2016 IL App (4th) 150153-U

NO. 4-15-0153

FILED
February 19, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DANIEL IGWE,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Macon County
DECATUR MEMORIAL HOSPITAL,	)	No. 13L181
Defendant-Appellee.	)	
	)	Honorable
	)	Thomas E. Little,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court (1) affirmed the trial court's dismissal of plaintiff's unlawful discrimination claims and (2) reversed the court's dismissal of plaintiff's retaliation claim.

¶ 2 In November 2014, plaintiff, Daniel Igwe, filed a third amended complaint against defendant, Decatur Memorial Hospital, alleging defendant (1) unlawfully discriminated against him on the basis of race and gender (counts I and II) and (2) retaliated against him for opposing what he perceived to be unlawful discrimination (count III). In December 2014, defendant filed a motion to dismiss plaintiff's third amended complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)), asserting the trial court lacked subject-matter jurisdiction over plaintiff's claims. Following a February 2015 hearing, the court granted defendant's motion and dismissed plaintiff's third amended complaint.

¶ 3 Plaintiff appeals, asserting the trial court erred in granting defendant's motion to dismiss his third amended complaint. In particular, he argues (1) defendant is a "place of public accommodation" under the Illinois Human Rights Act (Act) (775 ILCS 5/5-101(A)(11) (West 2012)) and (2) resolution of his retaliation claim would not require the court to review an academic decision. We (1) affirm the trial court's judgment dismissing plaintiff's unlawful discrimination claims (counts I and II) and (2) reverse the court's judgment dismissing plaintiff's retaliation claim (count III) and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 The following facts are taken from plaintiff's third amended complaint and other matters of record in this case.

¶ 6 In August 2010, plaintiff was admitted to a nurse-anesthesia program, the product of a partnership between Bradley University and defendant. The purpose of the program was to provide classroom education and clinical training to registered nurses wishing to pursue careers in nurse anesthesia.

¶ 7 Plaintiff successfully completed the classroom portion of the nurse-anesthesia program and, in July 2011, began the clinical portion. After beginning the clinical portion of the program, plaintiff began experiencing what he perceived to be racial and gender discrimination by certified registered nurse anesthetists (CRNAs) and the program director, Rhonda Gee.

¶ 8 According to his third amended complaint, in September 2011, plaintiff was the only student penalized for being late to a clinical demonstration despite the fact that all students were late to the demonstration. In October 2011, he expressed his concern to the clinical director of the nurse-anesthesia program, Dawn Cotter, that some CRNAs were discriminating against him. Nonetheless, plaintiff continued to experience what he believed to be discriminatory

treatment. Specifically, plaintiff complained as follows. Despite receiving overwhelmingly positive evaluations from a majority of CRNAs, Gee placed him on a remediation plan in February 2012. That same month, he was denied an extended period to research an answer to a question while another student was given extended time. In March 2012, a CRNA left harassing messages on his phone and pager. Later that month, the "progressions committee" placed him on probation, a decision which was upheld by the "grievance committee." When plaintiff was assigned to another hospital in April 2012, Gee called the CRNAs at that hospital and "spread disturbing reports" of his performance. In May 2012, plaintiff was denied equal time to take a test as a result of being called to an operating room during the test. In addition, Gee refused to adjust one of plaintiff's test grades even though the instructing physician acknowledged conflicting information was presented to plaintiff and "offered to return points." Another student was granted a grade reversal under similar circumstances. In June 2012, plaintiff made a complaint to the American Association of Nurse Anesthetists Counsel on Accreditation, although his third amended complaint does not specify the substance of the complaint. Also in June 2012, defendant was one of two interns present in a magnetic resonance imaging (MRI) suite when a piece of metal was drawn into the machine (MRI incident). Despite no proof that defendant was responsible, he was the only person accused of bringing the metal into the room and was suspended the next day. Following a progressions committee hearing, plaintiff was dismissed from the program, a decision upheld by the "appeals committee" in July 2012. According to a July 20, 2012, letter, the decision to terminate plaintiff's participation in the program was the result of his act of bringing a metal endotracheal tube into the MRI suite and jeopardizing the safety of a patient.

