IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
EDGAR COUNTY, ILLINOIS

JOHN KRAFT, PAMELA KRAFT, RICHARD WILKEN, JR., STACEY WILKEN, DIANNE DUZAN, STEVE TERRELL, MARLENE TERRELL, ALBERT SCHNEIDER and GORDON BROWN,

Plaintiffs,

vs.

COUNTY OF EDGAR

and

CHRIS PATRICK, individually and in his official capacity as Edgar County Board Chairman

and

BEN JENNESS, MIKE HELTSLEY, DAN BRUNER, KARL FARNHAM, JR., ALAN ZUBER, JEFF VOIGT, each individually and in official capacities as Edgar County Board Members

Defendants.

FILED
DEC 16 2013
Karen D. Hallowan
Circuit Clerk, 5th Judicial Circuit Edgar Co.

Case No: 13- MR - 50

RESPONSE TO DEFENDANTS' MOTION TO DISMISS

All defendants, appearing by the Edgar County State's Attorney, moved to dismiss the Complaint pursuant to both 735 ILCS 5/2-619 and 735 ILCS 5/2-615.

Although the Complaint was pled in two Counts, defendants' motion requests dismissal of Count I (2-619), Count II (2-615) and Count III (2-615).

The motion to dismiss Count III under 2-615 is textually identical to the motion to dismiss Count I under 2-619.

AUTHORITY - MOTIONS TO DISMISS

In deciding a motion to dismiss, all well-pleaded facts are taken as true and all reasonable inferences from those facts are drawn in favor of the plaintiff. *Perona v. Volkswagen of America, Inc.*, 292 Ill.App.3d 59, 67, 684 N.E.2d 859 (1997). The court must determine whether the allegations in the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 490, 675 N.E.2d 584 (1996). Dismissal is improper "unless it clearly appears that no set of facts can be proved under the pleadings which will entitle the complainant to recover." *Peter J. Hartmann Co. v. Capital Bank & Trust Co.*, 296 Ill.App.3d 593, 600, 694 N.E.2d 1108 (1998). At this stage, the court is not called upon to decide the likelihood of plaintiff proving his case but only that he is entitled to relief upon proving the facts alleged. *Oliveira v. Amoco Oil Co.*, 311 Ill.App.3d 886, 895, 726 N.E.2d 51, 59 (4th Dist. 2000). A motion to dismiss should be denied where a cause of action is stated, even if it is not the cause of action intended by the plaintiff. *Boyd v. Travelers Insurance Company*, 166 Ill.2d 188, 194, 652 N.E.2d 267, 270 (1995).

Section 2-619.1 of the Code permits a defendant to file a combined motion to dismiss pursuant to sections 2-615 and 2-619 of the Code. *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, 960 N.E.2d 18, 21, 355 Ill.Dec. 575, 578 (4th Dist. 2011).

A section 2-615(a) 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. Id.

I. MOTION TO DISMISS COUNT III SHOULD BE STRICKEN

First, this portion of the motion requests impossible relief - to dismiss a Count - Count III - that does not exist.

Second, the motion to dismiss Count III is an impermissible hybrid motion in that it purports to seek relief under 2-615 but, at the same time, purports to request the court to consider other matter outside of the Complaint (Exhibits 1, 2 and 3), which is only proper in a motion under 2-619. A section 2-615(a) 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. *Thurman v. Champaign Park District,* 2011 IL App (4th) 101024, 960 N.E.2d 18, 21, 355 Ill.Dec. 575, 578 (4th Dist. 2011). Thus, in this hybrid motion, defendants both admit the legal sufficiency of the Complaint (2-619) and tests the legal sufficiency of the Complaint (2-615).

735 ILCS 5/2-619.1 states:

> Combined motions. Motions with respect to pleadings under Section 2-615, motions for involuntary dismissal or other relief under Section 2-619, and motions for summary judgment under Section 2-1005 may be filed together as a single motion in any combination. A combined motion, however, shall be in parts. Each part shall be limited to and shall specify that it is made under one of Sections 2-615, 2-619, or 2-1005. Each part

shall also clearly show the points or grounds relied upon under the Section upon which it is based.

