

2012 IL App (2d) 111289-U  
No. 2-11-1289  
Order filed July 19, 2012

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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T.G.,	)	Appeal from the Circuit Court
	)	of Winnebago County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-MR-198
	)	
RICHARD H. CALICA, as Director of the	)	
Department of Children and Family Services,	)	
and THE DEPARTMENT OF CHILDREN	)	
AND FAMILY SERVICES,	)	Honorable
	)	J. Edward Prochaska,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE BOWMAN delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

*Held:* The trial court properly dismissed plaintiff's administrative-review complaint for lack of proper service: plaintiff personally (not via the clerk) served defendants' counsel (not defendants), and, as plaintiff did not challenge the trial court's striking of her evidence of an explanation, she did not satisfy the good-faith exception to the service requirements.

¶ 1 Plaintiff, T.G., appeals from the dismissal, under section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), of her administrative-review complaint against

defendants, the Department of Children and Family Services (Department) and its director, then Erwin McEwen, now Richard H. Calica (director). Plaintiff concedes that she did not strictly comply with the relevant service requirements, but contends that the court erred when it did not apply an exception to the strict-compliance requirement that allows for a good-faith attempt at service. We hold that plaintiff's attempts at service were not consistent with a good-faith attempt at service, and we therefore affirm the dismissal.

¶ 2

### I. BACKGROUND

¶ 3 On April 18, 2011, plaintiff, through counsel, filed a complaint for administrative review of the Department's decision on administrative appeal that an "indicated" child-abuse finding against her would not be expunged. The decision of which she sought review was made on March 16, 2011. She named as defendants the Department and its director. The new-case information sheet listed both defendants' address as "Assistant Attorney General, Child Welfare Litigation Bureau, 100 W. Randolph, Suite 11-200, Chicago, IL 60601." Someone that day sent the summonses (not administrative-review summonses) to that same address by certified mail. Plaintiff's brief says that plaintiff, not the clerk, sent them, and that is consistent with the appearance of the record.

¶ 4 On July 7, 2011, plaintiff's counsel filed an affidavit stating that defendants could properly be served at 406 East Monroe Street, Springfield, Illinois 62701-1498. On July 21, 2011, the clerk filed a certificate of mailing to each defendant. This was associated with an administrative review alias summons.

¶ 5 The attorney general filed an appearance for defendants on August 29, 2011. Defendants filed a motion to dismiss under sections 2-619(a)(5) (735 ILCS 5/2-619(a)(5) (West 2010)) and 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2010)) of the Code. They noted that section 3-103 of the

Code (735 ILCS 5/3-103 (West 2010)) requires an administrative-review plaintiff not only to file his or her complaint within 35 days but also to have summonses issued by that deadline. Moreover, section 3-105 of the Code (735 ILCS 5/3-105 (West 2010)) specifies that “[s]ervice on the administrative agency shall be made by the clerk of the court by sending a copy of the summons addressed to the agency at its main office in the State.” Finally, section 3-102 of the Code (735 ILCS 5/3-102 (West 2010)) provides that “[u]nless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision.” Defendants argued that, because plaintiff had originally designated the wrong address for the summonses, and had herself mailed the summonses rather than having the clerk issue them, she had not complied with section 3-103. They further argued that the complaint was therefore subject to dismissal under section 3-102. Finally, they argued that, under cases interpreting the relevant Code sections, once they established plaintiff’s noncompliance with the relevant sections, the burden shifted to plaintiff to show a good-faith attempt to get the clerk to issue the proper summonses.

¶ 6 Plaintiff responded that summonses had been directed to defendants within the 35-day period; the issue was the address. Counsel’s assistant had called the Administrative Hearing Unit of the Department to ask for the proper address. Whomever she reached told her that the Randolph Street address was the proper address. (The affidavit of Maria Hagerman, counsel’s assistant, was an exhibit to the response. Her statement on the relevant points was in paragraphs four and five of the affidavit.) Counsel also wrote a follow-up letter on June 20, 2011. Plaintiff argued that these circumstances made the cases cited by defendants distinguishable.

¶ 7 Defendants filed a motion to strike paragraphs four and five of Hagerman's affidavit as hearsay.

¶ 8 The court had a hearing on the motion to dismiss on November 21, 2011. The order says that it heard argument, but does not say that it heard testimony. The court granted defendants' motion to dismiss. It also struck paragraphs four and five of Hagerman's affidavit. Plaintiff filed a timely notice of appeal.

