

CIVIL PRETRIAL MOTIONS

MOTIONS TO DISMISS

David Butler
Retired Associate Circuit Judge

9/18/2023

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PLEADINGS

Designation and Order of Pleadings

First pleading by the plaintiff: **COMPLAINT**

First pleading by defendant: **ANSWER**

Plaintiff's response to new matter plead by defendant: **REPLY**

735 ILCS 5/2-602

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FORM OF PLEADINGS

All pleadings shall contain a plain concise statement of the pleader's cause of action, counterclaim, defense or reply.

735 ILCS 5/2-603

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FACT PLEADING

Illinois is a fact pleading jurisdiction as opposed to notice pleading in federal court. Johnson v. Matrix Fin. Serv. Corp., 354 Ill. App. 3d 684 (4th Dist. 2004).

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**MOTIONS WITH RESPECT TO PLEADINGS
735 ILCS 5/2-615**

(a) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially deficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated mis-joined be dismissed, and so forth.

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- (b) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.
- (c) Upon motions based upon defects in pleadings, substantial defects in prior pleadings may be considered.
- (d) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.

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(e) Any party may seasonally move for judgment on the pleadings.

Moving party is saying "Based on the pleadings, I win."

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SUMMARY OF RELIEF UNDER 735 ILCS 5 /2-615

- (1) Pleading stricken because insufficient in law
- (2) Action dismissed
- (3) Pleadings ordered to be made more definite and certain
- (4) Immaterial matter stricken
- (5) Necessary parties added
- (6) Mis-joined parties dismissed out

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More Definite Pleadings

- Not an attack on the pleadings
- Essentially a Motion For Bill of Particulars
- Enables defendants to better know what they have to defend
- Same relief available under 735 ICS 5/2-607

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(e) Judgment on the Pleadings

- Not an attack on the Pleadings
- Both Plaintiff and Defendant can file Motion
- Relief sought is a **Judgment**, not Dismissal
- Judgment on the pleadings is properly granted if the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Pekin Insurance Company v. Wilson, 237 Ill 2nd 446 (2010)

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What does that sound like?

You're right!

A Motion for Judgment on the Pleadings is like a motion for summary judgment, limited to the pleadings. Pekin Insurance Company v. Wilson

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MOTIONS TO DISMISS BASED ON LEGAL INSUFFICIENCY OF THE COMPLAINT

Most common challenge to a civil Complaint is that it does not state a cause of action.

Relief Sought—Dismissal of the action

Remember the 6 forms of relief available under Section 2-615?

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A section 2-615(a) Motion to Dismiss tests the legal sufficiency of the Complaint based on defects apparent on its face. Doe-3 v. McLean County Unit District No. 5 Board of Directors, 2012 IL 112479

NOT A DEFENSE TO THE FACTS ALLEGED IN THE COMPLAINT

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To survive a section 2-615 motion to dismiss, a plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action. Reynolds v. Jimmy John's Enterprises, LLC, 2013 IL App (4th) 120139

The defendant is saying, "So what? The facts plaintiff has plead do not state a cause of action against me." Reynolds

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The question presented is whether the allegations of the Complaint, when viewed in a light most favorable to the Plaintiff, are sufficient to state a cause of action upon which relief can be granted. Borowiec v. Gateway 2000, Inc., 209 Ill. 2d 376 (2004)

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. Pooh-Bah Enterprises, Inc. v. County of Cook, 232 Ill. 2d 463 (2009)

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CAUSE OF ACTION

To state a cause of action, the Complaint must:

- (1) State a legally recognized basis for recovery;
- (2) Plead facts that establish that claim

See People ex rel. Fahner v. Chicago Carriage Way West, Inc., 88 Ill. 2d 300.

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WHAT COURT CONSIDERS IN RULING ON 2-615 MOTION TO DISMISS

A section 2-615 motion only attacks the legal sufficiency of the Complaint and accepts all well-pleaded facts as true. Reynolds v. Jimmy John's Enterprises.

