
Pre-trial Dismissal Based On Other Affirmative Matter: An Open Invitation Has Its Limits, Too

By David H. McCarthy

Section 2-619 of the Code of Civil Procedure all but invites abuse by its promise of so much so soon. For obtaining orders of dismissal with prejudice at the start of a case section 2-619 has no peers because “[i]t is designed to encourage early termination of litigation where affirmative defenses exist.”¹ Section 2-615 can produce dismissal with prejudice in theory, but it seldom yields more in practice than leave to amend a stricken pleading. Section 2-1005 permits a defendant to move for summary judgment even before it has answered the complaint, but in practice the parties are usually at issue on the pleadings and all or much discovery has been done before summary judgment is sought. The temptation to deduce that “the sky’s the limit” from the other-affirmative-matter clause at section 2-619(a)(9) is particularly seductive. The wealth of case law reversing orders of dismissal entered on motions under section 2-619(a)(9) bears this out.² What follows is an examination of the use and abuse of section 2-619(a)(9) and how its misuse might be controlled.

BACKGROUND

Three potentially-dispositive pre-trial motions are available under the Code of Civil Procedure: the motion with respect to pleadings found at section 2-615 (formerly section 45 of the Civil Practice Act); the motion for summary judgment at section 2-1005 (formerly section 57); and the motion for involuntary dismissal at section 2-619 (formerly section 48). Section 2-619 has enough in common with sections 2-615 and 2-1005 that it might have been eliminated by the Joint Committee on Illinois Civil Procedure had the Committee not learned that “the predecessor of section 2-619 was widely and successfully used, particularly outside Cook County.”³ In consequence of that discovery, section 2-619 was retained and expanded.⁴ Generally, section 2-619 “affords a ‘means of obtaining . . . a summary disposition of issues of law or of easily

proved issues of fact, with a reservation of jury trial as to disputed questions of fact.’”⁵ Although the text of the statute requires the motion to be made “within the time for pleading,”⁶ the circuit court has discretion to extend the time for making the motion.⁷ A motion for involuntary dismissal under section 2-619, like a motion with respect to pleadings under section 2-615, admits the truth of the well-pled facts in the pleading attacked.⁸

THE “FOUR CORNERS RULE” THAT LIMITS THE SECTION 2-615 MOTION DOES NOT APPLY TO THE SECTION 2-619 MOTION

The “four corners rule” limits motions under section 2-615 to defects on the face of the pleading attacked. Motions under section 2-619 may raise issues of fact and law that are outside the four corners of the complaint, sometimes known as the “good stuff” that artfully drawn complaints omit. Indeed, a motion under section 2-619 that does not go beyond the four corners of the complaint is seldom seen. When the grounds for dismissal do not appear on the face of the pleading attacked, the motion “shall be supported by affidavit.”⁹ Illinois Supreme Court Rule 191(a) governs the form and content of the affidavit. Some commentators maintain that all section 2-619 motions need affidavits because it is the job of section 2-615 to reach defects that appear only on the face of a pleading.¹⁰ The absence of an affidavit has been overlooked when a motion relied on certified copies of documents and when an opponent failed to object to the absence of an affidavit,¹¹ but the vast weight of the decisional law holds that section 2-619 means what it says, i.e., failure to submit an affidavit is fatal when the defect objected to is not apparent on the face of the challenged pleading.¹² Prudent counsel will err on the side of including an affidavit.¹³

What may properly be submitted in support of a motion under section 2-619 is

not confined to affidavits, however. Pleadings, depositions, documents, answers to interrogatories, and even live testimony — all this is acceptable.¹⁴ Little is lost to the defendant whose motion for involuntary dismissal is denied. The same theories of defense presented by motion may be included in the answer to the complaint in the form of affirmative defenses, except in that rare case when the court has disposed of the motion “on its merits.”¹⁵

THE QUESTION OF FACT THAT DOOMS ANY SUMMARY JUDGMENT MOTION IS NOT FATAL TO MANY MOTIONS FOR INVOLUNTARY DISMISSAL

The “material and genuine disputed questions of fact” that doom any motion for summary judgment are not fatal to a motion under section 2-619 in a chancery case, or in a law case in which the opponent of the motion has not timely demanded a jury trial. Section 2-619(c) states:

If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time.

