2012 IL App (4th) 110940-U

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NO. 4-11-0940

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

SHAWN BAHRS, Plaintiff-Appellant, v. RON BLAKEY and MARY Schenk, Defendants-Appellees.	)	Appeal from Circuit Court of Champaign County No. 11L86
	)	Honorable Michael Q. Jones, Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiff's amended complaint failed to state a claim for any legally recognized cause of action and the trial court correctly granted defendants' motion to dismiss.

¶ 2 Plaintiff, Shawn Bahrs, appeals the trial court's dismissal of his complaint against defendants, Ron Blakey and Mary Schenk. He argues (1) he was denied an opportunity to be heard on defendants' motion to dismiss when the court failed to conduct an oral hearing and defendants' attorney engaged in *ex parte* conversations with the court and (2) the court erred in granting defendants' motion to dismiss his amended complaint. We affirm.

¶ 3 The record shows both Blakey and Schenk were newspaper employees, working for The News-Gazette. On February 7, 2011, Blakey was collecting money from a newspaper vending machine near plaintiff's home. According to Blakey, he observed plaintiff appearing hunched over and ill near a van and plaintiff initiated a confrontation. Blakey believed plaintiff

was intoxicated and saw plaintiff enter the van and begin driving. Blakey contacted police and followed plaintiff's vehicle until police arrived. Plaintiff was arrested and charged with multiple offenses, including aggravated driving under the influence (DUI), driving on a revoked license, and aggravated fleeing and attempting to elude a police officer. Ultimately, plaintiff was found guilty of those offenses. On February 9, 2011, Schenk, a reporter for The News-Gazette, wrote an article about the incident that led to plaintiff's arrest entitled "Chase and DUI Case Starts in Philo Ends Up in Urbana."

¶ 4 On May 20, 2011, while incarcerated, plaintiff filed a *pro se* complaint against Blakey and Schenk, alleging they "violated state laws and caused [him] serious mental, physical, and social harm." On June 28, 2011, the trial court granted plaintiff leave to file a *pro se* amended complaint. He raised several "issues" against defendants, including invasion of his privacy, criminal trespass to his vehicle, bodily harm, stalking, false reporting to police, publishing false material, and slander. Plaintiff's claims against defendants were not separated into distinct counts. Instead, his amended complaint contained sections entitled "statement of facts," "affidavit of plaintiff," "civil and criminal law violation," and "relief request." Plaintiff specifically alleged that, on February 7, 2011, he was approached by Blakey outside his home and observed Blakey looking into his work van. Upon telling Blakey to get away from his van, a confrontation ensued and "it seemed that [Blakey] hit [him] with something." Plaintiff alleged he fell to the pavement and the next thing he remembered was waking up in jail. He further asserted Schenk's newspaper article about the incident was "false and misleading."

¶ 5 On August 10, 2011, defendants filed a combined motion to dismiss plaintiff's amended complaint, seeking dismissal pursuant to both sections 2-615 and 2-619(a)(9) of the

Code of Civil Procedure (Civil Code) (735 ILCS 5/2-615, 2-619(a)(9) (West 2010)) along with a memorandum in support of their motion. On August 31, 2011, plaintiff filed a response to defendants' motion and, on September 15, 2011, defendants filed a reply. On September 27, 2011, the trial court made a docket entry, showing its dismissal of plaintiff's amended complaint based upon the parties' written submissions without oral argument. The court found as follows:

> "Defendant's [*sic*] motion to [d]ismiss brought pursuant to [s]ection 2-615 of the Code *** is allowed. Even if the compliant [*sic*] was properly separated into individual counts, the [c]ourt finds that no cause of action is stated. Further, to the extent the complaint attempts to allege slander and/or defamation, it is dismissed pursuant to section 2-619. In the exercise of the court's discretion, the complaint is dismissed in its entirety with prejudice."

¶ 6 On October 3, 2011, plaintiff filed a petition for writ of *habeas corpus ad testificandum*, asking the trial court to schedule a new court date and bring him before the court. He also filed a motion to reschedule oral arguments. On October 8, 2011, the court denied plaintiff's petition and motion.