Motions brought under the different sections (2-615, 2-619, 2-1005) each provide a different method for reaching the defect in a pleading and the court is required to consider each of the statutory sections under the respective burdens that the movant must meet. Where the different sections of the Code are not specified and/or the parts of a motion are not limited to the parameters of a specific section of the Code, the motion has been termed a "hybrid motion". "This 'hybrid motion' has been consistently criticized. 'Reviewing courts have long disapproved of this slipshod practice as it causes unnecessary complication and confusion.' *McNellis v. O'Connor,* 266 Ill.App.3d 1063, 1068-69, 640 N.E.2d 1354, 1358 (1st Dist. 1994).

In *Jenkins v. Concorde Acceptance Corp.,* 345 Ill.App.3d 669, 674, 802 N.E.2d 1270, 1276 (1st Dist. 2003), the court stated: "Section 2-619.1 of the Code allows a litigant to combine a section 2-615 motion to dismiss and a section 2-619 motion for involuntary dismissal in one pleading. 735 ILCS 5/2-619.1 However, this statute does not authorize hybrid motion practice. *Storm & Associates, Ltd. v. Cuculich,* 298 Ill.App.3d 1040, 1046, 233 Ill.Dec. 101, 700 N.E.2d 202, 206 (1998). The failure to specifically designate whether a motion to dismiss is brought pursuant to section 2-615 or section 2-619 is not always fatal, but reversal is required if prejudice results to the nonmovant. *Illinois Graphics Co. v. Nickum,*159 Ill.2d 469, 484, 203 Ill.Dec. 463, 639 N.E.2d 1282, 1289 (1994)." Clearly, the statute requires that each part of a combined motion *shall* be limited

to and *shall* specify that it is made under one of Sections 2-615, 2-619, or 2-1005. A 2-619.1 motion which does not properly specify the section and which intermingles the various requirements is an unauthorized hybrid motion.

Plaintiffs object to the hybrid motion to dismiss Count III. Defendants have impermissibly incorporated 2-619 elements into a 2-615 motion. Section 2-619.1 requires that "each part shall also clearly show the points or grounds relied upon under the Section upon which it is based." The hybrid motion filed in this case is incomprehensible, under the requirements of the Code of Civil Procedure and should be stricken.

The motion to dismiss Count III was filed under 2-615 which does not allow exhibits or extraneous matters to be considered. Therefore, Exhibits 1, 2 and 3 should be stricken.

II. MOTION TO DISMISS COUNT I MUST BE STRICKEN AND/OR DENIED BECAUSE ATTORNEY MARK ISAF HAS AN IMPERMISSIBLE CONFLICT OF INTEREST AS TO CHRIS PATRICK

Mark Isaf, State's Attorney for the County of Edgar, purports to represent Chris Patrick, by filing a motion to dismiss on behalf of all defendants, specifically including a motion to dismiss Count I which names only Chris Patrick as the defendant in Count I. Mr. Isaf has an impermissible conflict of interest.

On June 5, 2013, when the Complaint was filed, Chris Patrick was a member of the Edgar County Board. Chris Patrick resigned his position on the Edgar County Board on June 26, 2013, Filed on June 28, 2013. As alleged, Chris

Patrick's economic and financial interests are to the interests of the County of Edgar and, therefore, to the Edgar County Board.

The Complaint alleges that Chris Patrick had and has financial/economic interests directly adverse to the financial/economic interests of the County of Edgar. A fact of which the Court can take judicial notice is that Chris Patrick is not an Edgar County official, but a private individual. The motion to dismiss Count I was filed on September 16, 2013, well after the date that defendant Chris Patrick resigned from the Edgar County Board.