¶ 9 Beginning in December 2013, plaintiff filed a series of verified complaints against defendant, alleging it (1) unlawfully discriminated against him on the basis of race and sex and (2) retaliated against him for opposing what he believed to be unlawful discrimination. Plaintiff's December 2013 complaint alleged defendant was a "place of public accommodation" under section 5-101(A)(11) of the Act (775 ILCS 5/5-101(A)(11) (West 2012)) (defining a "place of education" as a "place of public accommodation"). (Plaintiff's December 2013 complaint named "Decatur Memorial Hospital Nurse Anesth[e]sia Program" as defendant.) In June 2014, the trial court dismissed plaintiff's discrimination claims for lack of subject-matter jurisdiction and struck his retaliation claim without prejudice.

¶ 10 In July 2014, after leave was granted by the trial court, plaintiff filed a second-amended three-count complaint. In his second amended complaint, plaintiff alleged defendant was a "place of public accommodation" under section 5-101(A)(6) of the Act (775 ILCS 5/5-101(A)(6) (West 2012)) by virtue of it being a hospital. In October 2014, following a hearing, the court dismissed plaintiff's second amended complaint for lack of subject-matter jurisdiction, but granted leave to file a third amended complaint.

¶ 11 In November 2014, plaintiff filed his third amended three-count complaint, at issue here. Plaintiff again asserted that defendant was a "place of public accommodation" under section 5-101(A)(6) of the Act (775 ILCS 5/5-101(A)(6) (West 2012)) by virtue of it being a hospital. Again, plaintiff alleged defendant violated the Act by (1) discriminating against him on the basis of race and sex (counts I and II) and (2) retaliating against him for opposing what he believed to be unlawful discrimination (count III). The supporting factual allegations contained in plaintiff's motion are detailed above.

¶ 12 In December 2014, defendant filed a motion to dismiss plaintiff's third amended complaint for lack of subject-matter jurisdiction under section 2-619 of the Code (735 ILCS 2-619 (West 2012)). Defendant asserted it was not a "place of public accommodation" under the circumstances alleged, and the trial court lacked subject-matter jurisdiction because the type of services offered by defendant were not available or offered to the general public. It argued, in the alternative, that the trial court "lack[ed] jurisdiction" to review "academic decisions made by [defendant]." Attached to defendant's motion was an affidavit from Gee in which she averred "[p]laintiff's dismissal from the [n]urse[-a]nesthesia [p]rogram was based on academic evaluations of his clinical performance, and a determination that [p]laintiff was not academically fit for the [program]."

¶ 13 Following a February 2015 hearing on defendant's motion, the trial court dismissed plaintiff's third amended complaint with prejudice for lack of subject-matter jurisdiction. Specifically, the court found defendant "[was] not a place of public accommodation because the goods or services plaintiff claim[ed] he was denied access to were not offered or available to the general public." In addition, the court concluded it "lack[ed] jurisdiction because [it] should not be in the business of reviewing academic decisions."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, plaintiff asserts the trial court erred in granting defendant's motion to dismiss his third amended complaint. In particular, he argues (1) defendant is a "place of public accommodation" under the Act and (2) resolution of his retaliation claim would not require the court to review an academic decision.

¶ 17 A. Standard of Review

¶ 18 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 (2003). Section 2-619(a)(1) of the Code permits involuntary dismissal where "the court does not have jurisdiction of the subject matter of the action." 735 ILCS 5/2-619(a)(1) (West 2012). "In reviewing the grant of a section 2-619 motion, we must interpret the pleadings and supporting materials in the light most favorable to the plaintiff." *Shirley v. Harmon*, 405 Ill. App. 3d 86, 90, 933 N.E.2d 1225, 1228 (2010). Since "[a] section 2-619 dismissal resembles the grant of a motion for summary judgment[,] we must determine whether a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal was proper as a matter of law." *Id.* "We review *de novo* the grant or denial of a motion to dismiss under section 2-619(a)(1)." *Id.*, 933 N.E.2d 1228-29.

