

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).

2014 IL App (4th) 130866-U

NO. 4-13-0866

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 5, 2014
Carla Bender
4th District Appellate
Court, IL

GARY FREDERICO ELLISON,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Sangamon County
LISA MADIGAN, Attorney General for the)	No. 13CH354
State of Illinois,)	
Defendant-Appellee.)	Honorable
)	Peter C. Cavanagh,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Appleton and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of plaintiff's complaint for failure state a claim upon which relief could be granted pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)).

¶ 2 In April 2013, plaintiff, Gary Frederico Ellison, filed a complaint against defendant, Lisa Madigan, Attorney General for the State of Illinois (Attorney General), in which he alleged the Attorney General improperly denied several Freedom of Information Act (FOIA) (5 ILCS 140/1 to 11.5 (West 2012)) requests for records pertaining to the 2003 electronic surveillance of him. Ellison asked the trial court to compel the Attorney General to disclose these records. In June 2013, the Attorney General filed a motion to dismiss Ellison's complaint for failure to state a claim upon which relief could be granted pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). Following a September 2013 telephone hearing, the court granted the Attorney General's motion to dismiss with prejudice.

¶ 3 Ellison appeals, asserting the trial court erred in granting the Attorney General's motion to dismiss. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On April 10, 2013, Ellison filed a document titled "Injunction Request" in the Sangamon County circuit court, naming the Attorney General as defendant. The trial court construed this document as a complaint. In the complaint, Ellison asked the court to compel the Attorney General to disclose certain records relating to the 2003 electronic surveillance of him pursuant to section 11(a) of FOIA (5 ILCS 140/11(a) (West 2012)), which provides "[a]ny person denied access to inspect or copy any public record by a public body may file suit for injunctive or declaratory relief." Specifically, Ellison requested the trial court to (1) order the Attorney General to disclose all (a) applications to use eavesdropping devices on him; (b) court orders authorizing electronic surveillance of him; (c) evidence, audible or not, regarding the electronic surveillance of him; and (2) determine whether the Attorney General intentionally and willfully failed to comply with FOIA.

¶ 6 Ellison's complaint alleged he made FOIA requests to the Attorney General on the following dates: April 21, 2009; February 14, 2011; May 18, 2011; January 12, 2012; and July 14, 2012. In each FOIA request, Ellison sought records related to the electronic surveillance of him that implicated him in a murder. Ellison asserted the Attorney General denied his first four FOIA requests and had not yet responded to his last request. In support of his allegations, Ellison attached a number of exhibits to his complaint, which he referred to throughout the complaint.

¶ 7 Exhibit F was an April 21, 2009, FOIA request, submitted by Ellison and addressed to "Randall E. Roberts[,] Freedom of Information Officer." Exhibit G was a May 11,

2009, letter from Randall E. Roberts, Executive Assistant State's Attorney for Cook County, denying Ellison's April 21, 2009, FOIA request because "No 'consensual overhears or interceptions or communications' were made of any conversations testified to at trial."

¶ 8 Exhibit H was a March 10, 2011, letter from Paul A. Castiglione, Executive Assistant State's Attorney for Cook County, denying Ellison's February 14, 2011, FOIA request because the only electronic tape it had in its possession was "inaudible and not used at trial," and according to Castiglione, "d[id] not fall within the definition of a 'public record' under Section 2 of FOIA."

¶ 9 Exhibit I was a May 23, 2011, letter from Castiglione, partially denying Ellison's May 18, 2011, FOIA request. Castiglione again denied Ellison's request for the inaudible electronic tape because "it d[id] not fall within the definition of a 'public record.' " Further, Castiglione denied the request because it was "unduly burdensome" due to Ellison's previous request. The letter stated an audio recording of a telephone call Ellison placed while in custody was used at his trial, but it was part of the court file, which Castiglione noted is not a "public record." Castiglione granted Ellison's request for copies of the FOIA requests he had submitted to the Cook County State's Attorney's office regarding the 2003 electronic surveillance of him.

¶ 10 Exhibit J was a December 19, 2011, letter from Rebecca Riddick, Assistant Attorney General, Public Access Bureau, addressed to Ellison and Castiglione. The letter indicated the Public Access Counselor (PAC) had completed her review of the Cook County State's Attorney's office's partial denial of Ellison's May 18, 2011, FOIA request. The letter stated, after investigation, the PAC concluded the State's Attorney's office had improperly denied Ellison's first request for the inaudible audio tape, finding the tape was a "public record" for purposes of FOIA even if its contents were inaudible. Accordingly, the PAC noted the State's

Attorney's office may not assert FOIA's unduly-burdensome exemption to deny Ellison's May 18, 2011, request for the tape. The PAC noted, "The State's Attorney's [o]ffice should furnish Mr. Ellison with a copy of the responsive record in accordance with this letter." The PAC further concluded the State's Attorney's office had no obligation to obtain the audible audio tape from the circuit clerk. The final paragraph of the letter stated, "The [PAC] has determined that resolution of this matter does not require the issuance of a binding opinion."

¶ 11 Exhibit K was a March 12, 2012, letter from Castiglione, denying Ellison's January 17, 2012, FOIA request in which he again sought copies of all records regarding the electronic surveillance of him and a copy of the order authorizing the eavesdropping device. Castiglione denied this request on the basis that, if the requested items existed, the Cook County State's Attorney's office did not have possession of them.