A 2-615 motion does not raise factual defenses. Borowiec v. Gateway 2000.

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In ruling on a section 2-615 motion the court only considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record. Reynolds v. Jimmy John's Enterprises.

The court is limited to the factual allegations of the Complaint and may not consider matters beyond the Complaint when reviewing the sufficiency of the Complaint. Khan v. Deutsche Bank AG, 2012 IL 112219

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WHAT HAPPENS IF COURT GRANTS A 2-615 MOTION TO DISMISS?

The court will nearly always give Plaintiff leave to file amended Complaint pursuant to 735 ICS 5/2-616

Unless the judge finds that Plaintiff cannot plead a cause of action under the apparent facts and circumstances of the case. People ex rel. Daley v. Datacom Systems Corp., 146 Ill. 2d 1.

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Under 735 ILCS 2-616, the court can grant a party leave to amend their pleadings on "just and reasonable terms."

The Illinois Supreme has interpreted this provision to require the trial court to permit amendments if it will further the ends of justice. In re Estate of Hoover, 155 Ill. 2d 402.

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**INVOLUNTARY DISMISSAL
BASED UPON CERTAIN DEFECTS OR
DEFENSES
735 ILCS 5/2-619**

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BASIS OF 2-619 MOTION TO DISMISS

A Motion To Dismiss pursuant to 735 ILCS 5/2-619 seeks dismissal of plaintiff's Complaint based on 8 specific grounds and one broader ground of "Other affirmative matter."

Defendant is saying in the motion, "Yes, the Complaint is legally sufficient, but an affirmative matter exists that defeats the claim. Howle v. Aqua Illinois, Inc., 2012 IL App. (4th) 120207

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PRELIMINARY CONSIDERATIONS

Section 2-619 furnishes a mechanism for the disposition of issues of law or easily proved issues of fact. Torcasso v. Standard Outdoor Sales, Inc., 157 Ill 2d 484 (1993).

For the motion to be properly brought under 2-619, the motion must:
(1) Be timely filed
(2) Assert one of the 9 listed grounds for dismissal

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Section 2-619(a)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact **relating to the affirmative matter** early in the litigation. Clemons v. Nissan N Am, Inc., 2013II App (4th) 120.943 (emphasis added).

A section 2-619 motion is intended to be heard and decided before the expense and inconvenience of litigation has been borne by either party or the trial court. Clemons v. Nissan N Am, Inc.

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The affirmative matter asserted by the defendant must be apparent on the face of the complaint, otherwise, the motion must be supported by affidavits or certain other evidentiary materials. Clemons v. Nissan N Am, Inc.

Affirmative matter is something other than the defendant's version of the facts, which negates the cause of action completely. Clemons v. Nissan N Am, Inc.

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Strict compliance with SCR 191(a) is required to insure the trial court is presented with valid evidentiary facts on which to base a decision. Clemons v. Nissan N Am, Inc.

Motions to Dismiss filed pursuant to 2-619(a) must be filed within the time for pleading, except for motions challenging the court's subject matter jurisdiction which can be filed at any time. Sheffler v. Commonwealth Edison Co., 399 Ill. App. 3d 51 (1st Dist. 2010), Ill Consol Telephone Co. v. Commerce Com, 99 Ill. App. 3d 462 (4th Dist. 1981).

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ISCR 181 establishes the time in which a party shall file an answer or motion after being served with summons.

30-Day Summons: Defendant shall appear with in 30 days by filing a motion, answer, or written appearance.

If defendant appears by filing a motion, defendant shall file an answer or other motion within the time directed by the court.

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Day Certain Summons: When summons requires defendant to appear in court on a specified day, defendant may appear in person or by counsel. If defendant appears in writing in any way other than filing a motion or answer, defendant will be allowed 10 days to file an answer or motion. ISCR 181

ISCR 183 gives the court discretion to extend the time in which to do any act which is required by rules to be done within a limited period, either before or after the expiration of the time.