A useful discussion of the difference between motions for involuntary dismissal and motions for summary judgment appears in an appeal of orders entered in a chancery case, *North Park Bus Service Inc. v. Pastor*, 39 Ill.App.3d 406, 349 N.E.2d 664 (1st Dist. 1976). “On a motion for summary judgment the trial court cannot decide issues of fact. . . In a chancery case such as this, a hearing on a section 48 motion (citation omitted) to dismiss presents a significantly different situation. . . Rather than simply determining the existence of a genuine issue of material fact, the court in a section 48 motion has the

power to decide such questions.” 349 N.E.2d 664, 667.

In sum, when the affidavits and counteraffidavits submitted for and against a motion for involuntary dismissal raise a material and genuine question of fact, the circuit court must deny the motion if the opponent is entitled to trial by jury. Otherwise it must conduct an evidentiary hearing and it may decide the factual question only by resort to the record or to matter so conclusive that plaintiff cannot deny it.¹⁶

Let it be understood, too, that a jury demand will not prevent dismissal under section 2-619 when the ground for dismissal is established as a matter of law. In such cases a motion under section 2-619 is the same thing as a motion for summary judgment. In fact, there are decisions that criticize orders of dismissal for exceeding the bounds of section 2-619 but affirm the dismissal on the grounds that the motion qualified as a motion for summary judgment and treating it as such would not unfairly prejudice the opponent.¹⁷

SECTION 2-619(a)(9): AN INVITATION TOMISCHIEF

To top all that, there is section 2-619(a)(9), with its broad invitation to seek dismissal because “[t]he claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.” An “affirmative defense” gives color to an opponent’s claim and the asserts “new matter” by which the apparent right is defeated.¹⁸ Some 17 affirmative defenses are listed in section 2-613(d) of the Code. That list is not exhaustive¹⁹ and there is little overlap between it and the nine subparts of section 2-619 which identify the grounds for dismissal that may properly be submitted by motion under section 2-619: want of subject matter jurisdiction, that plaintiff lacks capacity to sue or defendant capacity to be sued, that another action pends between the same parties for the same cause, *res judicata*, statute of limitations, release, satisfaction, discharge in bankruptcy, Statute of Frauds, that defendant is a minor or otherwise under a legal disability — and finally, that the claim is barred by “other affirmative matter avoiding the legal effect of or defeating the claim.”²⁰

“Affirmative matter,” the term that section 2-619(a)(9) uses, has been construed

to be broader than “affirmative defense.” *Ingersoll v. Klein*, 106 Ill.App.2d 330, 245 N.E.2d 288 (2d Dist. 1969) affirmed an order of dismissal entered on motion under old Section 48(1)(i) on the grounds that the other affirmative matter clause was broad enough to reach the question whether a wrongful death case was governed by Illinois law or by Iowa law. “Affirmative matter” means “something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained or inferred from the complaint.”²¹ The other-affirmative-matter clause is unavailable, however, “where the affirmative matter, so called, is nothing more than evidence upon which defendant expects to contest a vital fact stated in the complaint.”²² It could not be otherwise, for as pointed out above a motion under section 2-619, like a motion under section 2-615, must concede the truth of the well-pled facts in the pleading attacked.

Proper Use of 2-619(a)(9)

The following have been recognized as proper subjects for motion under section 2-619(a)(9): sovereign immunity,²³ that services are non-lienable,²⁴ the failure of a condition precedent,²⁵ lack of standing to sue,²⁶ exemption from ordinance,²⁷ interspousal tort immunity,²⁸ innocent construction of allegedly defamatory statements,²⁹ absolute privilege in a defamation case,³⁰ the non-existence of a duty of care,³¹ statutory immunity.³² The foregoing is not held out to be exhaustive on the subject.

