

2020 IL App (2d) 190511-U
No. 1-19-0511
Order entered August 6, 2020

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

FARIS M. AYOUBI,) Appeal from the Circuit Court
) of Cook County.
Plaintiff-Appellant,)
)
v.) No. 18-L-305
)
PETER E. GARBIS, SHARON KANTER,)
JACKLYN LANTZ, and JEFFREY L.)
WARNICK,) Honorable
) Christopher E. Lawler,
Defendants-Appellees.) Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Bridges concurred in the judgment.

ORDER

¶ 1 *Held:* This court lacks jurisdiction over plaintiff's appeal where plaintiff's notice of appeal did not specify the judgment or part thereof or other orders appealed from, and the relief sought from the reviewing court. Appeal dismissed.

¶ 2 Plaintiff, Firas M. Ayoubi, *pro se*, appeals¹ the dismissal of his amended complaint against defendants, Peter E. Garbis (plaintiff's defense counsel), Sharon Kanter (assistant State's attorney), Jacklyn Lantz (assistant State's attorney), and the Honorable Judge Jeffrey L. Warnick. Plaintiff filed his complaints after he was found guilty of aggravated criminal sexual assault and while serving his 28-year prison sentence. Plaintiff alleged various acts of misconduct involved in the investigation of and during his criminal prosecution. On appeal, plaintiff argues that the trial court erred by 1) dismissing his original complaint against the assistant State's attorneys because they did not have prosecutorial immunity; 2) dismissing his amended complaint, *sua sponte*, against the assistant State's attorneys; and 3) dismissing his complaints, *sua sponte*, against Garbis. We dismiss for lack of appellate jurisdiction.

¶ 3

I. BACKGROUND

¶ 4 On August 2, 2018, plaintiff, *pro se*, filed a 10-count complaint against his former criminal defense attorney, Judge Warnick, the judge who presided over his criminal trial, and Kanter and Lantz, assistant State's attorneys (ASAs) who prosecuted his case. The complaint was based upon the prosecution of plaintiff in or around December 2012 for sexual assault and robbery of an employee at a tanning salon in Niles, Illinois. Plaintiff was found guilty of aggravated criminal sexual assault and was sentenced to 28 years in prison. Plaintiff remains incarcerated.

¶ 5 Count I against Garbis alleged legal malpractice. Count II against Garbis alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1

¹ Although the appeal was filed in the First District, the chief of the executive committee of that district requested that justices from another district be assigned to hear and decide the case. The Illinois Supreme Court, therefore, assigned the justices from the Second District Appellate Court to hear and decide the case. See Ill. S. Ct. R. 22(b) (eff. Jul. 1, 2017).

et seq. (2016)). Count III against Garbis alleged intentional infliction of emotional distress. Count IV against Garbis alleged breach of contract. Count V against all defendants alleged a “Civil Rights Conspiracy.” Count VI against ASAs Kanter and Lantz alleged malicious prosecution. Count VII against Judge Warnick alleged a “Civil Rights Conspiracy.” Count VIII against Judge Warnick alleged gross negligence. Count IX against Garbis sought indemnification. Count 10 sought a preliminary injunction or “to file proceedings under court of seal.”

¶ 6 Service was affected on all named defendants except Garbis. The sheriff’s affidavit indicates that Garbis was not served because he had moved and his office was vacant.

¶ 7 ASAs Kanter and Lantz moved to dismiss plaintiff’s claims asserted against them for “Civil Rights Conspiracy” (count V) and malicious prosecution (count VI), pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2016)). They also argued that plaintiff failed to state a cause of action pursuant to section 2-615 of the Code (*id.* § 2-615). The ASAs also argued that the counts against them should be dismissed pursuant to section 2-619 of the Code (*id.* § 2-619) under the doctrine of absolute quasi-judicial immunity. Lastly, the ASAs argued that the trial court lacked subject-matter jurisdiction because their alleged conduct occurred solely within the scope of their employment with the State and, therefore, the court of claims had exclusive jurisdiction over plaintiff’s claims against them.