¶ 7 This appeal followed.

¶ 8 On appeal, plaintiff initially argues he was denied due process. Specifically, he contends he was denied an opportunity to be heard regarding defendants' motion to dismiss where no hearing was held on the motion and defendants engaged in *ex parte* communications with the trial court.

¶ 9 "Generally, private conversations with a judge concerning a pending case are improper." *In re Maher*, 314 Ill. App. 3d 1088, 1097-98, 734 N.E.2d 95, 102 (2000). However, the Code of Judicial Conduct, Canon 3, provides as follows:

> "Where circumstances require, *ex parte* communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and
>
> (ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond." Ill. S. Ct. R. 63(4)(a) (eff. Apr. 16, 2007).

¶ 10 To support his position, plaintiff attached two letters to his appellant's brief which he received from defendants' counsel. The content of the letters alerted him to matters involving the scheduling of a hearing on defendants' motion to dismiss and defendants' request that the trial court decide the matter based solely upon the parties' written submissions. The letters do not appear in the appellate record but defendants assert they have no objection to this court's consideration of the letters on appeal. Accordingly, we treat the inclusion as a motion to supplement the record and we grant it.

¶ 11 Here, the record fails to show the trial court engaged in inappropriate *ex parte*

communications with defendants' counsel. The letters plaintiff uses to support his position fail to show a discussion of any substantive matters related to the motion to dismiss. Instead, they indicate any communications that occurred between the court and defendants' counsel involved only administrative or scheduling matters. Defendants gained no advantage over plaintiff and plaintiff was notified of the communications.

¶ 12 Moreover, the Civil Code contains no requirement that a party receive an oral hearing on pending motions. Although due process requires notice and an opportunity to be heard (*East St. Louis Federation of Teachers, Local 1220 v. East St. Louis School District No. 189 Financial Oversight Panel*, 178 Ill. 2d 399, 419-20, 687 N.E.2d 1050, 1062 (1997) (fundamental requirements of due process are notice and an opportunity to be heard)), the record shows plaintiff received notice of defendants' motion to dismiss and filed a written response to the motion that was considered by the trial court. Plaintiff received the process to which he was due and the legal authority he cites on appeal is distinguishable from the facts presented. The trial court committed no error.

¶ 13 On appeal, plaintiff further challenges the trial court's dismissal of his amended complaint pursuant to section 2-615 and 2-619(a)(9) of the Code. Under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2010)), a defendant may file a combined motion to dismiss pursuant to sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2010)). A section 2-615 motion to dismiss "tests the legal sufficiency of the complaint," while a section 2-619 motion "admits the legal sufficiency of the complaint, but asserts affirmative matter outside the complaint that defeats the cause of action." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361, 919 N.E.2d 926, 931-32 (2009). "Under either section of the Code, our standard of review

is *de novo*." *Kean*, 235 Ill. 2d at 361, 919 N.E.2d at 932.

¶ 14 We agree with the trial court's finding that plaintiff's amended complaint failed to plead sufficient facts to state a cause of action and dismissal pursuant to section 2-615 was warranted. As a result, it is unnecessary to address clams related to dismissal of the complaint pursuant to section 2-619(a)(9).

¶ 15 When considering a section 2-615 motion to dismiss, "[t]he proper inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Loman v. Freeman*, 229 Ill. 2d 104, 109, 890 N.E.2d 446, 451 (2008). "In ruling on a section 2–615 motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 291, 938 N.E.2d 471, 477 (2010).

¶ 16 In his amended complaint, plaintiff accused Blakey of causing him bodily harm. "[B]attery is committed by an individual if: '(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results.' " *Bakes v. St. Alexius Medical Center*, 2011 IL App (1st) 101646, ¶ 22, 955 N.E.2d 78, 85-86 (2011) (quoting Restatement (Second) of Torts § 13 (1965)). Thus, "[t]he elements of a battery must include an intentional act on the part of the defendants and a resulting offensive contact with the plaintiff's person." *McNeil v. Carter*, 318 Ill. App. 3d 939, 944, 742 N.E.2d 1277, 1281 (2001). "[B]attery requires more than an intent to contact, in that a defendant must intend to cause a harmful or offensive contact." *Bakes*, 2011 IL App (1st) 101646, ¶ 22, 955 N.E.2d at 86.

