

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MICHAEL JORDAN,)
)
Plaintiff/Counter-Defendant) No. 02 CH 19143
)
v.)
)
KARLA KNAFEL) Calendar 10
)
Defendant/Counter-Plaintiff.)

JUDGE RICHARD A. SIEBEL
JUN 12 2003
Circuit Court - 1778

Memorandum Opinion and Order

This matter initially came before the Court on Plaintiff Michael Jordan's ("Jordan") combined Section 2-615 Motion for Judgment on the Pleadings on the Complaint and Answer, and Motion to Dismiss Defendant Karla Knafel's ("Knafel") Counterclaim. Because there is no authority in the Code of Civil Procedure or in the case law for such a hybrid motion, and because the Court could not ascertain where the Motion for Judgment on the Pleadings ended and the Motion to Dismiss commenced, the Court declined to proceed with a hearing on the combined motions. By agreement of the parties, the Court proceeded to hear the Motion for Judgment on the Pleadings only. Jordan was granted leave to file a separate Motion to Dismiss Knafel's Counterclaim.

Motion for Judgment on the Pleadings: Complaint and Answer

Despite the fact that a motion for Judgment on the Pleadings is a Section 2-615 motion, both counsel sought to introduce "facts" that did not appear in the pleadings. The first 3½ pages of Jordan's opening memorandum were stricken as were the exhibits attached to Knafel's memorandum. The Court has ignored and has not considered any "facts" that are outside the four corners of the pleadings.

Jordan alleges in his Complaint that more than a decade ago, he and Knafel had a sexual relationship; that under threat of publicly exposing that relationship, Knafel extorted and received \$250,000 from Jordan; and that pursuant to a purported second agreement, Knafel has threatened to publicly expose the relationship unless Jordan pays Knafel an additional \$5 million when he retires from professional basketball.

It is this purported second agreement that is at issue. Jordan says there never was a second agreement, but then contends that if a second agreement to pay \$5 million is found to exist, the agreement is unenforceable because (1) the agreement would violate public policy; (2) the agreement would lack consideration; (3) the agreement would violate the Statute of Frauds; and (4) the agreement would be barred by the Statute of Limitations. Jordan seeks a declaration that the \$5 million second agreement is unenforceable.

Knafel has filed an Answer and Affirmative Defenses as well as a Counterclaim. Jordan has filed a Reply to the Affirmative Defenses. This matter initially comes before the Court on Jordan's Motion for Judgment on the Pleadings. The motion is directed to the Complaint and Answer, not the Counterclaim.

Where a plaintiff moves for Judgment on the Pleadings, the issue is whether the facts alleged in the Answer constitute a legally sufficient defense. *People ex rel. Shapo v. Agora Syndicate, Inc.*, 323 Ill. App. 3d 543 (1st Dist. 2001). The Court must examine all pleadings, including the Complaint, the Answer, and the Counterclaim, taking as true the well-pled facts set forth in the respondent's pleadings and the reasonable inferences to be drawn therefrom. *Schaffner v. 514 W. Grant Place Condo. Ass'n*, 324 Ill. App. 3d 1033 (1st Dist. 2001). If the pleadings present a material factual dispute, the motion for Judgment on the Pleadings must be denied. *People ex rel. Shapo v. Agora Syndicate, Inc.*, 323 Ill. App. 3d 543 (1st Dist. 2001).

Knafel's Answer asserts the existence of the \$5 million second agreement, and through some unconventional affirmative defenses, denies that the agreement is unenforceable for any of the reasons suggested by Jordan. Knafel also affirmatively pleads that Jordan is estopped from denying the existence, validity or enforceability of the agreement. The only factual dispute raised by the pleadings is whether the \$5 million second agreement was entered into. Validity and enforceability are questions of law. The factual dispute concerning the existence or non-existence of the agreement cannot be resolved on a motion for Judgment on the Pleadings.

Jordan's Complaint is brought under the Declaratory Judgment Statute, 735 ILCS 5/2-701. Two requirements must be met when bringing a declaratory judgment action: (1) there must be an actual controversy between the parties; and (2) the party bringing the action must have an interest in the controversy. The "actual controversy" element is a safeguard against complaints seeking advisory opinions. *Stokes v. Pekin Ins. Co.*, 298 Ill. App. 3d 278 (5th Dist. 1998).