Count I names Chris Patrick as the sole defendant and alleges fraudulent conduct done by him prior to his election to the Edgar County Board, in violation of the Illinois Governmental Ethics Act. 5 ILCS 420/4A-101. Defendant Patrick was required to file a Disclosure of Economic Interests. He is alleged to have failed to disclose his financial interests in Zimmerly Ready Mix, a corporation in which he is alleged to have financial interests which must be reported. This allegedly fraudulent conduct adversely affected contracts entered into by the County of Edgar during defendant Patrick's tenure as County Board member. Pursuant to the Public Officers Prohibited Activities Act, an elected county board member may not be called upon to vote on any contract in which the elected official may, in any manner, be financially interested, either directly in his own name or indirectly in the name of any other person or corporation. And any contract made and procured in violation of this Act is void. 50 ILCS 105/3

Furthermore, any person who is required to file a statement of economic interests under Article 4A of the Illinois Governmental Ethics Act, who willfully files a false or incomplete statement shall be guilty of a Class A misdemeanor. 5 ILCS 420/4A-107. As the State's Attorney for the County of Edgar, it is the duty of Attorney Isaf to prosecute crimes, including Class A misdemeanors, such as the one alleged to have been committed by defendant Patrick in this Complaint.

"The duty of each State's attorney shall be: (1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned." 55 ILCS 5/3-9005 (a)(1). The Supreme Court of Illinois has held that "the State's Attorney is an officer provided for by the constitution and he is a county officer." *Ashton v. Cook County,* 384 Ill. 287, 51 N.E.2d 161, 165 (1943). In *Boyd v. Village of Wheeling,* 1985 WL 2564, *15 (N.D.Ill.), citing *Ashton,* the court said:

> "The Cook County State's attorney is not elected by the people of the State of Illinois, but by the people of Cook County, and is therefore empowered to act as the chief prosecuting and advising attorney of the county. Although his actions may not be controlled by the county board, he is nonetheless an elected official of the county, and his staff are employees of the county. [citations omitted] Although the county board is one source of authority within county government, the independently elected county officials constitute other sources of authority, and thus the actions and policies of the Cook County State's Attorney are tantamount to official policies of the County."

The State's Attorney is paid by the County of Edgar. Therein lies the conflict of interest. The Rules of Professional Conduct, RPC 1.7 and 1.8 prohibits

attorneys from entering into relationships with clients which present actual or potential conflicts of interest. Specifically, the Committee Comments to both rules caution a lawyer who receives payment from someone other than the client. Here, Mr. Isaf is paid by the County of Edgar as its legal representative. Committee Comment [6] to RPC 1.7 prohibits a lawyer from representation that is directly adverse to another current client.

"Public policy demands that an office holder discharge his duties with undivided loyalty." *Rogers v. Village of Tinley* Park, 116 Ill.App.3d 437, 446, 72 Ill.De. 1, 451 N.E.2d 1324, 1330 (1983).

Mr. Isaf has impermissible conflicts of interest in the dual representation that he undertook in the motion to dismiss. Mr. Isaf owes undivided loyalty to the County of Edgar and cannot represent the adverse interests of Chris Patrick. Mr. Isaf is barred by the Rules of Professional Conduct from representation of defendant Chris Patrick in this cause. For these reasons, the motion to dismiss Count I should be Stricken or Denied. Exhibits 1, 2 and 3, referenced as authority for the motion to dismiss Count I should be stricken.

In the alternative, if this Court believes that Attorney Isaf does not have a conflict interest and that he may permissibly represent defendant Chris Patrick, plaintiffs assert that their claims against Chris Patrick are not moot but rather their claims fall within the public interest exception to the mootness doctrine and the plaintiffs request 14 days within which to substantively respond to the motion to dismiss Count I, and/or for leave to file an Amended Complaint.

III. MOTION TO DISMISS COUNT II SHOULD BE DENIED

Defendants Ben Jenness, Mike Heltsley, Dan Bruner, Karl Farnham, Jr. and Jeff Voight moved, pursuant to 735 ILCS 5/2-615 to dismiss Count II as to these defendants in their individual capacities only. They are properly represented by Mark Isaf, Edgar County State's Attorney. The only issue in the motion to dismiss Count II is whether plaintiffs have adequately alleged claims against the individuals named which impact plaintiffs' rights.