¶ 17 Here, plaintiff alleged he and Blakey had a confrontation and "it seemed that [Blakey] hit [him] with something." His complaint failed to include any allegations of an intent by Blakey to cause a harmful or offensive contact. Plaintiff also failed to allege any actual contact between Blakey and himself, stating only that "it seemed" Blakey hit him. He failed to plead sufficient facts to state a cause of action for battery.

¶ 18 In his amended complaint, plaintiff also alleged Blakey invaded his privacy by "[w]atching [him] from a distance." In Illinois, one way to state a cause of action for invasion of privacy is to allege the intrusion upon the seclusion of another. *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 366, 943 N.E.2d 23, 31-32 (2010). To support such a claim, "plaintiffs must allege: (1) an unauthorized intrusion into seclusion; (2) the intrusion would be highly offensive to a reasonable person; (3) the matter intruded upon was private; and (4) the intrusion caused the plaintiffs anguish and suffering." *Cooney*, 407 Ill. App. 3d at 367, 943 N.E.2d at 32.

¶ 19 Plaintiff's allegations that Blakey watched him from a distance, approached him outside his home, and looked into his van are insufficient to state a cause of action for invasion of privacy based on the intrusion theory. In particular, plaintiff failed to allege that Blakey intruded upon any private matter. Instead, his allegations show both he and his van were in public view when observed by Blakey. Specifically, plaintiff acknowledged that he was outside his home and his van was parked in front of his home.

¶ 20 Plaintiff next alleged Blakey criminally trespassed to his vehicle. A person criminally trespasses to a vehicle when he or she "knowingly and without authority enters any part of or operates any vehicle." 720 ILCS 5/21-2 (West 2010). In his amended complaint,

plaintiff alleged only that Blakey looked into his van and not that Blakey either entered or operated the van. As such, plaintiff failed to state a cause of action against Blakey for trespassing to his vehicle.

¶ 21 Plaintiff also attempted to raise a claim against Blakey for stalking.

> "A person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to:
> (1) fear for his or her safety or the safety of a third person; or
> (2) suffer other emotional distress." 720 ILCS 5/12-7.3(a) (West 2010).

The stalking statute defines "Course of conduct" to mean "[two] or more acts." 720 ILCS 5/12-7.3(c)(1) (West 2010).

¶ 22 Here, plaintiff failed to allege facts sufficient to show Blakey engaged in a "course of conduct," meaning two or more acts, directed at plaintiff. He also failed to specifically allege that Blakey's conduct caused him to fear for his safety or suffer emotional distress. Again, the facts alleged were insufficient to state a cause of action for stalking.

¶ 23 In his complaint, plaintiff further alleged Blakey illegally chased his vehicle. Defendants argue no such claim exists in Illinois and, to the extent plaintiff's allegations could be construed as a claim against Blakey for assault, they are also insufficient. We agree. "A person commits an assault when, without lawful authority, he or she knowingly engages in conduct which places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1(a)

(West 2010). Here, plaintiff failed to allege Blakey's conduct caused him a "reasonable apprehension of receiving a battery." Notably, he asserted he had no memory of the time period between when he interacted with Blakey outside his home and when he woke up in jail. As a result he had no recollection of the time period during which Blakey allegedly "chased" him.

¶ 24 Finally, plaintiff maintained defendants made false reports to police, published false information, and slandered him. "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." *Green v. Rogers*, 234 Ill. 2d 478, 491, 917 N.E.2d 450, 459 (2009). In his complaint, plaintiff failed to allege which statements by Blakey or Schenk were false and set forth only conclusory allegations. As a result, he also failed to plead sufficient facts to state a claim for defamation.

¶ 25 Plaintiff's amended complaint failed to state a claim based upon any legally recognized cause of action. The trial court correctly granted defendants' motion to dismiss.

¶ 26 For the reasons stated, we affirm the trial court's judgment.

¶ 27 Affirmed.