¶ 19 B. Place of Public Accommodation

¶ 20 Plaintiff first asserts the trial court erred in granting defendant's motion to dismiss his third amended complaint where the plain language of the Act establishes defendant is a "place of public accommodation" by virtue of it being a hospital. While defendant concedes the Act designates hospitals as places of public accommodation, it notes that plaintiff's complaints concern alleged acts and damages suffered as the result of his status as a student in the nurse-anesthesia program rather than as a patient. Thus, defendant contends, when viewed in the appropriate context, it is not a place of public accommodation.

¶ 21 "[T]he fundamental rule of statutory interpretation is to ascertain and give effect to the legislature's intent." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 180, 950 N.E.2d 1136, 1146 (2011). "The best indication of legislative intent is the statutory language, given its

plain and ordinary meaning." *Id.* "A statute should be evaluated as a whole, with each provision construed in connection with every other section." *Id.* "Where the meaning of a statute is plain on its face, no resort to other tools of statutory construction is necessary." *Id.*

¶ 22 Section 5-102(A) of the Act provides, "[it] is a civil rights violation for any person on the basis of unlawful discrimination to *** [d]eny or refuse to another the full and equal enjoyment of the facilities, goods, and services of any public place of accommodation." 775 ILCS 5/5-102(A) (West 2012). Section 5-101(A)(6) of the Act provides that a place of public accommodation includes, but is not limited to, "a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, *hospital*, or other service establishment." (Emphasis added.) 775 ILCS 5/5-101(A)(6) (West 2012).

¶ 23 Here, plaintiff maintains the nurse-anesthesia program is merely a "service department" within the hospital rather than a separate entity. He argues that under the trial court's ruling, every service department within the hospital, including the intensive care unit, the neonatal unit, and the oncology unit—all of which require a patient to exhibit certain characteristics prior to their admittance, *e.g.*, severity of medical condition, age of infant, cancer diagnosis—would not be considered places of public accommodation and would essentially be removed from the Act's jurisdiction. We disagree.

¶ 24 Based upon our reading of the Act, we note the existence of a clear, unified theme in article 5. Specifically, every place of public accommodation enumerated by the legislature is an establishment which provides goods and/or services to the general public. In particular, subsection (A)(6), relied upon by plaintiff, enumerates a number of service establishments in

which any member of the general public may receive a service in exchange for money, *e.g.*, dry-cleaning at a dry cleaner's, a hair cut at a barber or beauty shop, legal services at an attorney's office, and health care services at a health care provider's office or a hospital. Thus, while a hospital is specifically listed in the Act as a place of public accommodation, it is listed in the context of a patient/medical-provider relationship, not as a place where educational services, such as those involved here, are provided to select individuals.

¶ 25 A similar issue was addressed by the First District in *Gilbert v. Department of Human Rights*, 343 Ill. App. 3d 904, 799 N.E.2d 465 (2003). In *Gilbert*, the appellate court was tasked with determining whether a business that conducted classes in scuba diving and other water-related activities was a place of public accommodation under the Act. *Id*. at 906, 799 N.E.2d at 466. The business required all scuba-diving applicants to complete a medical questionnaire prior to taking lessons and required applicants who suffered from certain conditions, including some behavioral-health conditions, to obtain a physician's approval before participating in the class. *Id*. at 466, 799 N.E.2d at 466. The plaintiff did not disclose her learning disability prior to beginning classes, but following a training incident, the business learned of her disability. *Id*. Thereafter, the business informed the plaintiff she would have to obtain medical clearance from her physician before she could continue receiving scuba-diving lessons. *Id*. at 907, 799 N.E.2d at 467. The plaintiff did not obtain a physician's approval, and instead, filed a discrimination claim with the Department of Human Rights. *Id*. The Department dismissed the plaintiff's complaint, in part, on the ground that the business was not a place of public accommodation under the Act. The First District agreed with the Department, noting that "[t]he scuba diving classes were available only to clients who agreed to 'maintain good physical and mental fitness for diving' *** [and the business] did not provide its services 'as if one