Jordan alleges in his Complaint that there was no \$5 million second agreement, but if such an agreement is found to exist, that agreement is unenforceable. Standing alone, the Complaint would not merit a declaratory judgment because there would be no controversy for the Court to resolve. Jordan is asking the Court to rule on a purportedly hypothetical contract. This would constitute the rendering of an advisory opinion. Illinois judges have no authority to issue advisory opinions. *Howlett v. Scott*, 69 Ill. 2d 135 (1977).

Jordan argues that the facts alleged by Knafel in her Answer and Counterclaim concerning the existence of a \$5 million second agreement cure the deficiencies in his Complaint and create the requisite controversy. There is nothing in the Code of Civil Procedure or in the case law that suggests that the pleadings of the party responding to a motion for Judgment on the

Pleadings may be used as a sword by the moving party. To the contrary, the pleadings of a respondent are available as a shield to defend against a motion for Judgment on the Pleadings where factual issues are raised in a respondent's pleadings.

Somewhat analogous to the case *sub judice* is the case of *Howlett v. Scott*, 69 Ill. 2d 135 (1977). Secretary of State Howlett was a candidate for governor. At the insistence of Governor Walker, Attorney General Scott instituted an investigation concerning certain consulting fees Howlett received while serving as State Auditor and Secretary of State. Scott publicly released an unfavorable report, and Howlett filed a declaratory judgment action claiming that his reputation as a candidate was being endangered and that there were threats of an imminent suit against him concerning the consulting fees. The Supreme Court held that the declaratory judgment action should be dismissed for the following reasons, among others: (1) there was no actual controversy when the suit was filed; (2) a declaration of non-liability for past conduct is not a function of the declaratory judgment statute, for in such cases the institution of a declaratory action by a potential defendant deprives the potential plaintiff of his or her right to determine whether he or she will file, and if so, when and where; and (3) any judgment entered would have been advisory, and Illinois judges have no authority to issue advisory opinions. Implicit in Jordan's Complaint and explicit in Howlett's Complaint are the concepts of endangerment to reputation and the threat of imminent litigation. Just as Howlett did, Jordan has filed a pre-emptive strike. When Howlett filed his declaratory action, Attorney General Scott had not formulated his litigation against Howlett. When Jordan filed his declaratory judgment action, both the terms of the purported second agreement and terms of a tolling agreement

between Jordan and Knafel precluded Knafel from suing Jordan until he retired from professional basketball.¹

This Court declines to issue a declaration, the Court finding that the Complaint fails to allege an actual controversy and further finds that the issuance of a declaratory judgment on a hypothetical contract would constitute the rendering of an advisory opinion. Under the authority of *Stone v. Omnicom Cable Television, Inc.*, 131 Ill. App. 3d 210 (2d Dist. 1985) Jordan's Complaint is dismissed.

Motion to Dismiss Counterclaim

This matter also comes before the Court on Jordan's Section 2-615 Motion to Dismiss Knafel's Counterclaim.

In her two-count Counterclaim, Knafel alleges that three months after Jordan's September 1989 marriage, she and Jordan engaged in a sexual relationship that continued from December of 1989 through November of 1990. In the spring of 1991 Knafel told Jordan that she was pregnant with his child. Jordan allegedly offered to pay Knafel \$5 million when he retired from professional basketball in exchange for her agreement not to file a paternity action and her agreement to maintain the confidentiality of their relationship. Knafel alleges that she accepted Jordan's offer in the spring of 1991. Knafel's child was born in July 1991.² Jordan paid certain birth related bills and medical expenses and also paid Knafel the sum of \$250,000 for what Knafel claims was "for her mental pain and anguish arising from her relationship with him." Knafel seeks \$5 million for breach of contract or, in the alternative, for anticipatory breach of contract.

¹ When Jordan filed his Complaint he had not retired from professional basketball. The parties concede that he recently has announced his retirement.

² The parties agree that Jordan is not the father of Knafel's child.