Crossing the Line

Decisions that reversed dismissals obtained under section 2-619(a)(9) differ on their facts and on their theories of liability but they invariably fault the motion in question on the ground that it did not present “other affirmative matter” but only material by which the defendant hoped to contest one or more of the elements of the plaintiff’s *prima facie* case. An action for damages for a six-year-old boy who got burned in a county garage was dismissed on motion under section 2-619(a)(9) that presented an affidavit averring that the county had spent a lot of money to fence in the garage and the relevant building had been locked when the last county employee left for the day.³³ The order of dismissal was

reversed on the grounds that the motion had merely “traversed” elements of the plaintiff’s *prima facie* case. An action for property damage alleging negligent installation and maintenance of a gas meter was dismissed on the strength of an affidavit that described the tests that gas meters underwent and offered the opinions of an employee of the defendant about why the meter at issue may have malfunctioned.³⁴ The Appellate Court reversed on the ground that this did not rise to the level of affirmative matter but merely contested the negligence allegations of the complaint.

Defendants to a legal malpractice action invoked section 2-619(a)(9) to win dismissal in the trial court on the ground that a bankruptcy court had found their client guilty of fraud. That order was reversed on the grounds that the finding of fraud may have been the fruit of the negligence of the defendants-attorneys, and their motion had not presented affirmative matter but only facts on which they proposed to contest the allegations of negligence. Another pre-trial dismissal of an action for legal malpractice was obtained by motion denying that an attorney-client relationship existed at the time of the occurrence complained of and reversed on the grounds that this did not constitute “affirmative matter” but merely raised a question of fact on an element of the *prima facie* case of plaintiff.³⁵ One of the many drug manufacturers joined as defendants to a personal injury case obtained, in response to a demand for bill of particulars, part of a label of a drug manufactured by a co-defendant and then obtained an involuntary dismissal on the grounds that the evidence available to plaintiff was insufficient to warrant judgment against the defendant-movant.³⁶ The Illinois Appellate Court reversed on the ground that the motion had not submitted “other affirmative matter” and that the plaintiff was still awaiting discovery from the defendant that obtained the dismissal order.

In an action for fraud and breach of contract brought by the would-be buyers of residential real estate, a motion under section 2-619(a)(9) was granted on the strength of affidavits and depositions that contradicted an allegation that defendants-sellers had failed to deliver an operating furnace and included the opinion of an engineer that the buyers had not relied on statements of the sellers.³⁷ The Appellate Court reversed on the grounds that all this

did not constitute affirmative matter. A defendant to an action for tortious conversion of a boat obtained a dismissal under section 2-619(a)(9) by submitting the plaintiff's sworn pleading from another case to the effect that plaintiff had rescinded the contract for purchase and sale of the boat.³⁸ The Appellate Court reversed on the grounds that the defendant had merely presented evidence with which it intended to contest an element of the plaintiff's prima facie case (and the sworn pleading was not a judicial admission but only an evidentiary admission that had been adequately explained away). An action for breach of a contract of employment was dismissed under 2-619(a)(9) on the grounds that plaintiff had received full payment. The Appellate Court reversed on the grounds, among others, that the question of payment merely went to "the truth of the allegations contained in the complaint."³⁹

Blurring the Line

The incentives to misuse section 2-619(a)(9) are hardly diminished by decisions that have blurred the line between what is truly "affirmative matter" and what is merely evidence in support of denials of allegations of the plaintiff's complaint. It has been held, for example, that the question whether a defendant was under a duty of care can be reached by motion under section 2-619(a)(9)⁴⁰ even though a complaint in negligence must allege the existence of the duty in order to be prima facie sufficient.⁴¹ The same is true as to failure of a condition precedent, which has been held to be a fit subject for a motion under section 2-619⁴² even though a complaint for breach of contract must allege due performance by plaintiff and fulfillment of all conditions on plaintiff's part to be fulfilled.⁴³ This apparent anomaly might be better understood in light of Illinois Supreme Court Rule 133(c) and the case law construing it. The law is that a complaint sounding in common law breach of contract may plead plaintiff's own performance and fulfillment of preconditions generally but an answer that denies the allegation only generally is deemed an admission.⁴⁴ A defendant who would contest the question of plaintiff's own performance must particularize the failures to perform at risk of waiving the issue.⁴⁵ Finally, at least one decision reversed a dismissal obtained under 2-619(a)(9) on the grounds that payment, a defense raised