¶ 9 **II. ANALYSIS**

¶ 10 On appeal, plaintiff concedes that the summonses were sent to the wrong address, but asserts that the court erred by not ruling that plaintiff had made a good-faith effort to serve defendants properly. She does not address the question of whether she, not the clerk, issued the April 18, 2011, summonses or the legal implications of the answer to that question. She states that review of a dismissal under section 2-619 is *de novo*.

¶ 11 Defendants respond that plaintiff failed to comply with the statutory service requirements, and that that is a basis for dismissal. They further argue that, to qualify for the good-faith exception to the general rule of strict compliance with administrative-review service requirements, a plaintiff must show that the noncompliance was the result of circumstances beyond his or her control. They make inconsistent statements about the standard of review.

¶ 12 Before we can address the substance of the appeal, we address what amount to matters of housekeeping. First, both plaintiff and defendants cite a transcript of the motion hearing that plaintiff included in the appendix to her brief, but that does not appear in the record proper. "Attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record." *Zimmer v. Melendez*, 222 Ill. App. 3d 390, 394-95 (1991).

Neither plaintiff nor defendants rely extensively on the transcript, but, to the extent that they do, this court must disregard the arguments. Second, the trial court struck paragraphs four and five of Hagerman's affidavit. Although the paragraphs were obviously hearsay for the purpose of showing the proper addresses for defendants, they were patently *not* hearsay for the purpose of showing *why* plaintiff thought the address that she used was proper. See *In re Estate of Michalak*, 404 Ill. App. 3d 75, 94 (2010) ("Out-of-court statements offered for some independent purpose, rather than the truth of the matter asserted [by the declarant], are not hearsay"). But plaintiff has not challenged the removal of the paragraphs. This court thus cannot consider them.

¶ 13 The briefs also require some discussion of the applicable standard of review. Although both parties state at the outset that our review is *de novo*, defendants also assert that "[t]he question of whether T.G. did all that she could to comply with the [statutory] requirements is one of fact" and that "[a]ccordingly, this Court may reverse the circuit court's finding only if that finding is against the manifest weight of the evidence." The *de novo* standard implies something that a court can decide as a matter of law. See *Law Offices of Nye & Associates, Ltd. v. Boado*, 2012 IL App (2d) 110804, ¶ 12 ("review of a dismissal under section 2-619 of the Code is generally *de novo*").

"However, [w]here \*\*\* the trial court grants a section 2-619 motion to dismiss following an evidentiary hearing, "the reviewing court must review not only the law but also the facts, and may reverse the trial court order if it is incorrect in law or against the manifest weight of the evidence." ' [Citations.] [In those circumstances], we review whether the trial court's findings of fact are against the manifest weight of the evidence while reviewing the questions of law *de novo*." *Nye & Associates*, 2012 IL App (2d) 110804, ¶ 12 (quoting *Hernandez v.*

*New Rogers Pontiac, Inc.*, 332 Ill. App. 3d 461, 464 (2002), quoting *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 13 (1989)).

Defendants cite *City National Bank & Trust Co. v. Property Tax Appeal Board*, 97 Ill. 2d 378, 382 (1983), in which the supreme court stated that “whether plaintiff has done all that it can to comply with the statute is one of fact,” and they infer that we may reverse only if the ruling against plaintiff was against the manifest weight of the evidence. Defendants overgeneralize. Where, as here, the parties disputed no facts, we need not be concerned with the *weight* of the evidence. The court did not conduct an evidentiary hearing, and, per the rule in *Nye & Associates*, our review is, as defendants initially recognized, *de novo*.

¶ 14 Turning to the substance of the matter, plaintiff has not shown a good-faith attempt at service; the burden to show that effort was hers. See *Blumhorst v. Department of Employment Security*, 335 Ill. App. 3d 1075, 1078 (2002) (“Defendants came forward with evidence that the circuit clerk issued the summonses more than 35 days after service of the board’s decision[,]” so the “burden shifted to plaintiff to come forward with evidence that he attempted, in good faith, to obtain the issuance of the summonses within the 35 day period”). Plaintiff and defendants agree that plaintiff did not comply with section 3-103 in that she did not have the summonses directed as specified by section 3-105. As the parties also agree, that failure is basis for dismissal unless the plaintiff made a good-faith effort to comply.

¶ 15 Under section 2-619(c) (735 ILCS 5/2-619(d) (West 2010)), a plaintiff cannot force an evidentiary hearing by simply making claims or allegations to defeat the basis for dismissal. Rather, it contemplates the plaintiff “present[ing] affidavits or other proof \*\*\* establishing facts obviating

the grounds of defect.” 735 ILCS 5/2-619(d) (West 2010). Therefore, if plaintiff had a defense to defendants’ defense, it was her burden to show it.