¶ 8 Judge Warnick moved to dismiss plaintiff’s claims against him for “Civil Rights Conspiracy” (count V), “Civil Rights Conspiracy” (count VII), and gross negligence (count VIII). Warnick also argued that plaintiff failed to state a cause of action pursuant to section 2-615 of the Code (*id.* § 2-615). Warnick further argued that both counts against him should be dismissed pursuant to section 2-619 of the Code (*id.* § 2-619) under the doctrine of absolute judicial immunity and that the count alleging gross negligence was barred by sovereign immunity.

¶ 9 Plaintiff moved for appointment of a special process server to serve Garbis, alleging that Garbis was evading service. Nothing in the record indicates that plaintiff moved for a hearing on the motion.

¶ 10 After the court set a briefing schedule, plaintiff did not file a response to the ASAs and Judge Warnick's motions to dismiss. Instead, on December 18, 2018, plaintiff, without leave of the court, filed an amended complaint against the same defendants.

¶ 11 Plaintiff alleged the following. In December 2012 plaintiff was arrested in connection with a sexual assault and robbery at a tanning salon in Niles, Illinois. Plaintiff hired Garbis as his defense attorney. During pretrial and trial preparations, the ASA defendants were aware that Garbis withheld "material information" from plaintiff pertaining to the ASA defendants' planned use of plaintiff's cell-phone information, that was ultimately used as "critical pieces of evidence" at trial. Specifically, Garbis withheld text messages plaintiff sent himself that contained the location of the tanning salon and were used at trial to establish plaintiff's intent, plan, and preparation of the offenses. The ASA defendants were also aware that Garbis withheld "cellular tower record" or "pings" that were used at trial to establish plaintiff's presence at the tanning salon at the time of the offenses. At the police station, detectives searched plaintiff's cell phone "before obtaining a search warrant," and Garbis was aware of this. Garbis failed to file a motion to suppress the phone data. Plaintiff also alleged that he became aware of the cell-phone information after he issued a "FOIA" request to the Niles Police Department and learned that the "police obtained a search warrant on [his] device." The search warrant for information related to plaintiff's cell-phone use was "illegal" because it was "overbroad, *** not supported by probable cause[,] and executed by a federal agent not named in the warrant."

¶ 12 Plaintiff further alleged that Garbis deceived him about the results of a DNA test of a hair sample found on the victim's shirt: Garbis told plaintiff that the DNA "was negative" when, at

trial, plaintiff learned that the results were “inconclusive.” At trial, Garbis and the State stipulated that the results were “inconclusive. However, the Illinois State Police did not find that hair sample to be “inconclusive,” but rather told the ASAs that they needed samples from both plaintiff and the victim for “comparison testing.” The ASAs refused to “send plaintiff’s hair sample for comparison testing, but with Garbis’ help and cooperation[,] withheld its existence from plaintiff.”

¶ 13 Count I against all defendants alleged “Conspiracy to Violate Civil Rights” under section 1983 of the federal Civil Rights Act (section 1983) (42 U.S.C. § 1983 (2012)). Count II against Judge Warnick alleged retaliation under section 1983. Count III against Garbis and ASAs Lantz and Kanter alleged unlawful search and seizure and violation of privacy under section 1983. Count IV against Garbis alleged legal malpractice. Count V against Garbis alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Count VI against Garbis alleged intentional infliction of emotional distress. Count VII against Garbis and ASAs Kanter and Lantz alleged common law fraud and fraudulent concealment. Count VIII against ASAs Lantz and Kanter alleged malicious prosecution. Count IX against ASAs Kanter and Lantz alleged defamation. Count X against Judge Warnick alleged negligence.

¶ 14 On January 10, 2019, the trial court stated in a written order:

“The Court has reviewed Plaintiff’s Amended Complaint filed without leave by Plaintiff Ayoubi and has also reviewed Defendants’ 2-619 Motions to dismiss. The Court finds Plaintiffs Amended Complaint fails to cure the deficiencies as laid out in the 2-619 motions, and Defendants’ Motions to dismiss are granted and the case is dismissed with prejudice pursuant to 2-619.”

¶ 15 On February 6, 2019, plaintiff mailed his “Motion to Reconsider and Notice of Appeal,” arguing, *inter alia*, that the trial court improperly dismissed Garbis “*sua sponte*” and that the other defendants’ 2-619 bases for dismissal did not apply to his amended complaint. Plaintiff also

stated: “Alternatively, if the court denied his motion to reconsider, to construe this as a notice of appeal to the Illinois Appellate Court.”