against a complaint for breach of contract did not constitute "affirmative matter" but only a contest on the prima facie case — though "payment" is a defense that appears by name in section 2-613(d) of the Code.⁴⁶

TO CURB THE ABUSE ENFORCE THE LAWS THAT ARE ALREADY "ON THE BOOKS"

What can be done about motions for involuntary dismissal that stretch the other affirmative matter clause of section 2-619(a)(9) past the breaking point? Enforcement of existing rules would probably get the job done. Movants should be made to identify their motions by citing the applicable part of the Code of Civil Procedure and by summarizing the relief requested. The local rules of the 18th Judicial Circuit Court require as much. *See LR 6.04(a) and 6.05(b)*. Strict compliance with Section 2-619.1 of the Code of Civil Procedure should be required whenever a "hybrid motion" is involved. It permits "hybrid motions" but requires them to be broken out into parts that specifically identify the applicable sections of the Code of Civil Procedure that are being relied on. Attention to the "four corners rule" would help, too. If the objection is that the pleading fails to state a cause of action, only that pleading may be considered. Material extrinsic to the pleading — affidavits, depositions and all the rest of it — must be disregarded. By the same token, a motion that insists on going outside the four corners of the pleading attacked, thereby concedes that it must be denied insofar as it invokes section 2-615 and stakes all on sections 2-619 and 2-1005. Does the motion use an affidavit to gainsay an element of the plaintiff's prima facie? If so, it has exceeded the scope of the invitation of section 2-619.

CONCLUSION

It has been said of summary judgment that the procedure is to be encouraged as a means of promptly disposing of a lawsuit but it is so drastic that it can be allowed only when the movant's right to it is clear and free from doubt. Much the same thing is true of the motion for involuntary dismissal under section 2-619, and especially section 2-619(a)(9). "It is designed to encourage early termination of litigation where affirmative defenses exist."⁴⁷ The "four corners rule" is inapplicable. Factual disputes are not necessarily fatal. The

other-affirmative-matter clause almost begs to be understood as "anything goes." The abuse can be diminished if not eliminated by requiring clear identification of the motion and of the relief it seeks, by noting whether the motion is or is not accompanied by supporting materials such as affidavits and depositions, and above all by ascertaining whether the motion is conceding or contesting one or more of the allegations of the complaint.

¹ *Brewer v. Stovall*, 54 Ill.App.3d 261, 369 N.E.2d 365, 368 (4th Dist. 1977) quoting Ill. Ann. Stat. ch. 110, para. 48, Committee Comments, at 353 (Smith-Hurd 1968).

² See notes 33-40 below.

³ Ill. Ann. Stat. ch. 110 sec. 2-619, Historical and Practice Notes, at 663 (Smith-Hurd 1983).

⁴ *Id.*

⁵ *Kedzie and 103rd Currency Exchange v. Hodge*, 156 Ill.2d 112, 619 N.E.2d 732, 735 (1993) quoting Ill. Ann. Stat., ch. 110, para. 2-619, Historical and Practice Notes, at 662 (Smith-Hurd 1983) and also citing *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill.App.3d 1065, 1071, 603 N.E.2d 1215 (1992).

⁶ 735 ILCS 5/2-619(a).

⁷ *Inland Real Estate Corp. v. Lyons Sav. & Loan Assn.*, 153 Ill.App.3d 848, 506 N.E.2d 652, 656 (2d Dist. 1987); *In re M.K.*, 284 Ill.App.3d 449, 672 N.E.2d 271, appeal denied, 172 Ill.2d 552, 679 N.E.2d 380 (1st Dist. 1996); 735 ILCS 5/2-1007; Illinois Supreme Court Rule 183.