¶ 16 With the substantive paragraphs of Hagerman’s affidavit stricken, the record lacks anything other than the wrong address itself that tends to show why plaintiff used the wrong address. The address used, “Assistant Attorney General, Child Welfare Litigation Bureau, 100 W. Randolph, Suite 11-200, Chicago, IL 60601,” effectively forces the inference that plaintiff was trying to serve defendants’ counsel.

¶ 17 Case law does not support plaintiff’s claim to be entitled to the good-faith exception to the service requirements on these facts. The supreme court’s most recent extended discussion of the issue appears in *Carver v. Nall*, 186 Ill. 2d 554, 559 (1999):

“The good-faith-effort exception to the requirement that summons timely issue is established, but narrow. This court has emphasized that section 3-103 of the Act requires that an action for administrative review ‘be commenced “by the filing of a complaint *and* the issuance of summons *within 35 days*” of receipt of the decision being appealed.’ [(Emphases in original.)] [Citations.] This court has distinguished the requirement of a timely filed complaint, which is jurisdictional, from the requirement of summons timely issued:

‘The 35-day period for the issuance of summons, on the other hand, is mandatory, not jurisdictional, and failure to comply with that requirement will not deprive the court of jurisdiction. [Citations.] However, as the 35-day period is intended to “hasten the procedure” of administrative review and avoid undue delay, a litigant must show a good-faith effort to file the complaint and secure issuance of summons within the 35 days in order to avoid dismissal. [Citations.] In cases where the 35-day requirement

has been relaxed, the plaintiffs had made a good-faith effort to issue summons within the statutory period. Nevertheless, due to some circumstance beyond their control, summons was not issued within the statutory period.’ ”

Here, nothing was beyond plaintiff’s control. Instead, it appears that counsel was only partially familiar with the law and chose to improvise.

¶ 18 Further, the obvious reason that the good-faith exception is necessary is that section 3-105’s mandate that the clerk issue the summonses means that a plaintiff is dependent on the clerk for proper service. See *Cox v. Board of Fire & Police Commissioners of City of Danville*, 96 Ill. 2d 399, 403-04 (1983) (the good-faith exception prevents a plaintiff who has acted with diligence in seeking to have the clerk issue the summonses from being thwarted by the clerk’s error). Where a plaintiff, without prompting from the clerk, takes on the role of issuing the summons, no obvious reason exists for that plaintiff to be able to use the good-faith exception.

¶ 19 The failure by counsel to follow the Code’s mandates resembles counsel’s failures in *Johnson v. Department of Public Aid*, 251 Ill. App. 3d 604, (1993), in which the court found that the good-faith exception did not apply. There, the plaintiff served the complaint on the defendant by certified mail, but did not serve a summons in any form or cause the clerk to serve one. *Johnson*, 251 Ill. App. 3d at 605. The *Johnson* court noted that the supreme court had held “that the Administrative Review Law is a departure from the common law and parties seeking its application must adhere strictly to its procedures.” *Johnson*, 251 Ill. App. 3d at 606. The *Johnson* court held:

“Here, the plaintiff did not make a good-faith effort to issue summons. Instead, he sent notice by certified mail. The plaintiff should not be allowed to create his own service procedure.” *Johnson*, 251 Ill. App. 3d at 606.

What plaintiff did here was very similar: closer to the statutory requirements in that plaintiff issued a summons, but farther in that she served counsel, not defendants.

¶ 20 Defendants are correct to point to *Gunther v. Civil Service Comm'n*, 344 Ill. App. 3d 912, 915 (2003), in which a First District panel held that “[s]ervice on the attorney for the agency does not suffice” when the plaintiff has not served the defendant agency, as a decision that supports the trial court’s ruling. The *Gunther* court held that, where the only service was on counsel, the record did not show any “evidence demonstrating a good faith effort to serve” the agency. *Gunther*, 344 Ill. App. 3d at 915. In other words, service on the attorney is not, without something more, a good-faith effort to serve the agency. Plaintiff seeks to distinguish this case on the basis that the plaintiff in *Gunther*, when he listed the attorney general as a defendant to be served, did not list the address of the agency and did not specifically name the agency as a defendant to be served. This is a difference, but it does not change the law’s requirement of service on the agency, not the attorney. Moreover, the addition of the agency name to the attorney general’s address has little to do with the existence of a good-faith effort. We follow *Gunther* in holding that service on counsel is not sufficient for a good-faith effort.

¶ 21

### III. CONCLUSION

¶ 22 For the reasons stated, we affirm the dismissal of plaintiff’s administrative review-complaint.

¶ 23 Affirmed.