Jordan's Section 2-615 Motion to Dismiss contends that the \$5 million agreement would be unenforceable because (1) it is contrary to public policy; (2) it was fraudulently induced; and (3) if it was not fraudulently induced, it is based on a mutual mistake of fact as to paternity.

A Section 2-615 motion to dismiss attacks the legal sufficiency of the pleading. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469 (1994). When ruling on a Section 2-615 motion, the Court is limited to the allegations of the pleadings. *Id.* Section 2-615 allows for dismissal of a Counterclaim for failure to state a cause of action. 735 ILCS 5/2-615. Neither Jordan's Motion to Dismiss nor the memoranda submitted in support of the motion suggest that Knafel has failed to state a cause of action in her Counterclaim. In fact, Jordan's counsel conceded, when responding to the Court's inquiry, that Jordan is not arguing that Knafel has failed to properly plead the elements of the claims asserted in her Counterclaim. A Section 2-619 Motion to Dismiss, on the other hand, allows for involuntary dismissal of a pleading based on certain defects or defenses. Where the grounds do not appear on the face of the pleading being attacked, the motion is to be supported by affidavit. 735 ILCS 5/2-619(a). Fraudulent misconduct and mutual mistake of fact are affirmative matters that do not appear on the face of the Counterclaim. They must be supported by affidavit. Moreover, both claims are replete with factual disputes that could not be disposed of on a Section 2-615 motion or on a Section 2-619 motion.

One of the essential requirements that must be present for a contract to exist is valid subject matter. *Steinberg v. Chicago Medical School*, 41 Ill. App. 3d 804 (1st Dist. 1976), *aff'd in part and rev'd in part*, 69 Ill. 2d 320 (1977). Jordan contends that the subject matter of the agreement violates public policy. Arguably, the validity of the subject matter of the Jordan – Knafel agreement appears on the face of the Counterclaim. That portion of the Motion to

Dismiss raising public policy could be “peculiarly within the confluence between section 2-615 and section 2-619(a)(9).” *Illinois Graphics Co. v. Nickum* at 486.

Even where a Motion to Dismiss should be brought under Section 2-619, Illinois courts have reviewed improperly joined Section 2-615 and Section 2-619 motions in the interests of judicial economy. *Janes v. First Fed. Sav. & Loan Ass'n.*, 57 Ill. 2d 398 (1974); *Harris v. Johnson*, 218 Ill. App. 3d 588 (2d Dist. 1991); *Magnuson v. Schaider*, 183 Ill. App. 3d 344 (2d Dist. 1989). In the case of *Harris v. Johnson*, 218 Ill. App. 3d 588 (2d Dist. 1991), plaintiff sued the mayor of the City of Plano for breach of promise to appoint plaintiff as the Chief of Police. The defendant mayor filed a Section 2-615 Motion to Dismiss asserting that a mayor could not enter into such a contract. The plaintiff responded by arguing that defendant’s *ultra vires* defense should be brought under Section 2-619 rather than Section 2-615. The trial court agreed with plaintiff, but nevertheless dismissed the complaint. The Appellate Court in *Harris* stated that in the interests of judicial economy, it was not inappropriate for the trial court to proceed as it did. In the case *sub judice*, the Court has twice heard essentially the same arguments regarding the enforceability of the \$5 million second agreement, once in March on Jordan’s severed Judgment on the Pleadings, and again in June on Jordan’s Motion to Dismiss. The facts will not change; the legal issues will not change; and the arguments, asserting the agreement is unenforceable, as professionally as they may have been delivered, are not likely to change on a Section 2-619 Motion to Dismiss. It would be a waste of judicial resources for the Court to entertain oral argument on the same issues a third time. Moreover, there is no prejudice to Knafel. At the inception of Jordan’s opening argument on the Motion to Dismiss, the Court inquired as to the propriety of proceeding under Section 2-615 rather than under Section 2-619. Jordan’s counsel responded to the inquiry and continued to argue his motion under Section 2-

615. Knafel's counsel never objected to proceeding under Section 2-615, and when presenting his oral argument, made no comment on the procedural propriety of the Motion to Dismiss.