¶ 12 On June 7, 2013, the Attorney General filed a motion to dismiss Ellison's complaint for failure to state a claim upon which relief could be granted pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). Specifically, the Attorney General asserted (1) Ellison filed the FOIA requests with the Cook County State's Attorney's office, not the Attorney General, and thus, it had not failed to respond to Ellison's requests as alleged; (2) the only relief requested by Ellison was injunctive relief compelling the Attorney General to produce documents it did not have in its possession; and (3) the December 19, 2011, letter from the Assistant Attorney General was a nonbinding advisory opinion not subject to administrative review.

¶ 13 On June 14, 2013, Ellison filed a "brief in opposition to defendant[']s motion to dismiss," asserting the Attorney General "is the head of" or the "final authority over" the Cook County State's Attorney's office, and thus, was a proper defendant.

¶ 14 On September 3, 2013, the trial court conducted a telephone hearing on the matter, after which it entered a written order dismissing Ellison's complaint with prejudice. We note a transcript of this hearing is not contained in the record. The court's written order concluded (1) Ellison directed his FOIA requests to the Cook County State's Attorney's office, not the Attorney General, and thus, the Attorney General had not failed to respond to Ellison's requests; (2) to the extent Ellison brought the action against the Attorney General in administrative review, the Assistant Attorney General's letter was an advisory opinion and not subject to administrative review; and (3) the Attorney General did not possess the documents Ellison requested and, even if she did, the Attorney General could not disclose them pursuant to section 9.5(c) of FOIA (5 ILCS 140/9.5(c) (West 2012)).

¶ 15 On September 30, 2013, Ellison filed his notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, Ellison asserts the trial court erred in granting the Attorney General's section 2-615 motion to dismiss. Specifically, Ellison argues the court erred in (1) concluding the Attorney General had no duty to disclose the public records Ellison originally requested from the Cook County State's Attorney's office; (2) finding the Attorney General's opinion was advisory, and thus, not subject to review; and (3) citing section 9.5(c) of FOIA (5 ILCS 140/9.5(c) (West 2012)) as a basis for dismissal.

¶ 18 "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473, 905 N.E.2d 781, 788 (2009). A section 2-615 motion should be granted only when "it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Id.* "[O]nly those facts apparent from the face of the pleadings, matters of which the

court can take judicial notice, and judicial admissions in the record may be considered." *Id.* at 473, 905 N.E.2d at 789. In our *de novo* review, this court will accept as true all well-pleaded facts and any reasonable inferences from those facts, but we will not accept as true conclusions of law or fact that are not supported by specific factual allegations. *Id.* This court may affirm the section 2-615 dismissal on any basis supported by the record. *Stoll v. United Way of Champaign County, Illinois, Inc.*, 378 Ill. App. 3d 1048, 1051, 883 N.E.2d 575, 578 (2008).

¶ 19 As stated, Ellison's complaint alleged that he submitted FOIA requests to the Attorney General on the following dates: April 21, 2009; February 14, 2011; May 18, 2011; January 12, 2012; and July 14, 2012. He asserted the Attorney General denied all of his requests, with the exception of the July 2012 request that was still pending. Ellison requested the trial court compel the Attorney General to disclose the requested records pertaining to the 2003 electronic surveillance of him. We observe, however, the exhibits—incorporated by reference in Ellison's complaint—establish that his FOIA requests were directed to, and denied by, the Cook County State's Attorney's office, not the Attorney General. As the Attorney General notes, these exhibits control over any inconsistent allegations in the complaint. See *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 431-32, 804 N.E.2d 519, 531 (2004) (Any document attached to a pleading is treated as part of the pleading if it is incorporated by reference in the pleading. Where the attached exhibits and the allegations in the pleading conflict, the exhibits control.). Additionally, in Ellison's initial brief opposing the motion to dismiss, Ellison stated he "requested the items from the Cook County State's Attorney." As the Attorney General points out, Ellison's acknowledgement that his FOIA requests were directed to the State's Attorney's office is a binding judicial admission. See *Abruzzo v. City of Park Ridge*, 2013 Ill App (1st)

122360, ¶ 49, 3 N.E.3d 824 ("statement in [defendant's] reply brief was an unequivocal assertion of fact that went beyond the pleadings and, therefore, constitutes an admission").

¶ 20 As noted, Ellison's request for injunctive relief in this case was based upon the written denials of his FOIA requests by the Cook County State's Attorney's office—the public body Ellison directed his FOIA requests to. Based on the record before us, the Attorney General never received or denied a FOIA request from Ellison. Further, there is no evidence that the Attorney General possesses any of the items Ellison requested from the State's Attorney's office and, therefore, the Attorney General is not capable of providing the relief Ellison requested. In addition, Ellison's assertion that the Attorney General was properly named a party in his complaint because she is the "head" of the Cook County State's Attorney's office is not supported by authority. Thus, the trial court properly granted the Attorney General's motion to dismiss.

¶ 21 Because we find the trial court properly dismissed Ellison's complaint as discussed above, we need not address his other contentions of error.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment.

¶ 24 Affirmed.