A section 2-615(a) motion to dismiss tests the legal sufficiency of the complaint. *Thurman v. Champaign Park District,* 2011 IL App (4th) 101024, 960 N.E.2d 18, 21, 355 Ill.Dec. 575, 578 (4th Dist. 2011). In the context of a section 2-615 motion to dismiss, the 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 can be granted. Id. 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. Id. A cause of action should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief. Id.

The plaintiffs have pled that the acts of these individual defendants, by and through their individual actions as members of the Edgar County Board, have deprived the plaintiffs of their fundamental constitutional rights to have their votes protected against dilution or debasement, in violation of the Illinois

Constitution and the 14th Amendment to the U.S. Constitution Under 42 U.S.C. §1983. The Edgar County Board is a body which performs it's official functions through the individual acts of its individual members, its human agents.

In *Monell v. New York City Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018 (1978), the Supreme Court overturned its holding in *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473 (1961), which provided local governments immunity from actions under section 1983. Municipalities, however, typically govern through human agents. Because municipalities so often act through human agents, *Monell* set forth an "official policy" requirement "intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 479, 106 S.Ct. 1292 (1986). There is no redundancy in naming individual policy-making individuals for their individual acts and simultaneously naming the municipality as a defendant, even if simply for purposes of financial responsibility. In *Robinson v. Sappington,* 351 F.3d 317, 339 (7th Cir. 2004), the Seventh Circuit held that the County of Macon could not be dismissed from a lawsuit by Judge Sappington's clerk for sexual harassment because the county had a financial interest in the outcome of the lawsuit and the county was a necessary party.

The term "policy" does not necessarily mean that a new rule is created which others are required to follow and adhere to. A policy can be made in a

single action. In *Owen v. City of Independence,* 455 U.S. 622, 100 S.Ct. 1398 (1980) and in *Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 101 S.Ct. 2748 (1981), the Supreme Court held that municipal liability attached to a *single decision to take unlawful action* made by a municipal policymaker. The Fifth Circuit Court of Appeals defined the making of policy as: "the municipality may be held liable for the illegal or unconstitutional actions of its final policymakers themselves as they engage in the setting of goals and the determination of how those goals will be achieved. *See Pembauer v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)" *Turner v. Upton County, Texas,* 915 F.2d 133, 136 (5th Cir. 1990). Individuals who set their goals and determine how to achieve them, can be final policymakers for the county and can cause the county to be liable for their illegal and unconstitutional actions under *Monell.*

A complaint should not be dismissed for failure to state a cause of action unless it clearly appears that no set of facts could be proved under the allegations which would entitle the party to relief. *Yuretich v. Sole,* 259 Ill.App.3d 311, 313, 631 N.E.2d 767, 769-70 (4th Dist. 1994) Where facts of necessity are within defendant's knowledge, a complaint which is as complete as the nature of the case allows is sufficient. Id.

The Complaint, taken as a whole, adequately alleges that these individual Edgar County Members, each acting in his individual capacity, recognized that Chris Patrick had a financial conflict of interest due to his ownership of Zimmerly Ready Mix and, each voted to enact resolutions that violate Illinois law and in so

doing, acted outside of their law given authority to the detriment of the plaintiffs. These defendants are state actors, in their individual capacities, and are subject to liability under 42 U.S.C. §1983, as alleged.

Plaintiffs request relief against these individual defendants in the form of a declaration that their individual votes are void and unconstitutional, in regards to the matters specifically delineated in the Complaint. The declaration sought by plaintiffs is a vindication of their voting rights which were abused, diluted and debased by the individual actions of each of the named defendants. Plaintiffs have a right to recover nominal damages and to request their attorney's fees, pursuant to 42 U.S.C. §1988 and costs of suit.

For the reasons stated herein, plaintiffs request that the motion to dismiss Count II be Denied. In the Alternative, if the court dismisses Count II, plaintiffs request leave to file an Amended Complaint.

December 16, 2013

Respectfully Submitted,

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