

2013 IL App (2d) 120816-U
No. 2-12-0816
Order filed September 25, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JOHN A. CUMBEE,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellant,)	
)	
v.)	No. 12-MR-32
)	
KATHERINE M. KEEFE,)	Honorable
)	Thomas A. Meyer,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed plaintiff's complaint for *mandamus*, as defendant had fulfilled any duty to prepare and provide to plaintiff a certification that his grand jury was impaneled and sworn, and the certification was not defective for any reason that plaintiff alleged.

¶ 2 Plaintiff, John A. Cumbee, filed a *pro se* complaint for a writ of *mandamus* in the circuit court of McHenry County against defendant, Katherine M. Keefe, the clerk of the circuit court, asking the trial court to order defendant to produce the certification that the grand jury was impaneled and sworn in his criminal case (No. 92-CF-676). The trial court granted defendant's section 2-619(a)(9) motion to dismiss (735 ILCS 5/2-619(a)(9) (West 2012)) with prejudice, and

plaintiff filed a timely notice of appeal.¹ Because defendant submitted affirmative matters that defeated plaintiff's request for a writ of *mandamus*, we affirm.

¶ 3

I. BACKGROUND

¶ 4 Following a jury trial in 1993, plaintiff was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 1992)) and sentenced to life imprisonment. We reversed and remanded. See *People v. Cumbee*, No. 2-93-0923 (1995) (unpublished order under Supreme Court Rule 23). Plaintiff was retried in 2003, was again convicted of first-degree murder, and was again sentenced to life

¹Plaintiff filed a timely notice of appeal on June 4, 2012. On June 8, 2012, the trial court entered an order that stated that on its own motion it was setting the matter for "clarification of requested relief." The June 8 order required plaintiff to "specify [the] exact relief requested" by July 13, 2012. On June 28, 2012, plaintiff filed an "answer to the courts [sic] order of clarification of requested relief," in which he reiterated his arguments in support of his complaint and in opposition to defendant's motion to dismiss. On July 13, 2012, the trial court entered an order that stated, in part, that it construed plaintiff's notice of appeal and answer to its order seeking clarification as a motion to reconsider. The July 13 order denied the motion to reconsider and stated that it was a "final appealable order." In turn, plaintiff filed a second notice of appeal on July 25, 2012, in which he appealed the dismissal of his complaint as well as the denial of the motion to reconsider.

This court docketed plaintiff's original notice of appeal in case No. 2-12-0621. We later docketed plaintiff's second notice of appeal in this case. We subsequently dismissed appeal No. 2-12-0621 with prejudice as we found that it was a duplicate of the present appeal. See *People v. Cumbee*, No. 2-12-0621 (Oct. 9, 2012) (minute order).

imprisonment. We affirmed plaintiff's conviction and sentence. See *People v. Cumbee*, 366 Ill. App. 3d 476 (2006).

¶ 5 On January 23, 2012, plaintiff filed a complaint for a writ of *mandamus*, in which he asked the trial court to order defendant to provide him with the certification of the circuit clerk showing that the grand jury was impaneled and sworn, as required by Illinois Supreme Court Rule 608(a)(2) (eff. Dec. 13, 2005). In his complaint, plaintiff asserted that the record on appeal in his criminal case did not contain such a certification, that he had requested a copy of the certification numerous times, and that those requests had been "met with negative results." Plaintiff further asserted that he was wrongfully convicted and incarcerated because the grand jury, which was not properly impaneled and sworn, returned a defective indictment. Plaintiff asked the trial court to require defendant to produce the certification and for "such other relief as the court deem[ed] just and necessary."

¶ 6 Defendant filed a motion to dismiss pursuant to section 2-619(a)(9). In that motion, defendant stated that the former clerk of the circuit court, Vernon Keys, included the certification as part of the record on appeal in plaintiff's original appeal in 1993. Defendant also asserted that, in response to plaintiff's complaint for a writ of *mandamus*, she mailed plaintiff a copy of the certification.

¶ 7 Defendant included an affidavit with her motion to dismiss, in which she attested to the facts in her motion. Defendant also included, as exhibits, that portion of the index to the common-law record showing the "certification of grand jury," and a copy of the two-page certification itself. The certification stated, in pertinent part, that the grand jury was "duly sworn according to law" and had been "empaneled and sworn herein."

¶ 8 In his response to the motion to dismiss, plaintiff contended that defendant “did not provide the proper statutory document that was requested,” but rather provided an “arbitrary and non descriptive report of proceedings of November 1992 that elude[ed] [*sic*] to actions that could have occurred [*sic*] on November 4, 1992.” Shifting his focus, plaintiff argued that the document provided by defendant did not satisfy either section 112-2(b) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/112-2(b) (West 2012)) or Rule 608(a)(2), and that there was no transcript proving that the grand jury had been given the oath set forth in section 112-2(c) of the Code (725 ILCS 5/112-2(c) (West 2012)). Thus, plaintiff contended that his conviction was invalid because there was a lack of jurisdiction. He also maintained that he could raise such a claim at that late date pursuant to a complaint for a writ of *mandamus*.

¶ 9 The trial court granted defendant’s section 2-619 motion to dismiss (735 ILCS 5/2-619 (West 2012)), and plaintiff appealed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, plaintiff, who is proceeding *pro se*,² contends that the trial court erred in granting defendant’s motion to dismiss, because there was no proper certification that the grand jury was impaneled and sworn, and thus that it lacked jurisdiction. Thus, he contends that his conviction and sentence must be vacated.