The "Florida", 101 U.S. 37 (1879), an 1879 U.S. Supreme Court case, gives some historical context to the significance of Jordan's public policy argument. On the night of October 7, 1864, the United States steamer "Wachusett", under the command of Commander Collins, captured the confederate steamer "Florida" in a Brazilian port. The "Florida" had inflicted over \$4 million of losses on the U.S. merchant marine fleet. The two steamers reached the United States, but the "Florida" was sunk as the result of a collision at Hampton Roads, Virginia. Under admiralty law, a capture in neutral waters is valid as between belligerents. However, a neutral sovereign whose territory has been violated is entitled to reparations and restoration of the captured property. Brazil was neutral during our civil war. Brazil demanded redress from the United States. The United States government disclaimed the capture and made reparations to Brazil. Commander Collins filed suit to have the "Florida" declared a prize of war. The U.S. Supreme Court affirmed dismissal of the complaint, holding that because of the government disclaimer, the capture violated public policy. The Supreme Court stated that no court should assist a party who bases his claim on an illegal act.

Similarly and more recently, the Appellate Court in *Harris v. Johnson*, 218 Ill. App. 3d 588 (2d Dist. 1991), affirmed the dismissal of the plaintiff's complaint based on the invalidity of the subject matter of the contract, the court finding that the mayor's agreement to appoint plaintiff as the Chief of Police violated public policy. As observed by the Supreme Court in the case of *First Trust & Savings Bank v. Powers*, 393 Ill. 97 (1946), where the bargain forming the basis of the action violates public policy, the courts ordinarily give no assistance. The

application of this rule is not in the interest of either party to the agreement, but is in the interest of the general public. *Vock v. Vock*, 365 Ill. 432 (1937).

Knafel has pled in her Counterclaim that Jordan promised to pay Knafel \$5 million “in exchange” for her agreement not to file a paternity suit against him and for her agreement to keep their romantic involvement publicly confidential. Jordan argues that the alleged agreement is extortionate and involves the payment of “hush money.” Relying on the cases of *In re Yao*, 661 N.Y.S. 2d 199 (N.Y. App. Div. 1997) and *Yao v. Bult*, 666 N.Y.S. 2d 159 (N.Y. App. Div. 1997), Jordan submits that such a contract violates public policy and is unenforceable.

The facts in *Yao* are strikingly similar to the facts in the case *sub judice*. Yao alleged that he and the defendant, a “wealthy financial executive,” had a “brief, intimate relationship”, and that they entered into an agreement under which the Defendant would pay substantial sums of money to Yao for life in exchange for Yao’s promise not to publicize the intimate relationship. Yao sought damages for breach of the agreement. The trial court dismissed the complaint for failure to state a cause of action. In affirming the dismissal, the Appellate Court found the agreement to be extortionate.

Knafel disputes that her agreement with Jordan is extortionate, but correctly argues that an agreement to refrain from filing a paternity suit is valid. The issue that then arises is whether the agreement is severable. The legal portion of a partially illegal agreement may be enforced only if the legal portion is severable. *Stevens v. Rooks Pitts & Poust*, 289 Ill. App. 3d 991 (1st Dist. 1997). Knafel alleges she made two promises, one to forbear from filing a paternity action and another to refrain from disclosing her affair with Jordan. In exchange for the two promises, Jordan allegedly made the single promise to pay Knafel \$5 million upon his retirement from basketball. The Court finds the agreement to be extortionate and against public policy. The

illegal portion, the agreement to pay "hush money", goes to the essence of the agreement and precludes severability. Because the "hush money" provision infects the entire agreement, the Court finds that the entire agreement between Jordan and Knafel is void and unenforceable as a matter of law.

WHEREFORE, IT IS HEREBY ORDERED that (1) Michael Jordan's Motion for Judgment on the Pleadings is denied and his Complaint is dismissed and (2) Michael Jordan's Motion to Dismiss Karla Knafel's Counterclaim is granted.

Enter:

JUDGE RICHARD A. SIEBEL

JUN 12 2003

Circuit Court - 1778

Richard A. Siebel - 1778

Dated: June 12, 2003