individual was no different from the next.' [Citation.] Respondent was not like the businesses enumerated in section 5-101(A)(2) which provide services to all members of the general public without pre-screening or qualification." *Id*. at 909-10, 799 N.E.2d at 469 (quoting *Cut 'N Dried Salon v. Department of Human Rights*, 306 Ill. App. 3d 142, 147, 713 N.E.2d 592, 595 (1999).

¶ 26 Similar to the scuba-diving lessons offered in *Gilbert*, the nurse-anesthesia program here was not available to the general public. For example, to be admitted to the program, an individual first had to be a registered nurse. Then, the individual had to successfully complete the classroom portion of the program prior to beginning the clinical portion of the program. In contrast, any member of the general public could be admitted to the hospital as a patient without meeting any prerequisites, just as any member of the general public may receive a haircut from a barber or beauty shop or have their clothes cleaned at a dry cleaner's. While patients in a hospital may ultimately be housed in particular units based on specific factors, such as their diagnosis, the severity of their injury or illness, or their age, this is for treatment purposes only and does not take away from the fact that they are hospital patients. Accordingly, we find the services which plaintiff claims he was denied, *i.e.*, clinical training in nurse anesthesia, were not available to the general public. Here, given the circumstances presented, defendant was not a place of public accommodation as defined by the Act. Thus, the trial court did not err in dismissing plaintiff's discrimination claims in the third amended complaint for lack of subject-matter jurisdiction.

¶ 27 C. Retaliation Claim

¶ 28 Next, plaintiff asserts, even if the trial court lacked subject-matter jurisdiction over his discrimination claims, it had jurisdiction over his retaliation claim. He argues that the

trial court erred in dismissing his retaliation claim based on an invalid assumption that resolution of his retaliation claim would require the review of an academic decision.

¶ 29 We first determine whether plaintiff's retaliation claim can survive the dismissal of his discrimination claims for lack of subject-matter jurisdiction. Section 6-101 of the Act provides, "[i]t is a civil rights violation for a person, or for two or more persons to conspire, to *** [r]etaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination." 775 ILCS 5/6-101 (West 2012). Plaintiff cites *Dana Tank Container, Inc. v. Human Rights Comm'n*, 292 Ill. App. 3d 1022, 1025, 687 N.E.2d 102, 104 (1997), in support of the proposition that his retaliation claim is justiciable despite the trial court's lack of subject-matter jurisdiction over his underlying discrimination claims.

¶ 30 In *Dana Tank*, the employee filed a claim of race discrimination against his employer under section 2-102 of the Act, which provides it is a civil rights violation for any employer to discriminate against an employee. *Id*. at 1023, 687 N.E.2d at 103. The employee's complaint was dismissed because the employer employed fewer than 15 persons, and thus, it was excluded from the Act's definition of "employer." *Id*.; see 775 ILCS 5/2-101(B)(1)(a) (West 1992) (defining an "employer" as "[a]ny person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation").

¶ 31 After the dismissal of the employee's race-discrimination charge, his employer fired him. *Id*. at 1023-24, 687 N.E.2d at 103. The employee filed a second complaint against his employer, alleging he was fired in retaliation for the race-discrimination charge. *Id*. at 1024, 687 N.E.2d at 103. The employer argued that the legislature would not have specifically excluded

small employers from liability for unlawful discrimination but then make them liable for retaliating against an employee for charges they could not be liable for in the first place. *Id*. at 1025, 687 N.E.2d at 104. The court disagreed, noting section 6-101(A) of the Act prohibits a "person" from retaliating against another person for filing a discrimination claim, and that a "person" can include an employer with fewer than 15 employees. *Id*.