⁸ *Kedzie and 103rd Currency Exchange v. Hodge*, 156 Ill.2d 112, 619 N.E.2d 732, 735 (1993).

⁹ 735 ILCS 5/2-619(a).

¹⁰ Ill. Ann. Stat. ch. 110, para. 2-69, Historical and Practice Notes, at 662 (Smith-Hurd 1983). "Although defects that appear on the face of the pleadings attacked may, according to the letter of the section be reached by motion under this section . . . if the only ground of a motion is a defect that appears on the face of the pleading attacked, the appropriate method of reaching that defect is by a motion under section 2-615." *Id.*

¹¹ *Hays v. Louisiana Dock Co.*, 117 Ill.App.3d 512, 452 N.E.2d 1383, 1387 (5th Dist. 1983); *Castenada v. Community School District Unit No. 200*, 226 Ill.App.3d 514, 589 N.E.2d 1038 (2d Dist. 1992).

¹² 735 ILCS 5/2-619, Notes of Decisions, nn. 328-334 pp. 1196-1203 (Smith-Hurd 1992)

¹³ For an example of a successful motion under section 2-619 that was not supported by affidavit, see Section 2-619 Motion to Dismiss of defendant New World Homes Inc. in *Stein et al v. Mount Vernon Fire Insurance Company et al.*, No. 02 L 911 on the docket of the Eighteenth Judicial Circuit Court, DuPage County, Illinois, filed November 7, 2003

¹⁴ *Zedella v. Gibson*, 165 Ill.2d 181, 185, 650 N.E.2d 1000 (1995); *Meyer v. Murphy*, 70

Ill.App.3d 106, 387 N.E.2d 878, 884-85 (1979);
¹⁵ 735 ILCS 5/2-619(d).
¹⁶ Curtis Casket Co. v. D.A. Brown & Co., 259 Ill.App.3d 800, 632 N.E.2d 204 (1st Dist. 1994); Gilbert Bros Inc. v. Gilbert, 258 Ill.App.3d 395, 630 N.E.2d 189 (4th Dist. 1994); A.F.P. Enterprises v. Crescent Pork, 243 Ill.App.3d 905, 611 N.E.2d 619, 624-25 (2d Dist. 1993).
¹⁷ Malanowski v. Jabamoni, 293 Ill.App.3d 720, 688 N.E.2d 732 (1st Dist. 1997); Turner v. 1212 S. Michigan Partnership, 355 Ill.App.3d 885, 823 N.E.2d 1062 (1st Dist. 2005); see also, Johnson v. Matrix Financial Services Corporation, 354 Ill.App.3d 684, 820 N.E.2d 1094 (1st Dist. 2004) (Section 2-619 motion analyzed as section 2-615 motion, and dismissal affirmed).
¹⁸ Cunningham v. City of Sullivan, 15 Ill.App.2d 561, 568 142 N.E.2d 200, 204 (3d Dist. 1958).
¹⁹ Contributory negligence was added to section 2-613(d) by amendment, P.A. 84-624, after Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886 (1981) made comparative fault the law of Illinois. Waiver is not on the list but it is widely recognized as an affirmative defense.
²⁰ 735 ILCS 5/2-619(a)(1)-(a)(9).
²¹ In re Estate of Schlenker, 209 Ill.2d 456, 461, 808 N.E.2d 995 (2004); Glisson v. City of Marion, 188 Ill.2d 211, 720 N.E.2d 1034, 1039 (1999); Illinois Graphics Co. v. Nickum, 159 Ill.2d 469, 486, 639 N.E.2d 1282 (1994).
²² John v. Tribune Co., 19 Ill.App.2d 547, 553, 154 N.E.2d 862 (1st Dist. 1958). Accord: Provenzale v. Forister, 318 Ill.App.3d 869, 743 N.E.2d 676, 683 (2d Dist. 2001); A.F.P. Enterprises v. Crescent Pork, 243 Ill.App.3d 905, 611 N.E.2d 619, 624 (2d Dist. 1993); Brewer v. Stovall, 54 Ill.App.3d 261, 369 N.E.2d 365, 369 (4th Dist. 1977).
²³ Arteman v. Clinton Community Unit School District 15, 198 Ill.2d 475, 763 N.E.2d 756 (2002).
²⁴ Consumer Electric Co. v. Coblecomex Inc., 149 Ill.App.3d 699, 501 N.E.2d 156 (1st Dist. 1986)
²⁵ Vuagniaux v. Korte, 273 Ill.App.3d 305, 652 N.E.2d 840 (5th Dist. 1995)
²⁶ Glisson v. City of Marion, 188 Ill.2d 211, 720 N.E.2d 1034 (1999).
²⁷ Spiegel v. Hollywood Towers Condominium Assn., 283 Ill.App.3d 992, 671 N.E.2d 350 (1st Dist. 1996)
²⁸ Little v. Economy Preferred Insurance Co., 286 Ill.App.3d 372, 675 N.E.2d 1048 (5th Dist. 1997)
²⁹ Bryson v. News America Publications Inc., 174 Ill.2d 77, 672 N.E.2d 1207 (1996)
³⁰ Golden v. Mullen, 295 Ill.App.3d 865, 693 N.E.2d 385 (1st Dist. 1997)
³¹ Fancher v. Central Illinois Public Service Co., 279 Ill.App.3d 530, 664 N.E.2d 292 (5th Dist. 1996)
³² Petty v. Crowell, 306 Ill.App.3d 774, 715 N.E.2d 317 (5th Dist. 1999).
³³ Brewer v. Stovall, 54 Ill.App.3d 261, 369 N.E.2d 365 (4th Dist. 1977).