¶ 12 The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact early in the litigation. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). Section 2-619(a)(9) permits involuntary dismissal where the alleged claim against the defendant is barred by “other affirmative matter avoiding the legal effect of or defeating the claim.” 735 ILCS 5/2-

²The trial court denied plaintiff’s motion for appointment of counsel on appeal.

619(a)(9) (West 2012). An affirmative matter, for purposes of section 2-619(a)(9), is like a defense that negates the cause of action completely, or that refutes crucial conclusions of law or material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). The moving party necessarily admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). When a court rules on a section 2-619 motion, it must view all the pleadings and supporting documents in the light most favorable to the nonmoving party. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). Our review of a section 2-619 dismissal is *de novo*. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003).

¶ 13 A plaintiff who seeks relief via a writ of *mandamus* must demonstrate: (1) a clear right to relief; (2) a clear duty by the defendant to act; and (3) a clear authority for the defendant to comply with the writ. *Bremen Community High School District No. 228 v. Cook County Commission on Human Rights*, 2012 IL App (1st) 112177, ¶ 14. A writ of *mandamus* is an extraordinary remedy that compels a public official to perform a purely ministerial act. *Bremen Community High School District No. 228*, 2012 IL App (1st) 112177, ¶ 14. *Mandamus* is a proper remedy to correct or expunge an order entered by a court without jurisdiction. *Bremen Community High School District No. 228*, 2012 IL App (1st) 112177, ¶ 15.

¶ 14 In our case, defendant submitted, in support of her motion to dismiss, evidence to defeat plaintiff's claim for *mandamus* relief. Her affidavit stated that the circuit clerk, at the time of plaintiff's original appeal, prepared a grand jury certification and included that certification as part of the record on appeal. Defendant also submitted a copy of the index to the record on appeal, which

showed that the “certification of grand jury” was on pages 3 and 4 of the common-law record. Finally, she included a copy of that document, which stated that on November 4, 1992, the grand jury was impaneled and “duly sworn according to the law.” That document further stated that the grand jury returned an indictment after being “empaneled and sworn herein.”

¶ 15 That evidence clearly refuted plaintiff’s claim that no circuit clerk’s certification regarding the grand jury was included in the record on appeal, as required by Rule 608(a)(2). Thus, the trial court correctly granted defendant’s section 2-619 motion to the extent that plaintiff’s complaint for a writ of *mandamus* relied on a claimed lack of a proper certification under Rule 608(a)(2).

¶ 16 The motion was also properly granted as to plaintiff’s attempt in his complaint to obtain a copy of the certification. Assuming that plaintiff could even obtain such relief via a complaint for a writ of *mandamus*,³ defendant provided him with a copy of the certification, which he acknowledges receiving, thereby defeating any claim that defendant should be required by *mandamus* to provide him with the certification.

¶ 17 Plaintiff contends, however, that the certification was deficient, because it did not show that the grand jury was properly impaneled and sworn as required under section 112-2(b). This contention is meritless. First, as discussed above, the certification stated that the grand jury was impaneled. Second, although Rule 608(a)(2) requires that the circuit clerk include a certification that

³A writ of *mandamus* is typically used to compel a government official to perform a purely ministerial act that the official is otherwise required to perform. See *Bremen Community High School District No. 228*, 2012 IL App (1st) 112177, ¶ 14. Here, although the circuit clerk is required by Rule 608(a)(2) to include the certification in the record on appeal, she is not required to provide a copy of that certification to an individual.

the grand jury was impaneled, it is silent as to whether the clerk must also certify that the grand jury was sworn pursuant to section 112-2(b). We are not aware of any authority that required that the certification under Rule 608(a)(2) include the fact that the grand jury was sworn.

¶ 18 Having said that, however, in this case the certification stated that the grand jury was “duly sworn.” Thus, even if the former circuit clerk had been required to certify that the grand jury was sworn, he did so in this case.

¶ 19 Plaintiff alternatively maintains that the certification did not satisfy Rule 608(a)(2) because it was not “signed, sealed, nor certified,” because it did not bear any case name or number, and because it was not accompanied by any transcript showing that the grand jury was sworn pursuant to section 112-2(b). These contentions fail. First, there is no express requirement under Rule 608(a)(2) that the certification be signed or sealed, and we are aware of no authority to that effect. Second, the absence of any case name or number is inconsequential. The undisputed affidavit of defendant stated that the certification was prepared by the former circuit clerk and included in the record on appeal in plaintiff’s criminal case. No additional identification was necessary under those circumstances. Finally, there is no separate requirement of a transcript showing that the grand jury was sworn. Moreover, there was no need for such a transcript, as the certification here included such information. Plaintiff has failed to identify any defect in the certification.

¶ 20 Finally, plaintiff contends that, if he demonstrates that the grand jury was not properly impaneled and sworn, his conviction and sentence must be vacated because the trial court lacked jurisdiction over his case. We need not decide to what extent, if any, plaintiff could obtain such relief via a writ of *mandamus*, however, as the certification clearly showed that the grand jury was impaneled and sworn. Absent a showing that the certification was defective, plaintiff cannot obtain

the relief he seeks. In any event, we note that a court's jurisdiction does not depend on a valid indictment. See *People v. Benitez*, 169 Ill. 2d 245, 256 (1996).

¶ 21

III. CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the circuit court dismissing plaintiff's petition for a writ of *mandamus*.

¶ 23 Affirmed.