¶ 16 On March 5, 2019, the trial court stated in a written order “(1) [Plaintiff’s] motion to reconsider is respectfully DENIED. (2) This matter is dismissed in its entirety.”

¶ 17

II. ANALYSIS

¶ 18 Judge Warnick contends that we lack jurisdiction over this appeal. We agree with Judge Warnick.

¶ 19 We lack jurisdiction due to plaintiff’s deficient notice of appeal. The Illinois Supreme Court has emphasized that courts of review have an independent duty to consider jurisdiction even if a jurisdictional issue is not raised by the parties. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009); *People v. Smith*, 228 Ill. 2d 95, 104-06 (2008).

¶ 20 In his appellate brief, plaintiff raised three grounds of error: that the trial court erred by:

(1) dismissing claims contained in his original complaint against the ASA defendants because they did not have prosecutorial immunity for their alleged acts; (2) dismissing, *sua sponte*, claims against the ASA defendants contained in his amended complaint; and (3) dismissing, *sua sponte*, his claims against Garbis.

¶ 21 Initially, we note that plaintiff’s amended complaint did not incorporate the original complaint. “ ‘Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn.’ ” *Foxcroft Townhome Owners Ass’n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983) (quoting *Bowman v. County of Lake*, 29 Ill. 2d 268, 272 (1963)). Thus, plaintiff abandoned the claims in his original complaint when he filed his amended complaint without referring to the original complaint and did not incorporate or reference his original

complaint. Therefore, we need not address plaintiff's arguments that the trial court erred by dismissing claims contained in his original complaint against the ASA defendants.

¶ 22 Plaintiff argues that the trial court erred by dismissing, *sua sponte*, claims against the ASA defendants contained in his amended complaint; and by dismissing, *sua sponte*, claims against Garbis. But in plaintiff's purported notice of appeal, he stated "if the court denies this motion to reconsider, to construe this as a notice of appeal."

¶ 23 "The filing of a notice of appeal is the jurisdictional step which initiates appellate review." (Internal quotation marks omitted.) *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). Illinois Supreme Court Rule 303(b)(2) requires that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. July 1, 2017).

¶ 24 "The purpose of the notice of appeal is to inform the prevailing party that the other party seeks review of the trial court's decision." *People v. Lewis*, 234 Ill. 2d 32, 37 (2009). "Where the deficiency in notice is one of form, rather than substance, and the appellee is not prejudiced, the failure to comply strictly with the form of notice is not fatal." (Internal quotation marks omitted.) *People v. Smith*, 228 Ill. 2d 95, 105 (2008). The failure to comply strictly with the form of the notice is not fatal if the deficiency is nonsubstantive and the appellee is not prejudiced. *People v. Lewis*, 234 Ill. 2d 32, 37 (2009) (citing *Smith*, 228 Ill. 2d at 105).

¶ 25 But "[a] notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *Pappas*, 242 Ill. 2d at 176. We lack jurisdiction to consider issues not specified in the notice of appeal. *Atkinson v. Atkinson*, 87 Ill. 2d 174, 177-78 (1981). Unless there is a properly filed notice of appeal, we lack jurisdiction over the matter and we are obliged to dismiss the appeal. *Pappas*, 242 Ill. 2d at 176.

¶ 26 Plaintiff's attempted notice of appeal does not present an excusable example of error merely as to form, such as a wrong numerical designation (see *People v. Bennett*, 144 Ill. App. 3d 184, 185 (1986) (incorrect numerical designation on *pro se* notice of appeal was treated as clerical error where body of notice clearly referred to matter sought to be reviewed and all of defendants' arguments pertained only to that case)), or the wrong date of an order (see *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 755-56 (2003) (notice of appeal of court order was not defective, even though notice had date of order wrong in one instance, where notice specified correct date in other instance)).

¶ 27 Here, the error relates entirely to the substance of the notice of appeal, which does not "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. July 1, 2017). As such, we do not have jurisdiction to review the court's final order dismissing plaintiff's amended complaint. Accordingly, we must dismiss the appeal.

¶ 28 **III. CONCLUSION**

¶ 29 Because plaintiff failed to file a proper notice of appeal, we dismiss the appeal for lack of jurisdiction.

¶ 30 Dismissed for lack of jurisdiction.