³⁴ Venezky v. Central Illinois Light Co., 168 Ill.App.3d 612, 522 N.E.2d 901 (3d Dist. 1988)
³⁵ Cioni v. Gearhart, 201 Ill.App.3d 853, 559 N.E.2d 494 (3d Dist. 1990).
³⁶ Smith v. St. Therese Hospital, 87 Ill.App.3d 782, 410 N.E.2d 219 (2d Dist. 1980).
³⁷ Provenzale v. Forister, 318 Ill.App.3d 869, 743 N.E.2d 676, 683 (2d Dist. 2001);
³⁸ Goodwin v. ITT Com.Fin.Corp., 146 Ill.App.3d 810, 497 N.E.2d 331 (1st Dist. 1986).
³⁹ Green v. Trinity Intl.University, 344 Ill.App.3d 1079, 801 N.E.2d 1208, 1214 (2d Dist. 2003).
⁴⁰ Fancher v. Central Ill.Pub.Serv.Co., 279 Ill.App.3d 530, 664 N.E.2d 692 (5th Dist. 1996).
⁴¹ Cunis v. Brennan, 56 Ill.2d 372, 308 N.E.2d 617 (1974); Indlecoffer v. Village of Wadsworth, 282 Ill.App.3d 933, 671 N.E.2d 1127 (2d Dist. 1996).
⁴² Vuagniaux v. Korte, 273 Ill.App.3d 305, 652 N.E.2d 840 (5th Dist. 1995).
⁴³ Thilman & Co. v. Esposito, 87 Ill.App.3d 289, 408 N.E.2d 1014 (1st Dist. 1980); Illinois Supreme Court Rule 133(c).
⁴⁴ Illinois Supreme Court Rule 133(c); Wilbur v. Potpura, 123 Ill.App.3d 166, 462 N.E.2d 734 (1st Dist. 1984)..
⁴⁵ Pioneer Trust & Sav.Bank v. Zonta, 74 Ill.App.3d 619, 393 N.E.2d 548 (1979).
⁴⁶ Green v. Trinity Int.l University, 344 Ill.App.3d 1079, 801 N.E.2d 1208 (2d Dist. 2003).
⁴⁷ See Note 1 above

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