

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).

2013 IL App (4th) 120598-U
NO. 4-12-0598
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
March 22, 2013
Carla Bender
4th District Appellate
Court, IL

JAMAL SHEHADEH)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
ANTHONY P. LIBRI, Circuit Clerk,)	No. 12MR456
Sangamon County, Illinois,)	
Defendant-Appellee.)	Honorable
)	John Schmidt,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court vacated and remanded the trial court's *sua sponte* dismissal of prisoner's *pro se* petition for *mandamus* prior to service of summons and complaint on defendant, concluding the ruling was premature within the meaning of *Powell v. Lewellyn*, 2012 IL App (4th) 110168, 976 N.E.2d 1106.

¶ 2 On May 29, 2012, plaintiff, Jamal Shehadeh, an inmate at Logan Correctional Center, filed a complaint for *mandamus* pursuant to the Code of Civil Procedure (Code) (735 ILCS 5/14-101 to 14-109 (West 2010)), naming the circuit clerk of Sangamon County, Anthony Libri, as defendant. Plaintiff sought an order finding defendant had violated the law, compelling defendant to perform certain actions as well as actions in the future, recommending a state-agency investigation of official misconduct of defendant, and awarding damages, costs and fees.

¶ 3 On June 14, 2012, the trial court *sua sponte* dismissed plaintiff's complaint as frivolous and without merit prior to service of summons on defendant. Plaintiff appeals, arguing

the trial court erred when it *sua sponte* dismissed his complaint for *mandamus* without first serving defendant and providing him an opportunity to plead. We vacate and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5

A. Sangamon County Case No. 11-MR-517

¶ 6

On August 1, 2011, plaintiff sued Jessie White in his official capacity as Secretary of State in Sangamon County case No. 11-MR-517, alleging White improperly withheld records plaintiff had requested pursuant to the Illinois Freedom of Information Act (FOIA) (5 ILCS 140/11(e) (West 2010)). *Shehadeh v. White*, 2012 IL App (4th) 120204-U, 2012 Ill. App. Unpub. LEXIS 2503. With his complaint, plaintiff filed an application to proceed *in forma pauperis*, which was not approved until October 3, 2011.

¶ 7

On November 29, 2011, approximately four months after plaintiff filed suit, the circuit clerk of Sangamon County issued summons. On January 6, 2012, the office of the Illinois Attorney General (Attorney General) filed a motion to dismiss. On February 22, 2012, the trial court held a telephone conference and granted the motion to dismiss. On February 27, 2012, plaintiff filed a notice of appeal, docketed as No. 4-12-0204.

¶ 8

On appeal, plaintiff alleged in part the trial court erred in failing to make a declaration, as he had requested in a January 2012 motion, that the circuit clerk's office violated section 11(h) of FOIA (5 ILCS 140/11(h) (West 2010)) by taking too long to issue summons in his cause against White. *Shehadeh*, 2012 (4th) 120204-U, ¶ 3, 2012 Ill. App. Unpub. LEXIS 2503. This court found the trial court did not err in dismissing plaintiff's motion because he had not shown an " 'actual controversy' " and because the summons had already issued, "any decision

by the court made with respect to [his] motion for declaration that the clerk had violated section 11(h) of FOIA would not have any legal effect." *Shehadeh*, 2012 (4th) 120204-U, ¶ 34, 2012 Ill. App. Unpub. LEXIS 2503.

¶ 9 On March 12, 2012, while plaintiff's appeal was pending, he sent a FOIA request to the Attorney General to obtain copies of his motion for leave to file an amended complaint and his amended complaint. On March 19, 2012, the Attorney General responded by letter and sent plaintiff his requested documents. Those documents were made part of the record in this appeal.

¶ 10 B. Sangamon County Case No. 12-MR-456, Underlying This Appeal

¶ 11 On May 29, 2012, plaintiff filed a complaint for *mandamus* against defendant herein. Plaintiff alleged defendant failed to "perform his ministerial duty to maintain complete and accurate common law records of proceedings before the Circuit Court of Sangamon County" in case No. 11-MR-517. More specifically, plaintiff alleged that in No. 11-MR-517, defendant (1) failed to docket several of plaintiff's pleadings, specifically his motion for leave to file an amended complaint, his memorandum in support thereof, and his amended complaint, which he alleged he mailed to the clerk's office on February 7, 2012; (2) failed to present his application to proceed *in forma pauperis* in that case to a judge for review until two months after it was received and then only after plaintiff contacted the Chief Judge's office; (3) failed to forward plaintiff's completed summonses to the Sheriff's office for nearly two months after plaintiff returned them to defendant for issuance despite a court order directing defendant to do so after plaintiff returned same; and (4) failed to return file-stamped copies in a self-addressed return envelope to plaintiff. Plaintiff alleges defendant's failure to docket plaintiff's February 7 pleadings resulted in unnecessary delay of plaintiff's appeal; and the expenditure of writing,

typing, and mailing supplies used by plaintiff to contact defendant, the Attorney General, and the Chief Judge's office; and caused plaintiff mental and emotional distress.

¶ 12 Plaintiff requested the following relief: (1) an order finding defendant's actions and omissions violated the law; (2) a recommendation for an official state-agency investigation of misconduct by defendant; (3) an order directing defendant to "formally acknowledge receipt of said pleadings on the date they were received by back dating the 'filed' markings to February 10, 2012"; (4) an award of damages in excess of \$50,000; (5) costs, fees, and interest; and (6) an order compelling defendant to timely file future documents of all incarcerated persons.