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The trial court has the discretion to allow the filing of a 2-619 Motion To Dismiss after defendant has filed an answer to the complaint. Long v. Elborno, 376 Ill. App. 3d 976 (1st Dist. 2007).

Court has discretion to allow parties to file late pleading and may do so unless it can be demonstrated the opposing party would be prejudiced by the late filing. In re Brownfield, 283 Ill. App. 3d 728 (4th Dist. 1996)

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5/2-619 Involuntary dismissal based upon certain defects or defenses.

(a) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

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(1) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by transfer of the case to a court having jurisdiction.

(2) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(3) That there is another action pending between the same parties for the same cause.

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(4) That the cause of action is barred by a prior judgment.

(5) That the action was not commenced within the time limited by law.

(6) That the claim set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(7) That the claim asserted is unenforceable under the provisions of the Statute of Frauds.

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(8) That the claim asserted against defendant is unenforceable because of his or her minority or other disability.

(9) That the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.

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AFFIRMATIVE MATTER

A motion for involuntary dismissal under 2-619(a)(9) admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint that defeats the cause of action. Kean v. Wal-Mart Stores, Inc., 235 Ill. 2d 351.

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Section 2-619(a)(9) permits resolution of easily proved issues of fact about the affirmative matter, and evidentiary material submitted in support of the motion must go to the affirmative matter. Reynolds v. Jimmy John's Enterprises, LLC, 2013 IL App (4th) 120139.

NOTE: The evidentiary material submitted in support of the motion to dismiss goes to the affirmative matter and not the allegations in plaintiff's complaint.

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An affirmative matter does not include evidence upon which defendant expects to contest an ultimate fact stated in the complaint. Smith v. Waukegan Park District, 23 Ill. 2d 111.

An affirmative matter is not the defendant's version of the facts as such a basis merely tends to negate the essential allegations of the plaintiff's cause of action. Smith v. Waukegan Park District, Reynolds v. Jimmy John's Enterprises, LLC

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Section 2-619 only permits a factual inquiry into the affirmative matter and does not permit fact-based arguments going to the veracity of the plaintiff's allegations. Reynolds v. Jimmy John's Enterprises, LLC.

Section 2-619(a)(9) does not authorize the defendant to submit affidavits or evidentiary matter for the purpose of contesting the plaintiff's factual allegations and presenting its version of the facts. Smith v. Waukegan Park District, 23 Ill. 2d 111, Reynolds v. Jimmy John's Enterprises, LLC.

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Where defendant seeks to address the complaint's factual allegations, a summary judgment motion pursuant to 735 ILCS 5/2-1005 is the proper vehicle. Reynolds v. Jimmy John's Enterprises, LLC.

To permit section 2-619(a)(9) to act as a vehicle to determine factual allegations raised in the complaint would effectively render summary judgment motions superfluous, force the plaintiff to prove his or her case early in the litigation, and, where a jury demand has been made, require the judge, rather than a jury, to resolve material issues of fact concerning the plaintiff's cause of action. Reynolds

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SUMMARY OF DIFFERENCES BETWEEN MOTIONS TO DISMISS PURSUANT TO SECTIONS 2-615 and 2-619 AND SUMMARY JUDGMENT

2-615 Motion To Dismiss:

- (1) Facts alleged in complaint are accepted as true
- (2) Defendant asserts that the facts alleged do not state a cause of action against defendant
- (3) Motion cannot be supported by extraneous evidence
- (4) Court considers only the allegation in complaint in ruling on motion

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2-619 Motion To Dismiss:

- (1) Admits allegations in complaint
- (2) Admits complaint states a cause of action
- (3) Defendant asserts an affirmative matter that defeats the claim
- (4) Parties can (must) submit evidence in support of or response to the motion

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5/2-1005 Motion For Summary Judgment:

