days. The court gave no indication of how the bill of particulars might impact the time to answer. Instead, the court order entered that day merely advised Yun that a status hearing was set for November 13, 2015. Had a complete and accurate order been entered it is unlikely that this case would be here at this time.

¶ 12 That said, we deal with what is before us. Specifically, Yun argues the court erred in dismissing (1) the fraud complaint and (2) the motion for default judgment. Both arguments fail in light of the fact that Yun's fraud complaint does not plead facts establishing that defendants made a false statement of material fact to the court.

¶ 13 Defendants filed their motion to dismiss pursuant to section 2-619.1 of the Code in order to file a combined motion with respect to the pleadings under section 2-615 of the Code and a motion for involuntary dismissal under section 2-619 of the Code. 735 ILCS 5/2-615, 2-619, 2-619.1 (West 2016). Defendants' assertion that, accepting Yun's allegations, the conduct did not constitute fraud upon the court was brought under section 2-615. "A section 2-615 motion to dismiss tests *** whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, state sufficient facts to establish a cause of action upon which relief may be granted." *Chang Hyun Moon v. Kang Jun Liu*, 2015 IL App (1st) 143606, ¶ 11. When ruling on a motion under section 2-615, the circuit court accepts well-pleaded facts as true, but will not "take mere conclusions of law or fact contained within the challenged pleading as true unless they are supported by specific factual allegations." *Id.* Defendants' allegation that they did not commit fraud was brought under section 2-619. A section 2-619 motion permits the movant to go outside the four corners of the complaint and use external submissions to defeat the plaintiff's claim. *Jones v. Brown-Marino,* 2017 IL App (1st) 152852, ¶ 20. We review dismissals under sections 2-615 and 2-619 *de novo*. *Chang Hyun Moon*, 2015 IL App (1st) 143606, ¶ 11.

¶ 14 "The elements of common-law fraud are (1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induce plaintiff to act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance on the statement. [Citation.] The first element includes three

requirements: (1) the defendant must make a misrepresentation; (2) it must involve a fact; and (3) the misrepresentation must be material." *Wernikoff v. Health Care Service Corp.*, 376 Ill. App. 3d 228, 233-34 (2007).

¶ 15 Yun only alleged that defendants committed fraud by failing to include in the written order that the court granted his demand for a bill of particulars. Our review of the record shows that the court did not grant Yun's *demand* for a bill of particulars. Instead, the court granted Yun *leave to file* the demand for a bill of particulars, which Yun failed to do. As the court did not grant the demand for a bill of particulars, any omission of such from the written order was not a misrepresentation. The court ordered that the parties return for status. The written order, which was reviewed and signed by the court, reflected this. As there was no misrepresentation, there was no false statement of material fact, and Yun could not show that defendants committed fraud.

¶ 16 Moreover, Yun's complaint specifically alleged fraud *on the court*. "[T]he phrase, fraud upon the court, is generally limited to egregious conduct attacking the judicial machinery itself, such as bribing a judge." *United States ex rel. Bonner v. Warden, Stateville Correctional Center*, 78 F.R.D. 344, 347 (N.D. Ill. 1978); see also, *Apotex Corp. v. Merck & Co., Inc.*, 507 F.3d 1357, 1361 (Fed. Cir. 2007) ("Fraud upon the court is typically limited to egregious events such as bribery of a judge or juror or improper influence exerted on the court, affecting the integrity of the court and its ability to function impartially."). Even if Riley failed to include the court's granting of a motion in the written order, such omission would not rise to the level of fraud upon the court.

¶ 17 Yun next contends that the court erred in dismissing his motion for default against Riley where the court did not consider Yun's pleadings on the motion. First, we reject defendants'

claim that we do not have jurisdiction to consider this argument. Specifically, defendants argue that "Yun's appeal is limited only to those arguments Yun made in the proceedings that occurred on November 28, 2016 upon [defendants'] Motion to Dismiss." Defendants' argument ignores the fact that the order granting defendants' motion to dismiss constitutes a final appealable order and resulted in the disposal of Yun's motion for default judgment. The disposal of the default motion is therefore properly before us on appeal as a final order includes all interlocutory orders. See *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427 (1979).

¶ 18 Section 2-1301(d) of the Code states, "Judgment by default may be entered for want of an appearance, or for failure to plead, but the court may in either case, require proof of the allegations of the pleadings upon which relief is sought." 735 ILCS 5/2-1301(d) (West 2016). Indeed, our supreme court has held that "a default judgment must be reversed when the complaint upon which that judgment is premised fails to state a cause of action." *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988). As stated above, Yun could not prove that fraud or fraud upon the court had been committed. Therefore, the motion for default judgment was properly dismissed.

¶ 19 Even if we were to assume Yun's complaint stated a viable cause of action, we find his motion for default judgment was not ripe for review. Yun filed motions for default judgment against Riley on August 19 and October 17, 2016. On November 28, 2016, the case was scheduled for hearings on the motion to dismiss, motion for default judgment, and for Yun to show proof that Riley had been served with the complaint. The case was dismissed on this date. The record does not show that Riley was actually served with the complaint until October 31, 2016. The summons provided that Riley had 30 days after service of the summons to answer the complaint or file his appearance. Therefore, the time for Riley to file his appearance or answer

the complaint had not expired at the time the court dismissed the case and, at that time, the motion for default judgment was not ripe for adjudication. See, *e.g., People v. Laugharn*, 233 Ill. 2d 318, 323 (2009) (section 2-1401 petition not ripe for adjudication where State was not given the full 30 days to respond). Stated another way, any ruling on the motion for default judgment on November 28, 2016, would have been premature as Riley had not yet had a full 30 days to respond or file his appearance.

¶ 20 CONCLUSION

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

¶ 22 Affirmed.