¶ 13 On June 14, 2012, the trial court *sua sponte* dismissed plaintiff's complaint as frivolous and without merit prior to service of summons on defendant. The court dismissed plaintiff's complaint by docket entry.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Section 14-102 of the Code provides "[u]pon the filing of a complaint for mandamus the clerk of the court *shall issue* a summons ***." (Emphasis added.) 735 ILCS 5/14-102 (West 2010). In *People v. Laugharn*, 233 Ill. 2d 318, 323, 909 N.E.2d 802, 805 (2009), our supreme court held the trial court could not *sua sponte* dismiss a prisoner's section 2-1401 petition (735 ILCS 5/2-1401 (West 2004)) unless it is " 'ripe for adjudication.' [Citation.]" The dismissal there occurred seven days after the petition's filing and prior to expiration of the usual 30-day period for the State to answer or plead.

¶ 17 In *Powell v. Lewellyn*, 2012 IL App (4th) 110168, 976 N.E.2d 1106, this court applied *Laugharn* in the context of an inmate's action for injunctive relief, where the trial court

denied the relief two weeks after plaintiff's filing. On appeal, defendants did not file a brief, as they had never been served with plaintiff's petition. We concluded the trial court's ruling on the merits, before defendants had even been served with the petition, was premature:

"Thus, this case is not ripe for adjudication because defendants were never notified that a petition for injunctive relief had been filed against them. Without notice, they could not answer or otherwise plead. The trial court denied the petition only two weeks after it was filed. A plaintiff must be given a reasonable amount of time to obtain service on a defendant or defendants. 'If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice.' Ill. S. Ct. R. 103(b) (eff. July 1, 2007). If the defendant is properly served, he will then be entitled to answer or file a motion to dismiss within the appropriate length of time. Here, plaintiff was indigent and in jail when he filed his petition. Service of summons might or might not have been forthcoming. But, as stated, only two weeks had passed since plaintiff filed his *pro se* petition. See *Segal v. Sacco*, 136 Ill. 2d 282, 289, 555 N.E.2d 719, 721-22 (1990) (finding 19-week delay in the service of process did not justify the dismissal of the plaintiff's action with prejudice). While we recognize 'the trial court possesses the inherent authority to control its

own docket and the course of litigation, including the authority to prevent undue delays in the disposition of cases caused by abuses of the litigation process' (*J.S.A. v. M.H.*, 224 Ill. 2d 182, 196, 863 N.E.2d 236, 244 (2007)), the court's ruling on the merits here, before defendants had even been served with the petition, was premature." *Powell*, 2012 IL App (4th) 110168, ¶ 11, 976 N.E.2d 1106.

We went on to disagree with the approach of our sister district, stating as follows:

"We note our disagreement with the Second District's recent decision in *People v. Nitz*, 2012 IL App (2d) 091165, 971 N.E.2d 633. In that case, like *Laugharn*, the defendant filed a petition for relief from judgment under section 2-1401. *Nitz*, 2012 IL App (2d) 091165, ¶ 4, 971 N.E.2d 633. Less than 30 days later, the trial court took up the matter, and an assistant State's Attorney appeared but did not participate beyond stating his name. *Nitz*, 2012 IL App (2d) 091165, ¶ 6, 971 N.E.2d 633. The court dismissed the petition *sua sponte*. *Nitz*, 2012 IL App (2d) 091165, ¶ 6, 971 N.E.2d 633. The defendant appealed, arguing *Laugharn* applied, and thus the trial court erred in dismissing his petition prior to the expiration of the 30-day period in which the State could respond. *Nitz*, 2012 IL App (2d) 091165, ¶ 8, 971 N.E.2d 633.

The Second District disagreed, finding the case distinguish-

able from *Laugharn* because the defendant did not give the State notice pursuant to section 2-1401(b). *Nitz*, 2012 IL App (2d) 091165, ¶ 12, 971 N.E.2d 633. Without service or a waiver of service, the court found the 30-day period for filing an answer by the State was irrelevant because it would 'never commence.' *Nitz*, 2012 IL App (2d) 091165, ¶ 12, 971 N.E.2d 633. Moreover, the court stated as follows:

'A remand "for further proceedings" would be meaningless, because no "further proceedings" will occur. The State will never answer or move to dismiss, and the State cannot be defaulted, because it was never served. Thus, remand would place the trial court in the position of being able to do nothing while the case remains on its docket permanently.'
Nitz, 2012 IL App (2d) 091165, ¶ 12, 971 N.E.2d 633.

After finding the petition deficient based on the failure to give notice, the court concluded dismissal without prejudice was proper. *Nitz*, 2012 IL App (2d) 091165, ¶ 13, 971 N.E.2d 633.

In contrast to our sister district, we find further proceedings in this case would not be 'meaningless' or wind up permanently etched on the trial court's docket. If plaintiff seeks to have his case

heard, he can have defendants served. Otherwise, the trial court has the power to dismiss the case for want of prosecution after a reasonable period of time. Accordingly, we vacate the court's judgment and remand for further proceedings. We express no opinion on the merits of the substantive arguments raised by plaintiff in his petition." *Powell*, 2012 IL App (4th) 110168, ¶¶ 12-14, 976 N.E.2d 1106.

¶ 18 Here, plaintiff complains, in part, about the circuit clerk's failure to promptly present indigent inmates' petitions to proceed *in forma pauperis* to a judge and failure of the clerk to file stamp and docket inmates' pleadings. The trial court dismissed the complaint as frivolous and without merit by docket entry. The docket entry does not reflect the court's basis for its finding plaintiff's complaint is frivolous and without merit. As in *Powell*, we conclude this case is not ripe for adjudication because defendant was never notified a petition for *mandamus* had been filed against him, service was not obtained, and dismissal occurred prior to any service on defendant.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated above, we vacate the Sangamon County circuit court's judgment and remand for further proceedings.

¶ 21 Judgment vacated; cause remanded for further proceedings.