- (1) Defendant contests the facts alleged in the complaint
- (2) Either party can file a Motion For Summary Judgment
- (3) Parties submit evidence (affidavits, depositions,...) in support of or in response to the motion

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Justice Steigmann in Howle v. Aqua Illinois and Winters v. Wangler, 386 Ill. App. 3d 788 (4th Dist. 2008), described these three motions this way:

2-615 A "So what?" Motion

2-619 A "Yes, but." Motion

Summary Judgment A "Not true" Motion

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FROM THE COURT'S PERSPECTIVE

2-615: Has plaintiff stated a cause of action upon which relief can be granted?

2-619: Is there affirmative matter that defeats the plaintiff's claim?

Summary Judgment: Is there a genuine issue of material fact to be resolved by trial?

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Section 2-615 and 2-619 are not proper vehicles to contest factual allegations contained in the complaint. Reynolds v. Jimmy John's Enterprises, LLC.

A section 2-619(a)(9) motion to dismiss is not a substitution for a summary judgment motion. Reynolds

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A 2-619 motion can be distinguished from a 2-615 motion in that a 2-615 motion attacks only the legal sufficiency of the complaint and does not raise affirmative factual defenses, as does a motion under 2-619. Urbaitis v. Commonwealth Edison, 143 Ill. 2d 458 (1091).

SUMMARY: When defendant asserts plaintiff has not stated a cause of action, a 2-615 motion is proper; when defendant asserts plaintiff's cause is action is barred by affirmative matter outside the complaint, a 2-619 motion is proper; when defendant asserts plaintiff cannot prove the allegations in the complaint, a 2-1005 motion for summary judgment is the proper motion to file.

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COMBINED MOTIONS

735 ILCS 5/2-619.1

5/2-619.1 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.

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MIX EM, BUT DON'T CROSS EM

Although section 2-619.1 permits a movant to combine separate claims brought under sections 2-615, 2-619, or 2-1005 into one filing, it prohibits the comingling of those distinctive claims. Section 2-619.1 does not authorize hybrid motion practice. Howle v. Aqua Illinois, Inc.

NOTE: **Combine**, but don't **Commingle** (mix em, but don't cross em)

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This means do not make arguments or present evidence in addressing the sufficiency of the complaint.

When addressing whether affirmative matters defeat the claim, don't address the sufficiency of the pleadings (they are deemed to be sufficient and state a cause of action).

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Because section 2-619.1 explicitly requires that a motion combining both sections 2-615 and 2-619 (1) must be in parts,(2) must be limited to and shall specify that it is made under either section 2-615 or 2-619, and (3) must clearly show the points or grounds relied upon under the section upon which it is based, trial courts should not-and need not accept for consideration combined motions under 2-619.1 that do not meet those statutory requirements. Howle v. Aqua Illinois.

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To avoid unnecessary complications and confusion, trial courts should sua sponte reject such motions and give the defendants who filed them the opportunity (if they wish) to file a section 2-619.1 motion that meets the statutory requirements. Or, of course, such defendants may choose to file separate motions under sections 2-615 and 2-619, thereby avoiding any improper commingling of their claims. Howle

THIS STATEMENT WAS REPEATED IN REYNOLDS v. Jimmy JOHN'S

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MOTIONS AND DISCOVERY IN SMALL CLAIMS CASES

ISCR 287

(a) No depositions shall be taken or interrogatories or other discovery proceeding or requests to admit be used prior to trial in small claims except by leave of the court.

(b) Except as provided in sections 2-619 and 2-1001 of the Code of Civil Procedure, no motion shall be filed in small claims cases, without prior leave of court.

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The pre-trial motions filed pursuant to 2-615, 2-619 and 2-1005, can help reduce the expense and risk of resolving a legal claim by trial.

It is important to know which motion to use based the defense available to defendants.

Plaintiffs in civil litigation can also benefit from the vehicles of motions for judgment on the pleadings and summary judgment.

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