¶ 32 Similarly, in this case, although subject-matter jurisdiction for plaintiff's claims of race and gender discrimination is lacking based on defendant not being a place of public accommodation, defendant is a "person" under the Act for purposes of plaintiff's retaliation claim. See 775 ILCS 5/1-103(L) (West 2012) (defining a "person" in part, as "one or more individuals, partnerships, associations or organizations"). Accordingly, plaintiff's retaliation claim can survive the dismissal of the underlying discrimination claims for lack of subject-matter jurisdiction.

¶ 33 We next determine whether a genuine issue of material fact exists regarding the reason for plaintiff's dismissal from the nurse-anesthesia program, thus precluding dismissal of plaintiff's retaliation claim.

¶ 34 "[I]t is well established in Illinois that academic evaluations and decisions are not subject to judicial review." *Seitz-Partridge v. Loyola University of Chicago*, 2013 IL App (1st) 113409, ¶ 30, 987 N.E.2d 34. However, "courts can review whether school authorities acted arbitrarily or capriciously in their treatment of a student, including dismissal." *Harris v. Adler School of Professional Psychology*, 309 Ill. App. 3d 856, 859, 723 N.E.2d 717, 720 (1999).

¶ 35 In this case, plaintiff maintains his dismissal from the nurse-anesthesia program was due to nonacademic reasons. He points to various occurrences pleaded in the third amended complaint, including the MRI incident, which were nonacademic in nature. He contends the

issue before the trial court was whether defendant acted arbitrarily, capriciously, or in bad faith in its treatment and dismissal of plaintiff. In contrast, defendant argues that plaintiff's dismissal was academic in nature and points to (1) "the uncontested affidavit of [Gee]," which defendant avers "establishes that [plaintiff] was dismissed for academic reasons"; and (2) plaintiff's pleadings, all of which were verified and contain a number of complaints regarding academic decisions.

¶ 36 Defendant cites *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 353, 938 N.E.2d 640, 653 (2010), for the proposition that the facts contained in Gee's affidavit must be deemed admitted where plaintiff failed to file a counteraffidavit opposing the facts. We note, however, that the *Piser* court held, "[i]n order to refute *evidentiary* facts contained in the defendant's supporting affidavits, the plaintiff must provide a counteraffidavit. [Citations.] If the plaintiff fails to do so, the facts of the defendant's affidavits are deemed admitted. [Citation.]" (Emphasis added.) *Id.* In this case, the "fact" contained in Gee's affidavit upon which defendant relies, *i.e.*, plaintiff was dismissed for academic reasons, is a conclusory statement, not an evidentiary fact that requires a counteraffidavit.

¶ 37 In addition, defendant cites *Winnetka Bank v. Mandas*, 202 Ill. App. 3d 373, 397, 559 N.E.2d 961, 976 (1990), for the proposition that admissions contained in verified pleadings are binding judicial admissions. While the earlier pleadings filed by plaintiff do contain allegations relating to academic matters, we do not find these allegations—which plaintiff excluded from his third amended complaint—to be determinative of the ultimate issue in this case, *i.e.*, whether plaintiff's dismissal was in retaliation for his opposition to perceived unlawful discrimination. Further, we note that plaintiff has not asserted his dismissal was the result of an academic decision.

¶ 38 Whether plaintiff's dismissal from the program was the product of retaliation for opposing what he perceived to be unlawful discrimination, or instead, was an academic decision raises a genuine issue of material fact. Thus, the trial court erred in dismissing plaintiff's retaliation claim. Our determination in no way represents an opinion as to the relative merit of plaintiff's retaliation claim or the sufficiency of the factual allegations underlying the claim.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we (1) affirm the trial court's judgment dismissing plaintiff's unlawful discrimination claims (counts I and II) and (2) reverse the court's judgment dismissing plaintiff's retaliation claim (count III). We remand for further proceedings.

¶ 41 Affirmed in part and reversed in part; cause remanded for further proceedings.