

NOTICE
Decision filed 04/29/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 120108-U

NO. 5-12-0108

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

BRIAN THOMPSON,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Perry County.
)	
v.)	No. 11-MR-44
)	
E. HAGENE, Property Officer, BRETT KLINDWORTH,)	
Lieutenant Adjustment Committee, and SALVADOR)	
GODINEZ,)	
)	
Defendants-Appellees)	
)	
(Sherry Benton, Administrative Review Board, Illinois))	Honorable
Department of Corrections, and Sarah Johnson,)	Richard A. Brown,
Administrative Review Board, Defendants).)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Welch and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The questions in this appeal, all of which concern rights and procedures applicable to an inmate assigned to a Department of Corrections facility, are moot in light of the fact that the plaintiff has been paroled, and therefore this appeal must be dismissed.

¶ 2 The plaintiff, Brian Thompson, appeals from the circuit court's order dismissing his complaint for declaratory judgment. At the time he filed the complaint, Thompson was an inmate assigned to a Department of Corrections (DOC) facility. He sought declarations

concerning rights and rules applicable to an inmate assigned to a DOC facility. During the pendency of this appeal, Thompson was paroled. He no longer is an inmate assigned to a DOC facility. Therefore, this court cannot grant him any relief that would have any practical effect. In other words, all questions in this appeal are moot. Due to mootness, this appeal must be dismissed.

¶ 3

BACKGROUND

¶ 4 In 1979, the DOC took custody of Thompson, who had been sentenced to imprisonment for 80 years on a charge of murder. In the years that followed, Thompson was assigned to various DOC facilities. On November 1, 2011, while he was assigned to the Pinckneyville Correctional Center (Pinckneyville), Thompson filed *pro se* a "complaint for declaratory judgement [*sic*]." The named defendants were Edward Hagene, Sherry Benton, Gladyse Taylor, the DOC, Sarah Johnson, and Brett Klindworth. All of the individual defendants were officials or employees of the DOC. The complaint was divided into three counts.

¶ 5 In count 1 of the complaint, Thompson sought a declaration that "the defendants are in violation of the law in infringing upon or revoking [his] contractual grant." Thompson alleged that in years past, he had purchased from the DOC various small items such as a stapler, a lamp, and a pair of headphones. These purchases were made pursuant to valid contracts formed by Thompson and the DOC. The contracts prohibited Thompson from loaning, selling, trading, or giving the items to any other inmate. None of the contracts included any kind of time limitation on the possession or enjoyment of the items. Thompson never loaned, sold, traded, or gave any of the items to any other inmate. Nevertheless, when Thompson was reassigned to Pinckneyville from some other DOC facility, Pinckneyville's "property officer" confiscated the items, on the ground that they were contraband. Thompson argued that under the terms of his contracts with the DOC,

he had a right to possess and enjoy the items for the duration of his time behind bars. Neither the passage of time nor "the mere passage of a new rule or act" could deprive him of his right to possess and enjoy the items for the duration of his imprisonment. The confiscation by Pinckneyville's property officer was arbitrary and capricious, and deprived Thompson of his property and his constitutional right to enter into contracts. Specifically, the confiscation violated article I, section 16, of the Illinois Constitution (Ill. Const., art. I, § 16), and article I, section 10, of the United States Constitution (U.S. Const., art. I, § 10), each of which prohibits Illinois from passing any law impairing the obligation of contracts.

¶ 6 In count 2, Thompson sought a declaration that the 60-day limitation period contained in section 504.810 of Title 20 of the Illinois Administrative Code (20 Ill. Adm. Code § 504.810) (2011), which requires an inmate to file his grievance within 60 days after discovering the basis of the grievance, is invalid because it contravenes section 3-8-8(a) of the Unified Code of Corrections (730 ILCS 5/3-8-8(a) (West 2012)), which states in pertinent part that "[a] committed person's right to file grievances shall not be restricted." Thompson alleged that the DOC refused to consider several of his grievances because they had been submitted beyond the 60-day limitation period of section 504.810. He argued that the 60-day limitation period amounted to a restriction of his right to file grievances.

¶ 7 In count 3, Thompson did not explicitly state what he wanted the circuit court to declare. Apparently, he sought a declaration that (1) the Open Meetings Act (5 ILCS 120/1 to 7.5 (West 2012)) applies to meetings of the DOC's administrative review board, thus obligating the board to keep written minutes of all its meetings, whether open or closed, and a verbatim record of all its closed meetings in the form of an audio or video recording (see 5 ILCS 120/2.06(a) (West 2012)), and (2) the Freedom of Information Act (5 ILCS 140/1 to 11.5 (West 2012)) requires the DOC to maintain "a searchable database listing the hearing charges, the statements and the results of the grievances and disciplinary

hearings." Thompson seemed to claim, essentially, that the board's failure to comply with the Open Meetings Act and the Freedom of Information Act had resulted in the board's issuing an erroneous decision on his grievance that challenged an earlier determination that he was guilty of violating a prison disciplinary rule regarding property (specifically, his television set), a determination that had resulted in a one-month commissary restriction.

¶ 8 The record shows that the circuit clerk issued summonses for defendants Hagene, Benton, Taylor, Johnson, and Klindworth. Certificates of service show that Hagene and Klindworth were served with summonses. Hagene was the property officer at Pinckneyville, and Klindworth was a DOC lieutenant who was involved in disciplinary proceedings against Thompson. Nothing in the record shows that Benton, Taylor, Johnson, or the DOC was ever served with notice or summons.

¶ 9 On December 16, 2011, the Illinois Attorney General filed on behalf of Hagene, Klindworth, Taylor, and Salvador Godinez (the director of the DOC, whom Thompson did not name as a defendant) a combined motion to dismiss Thompson's complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619.1 (West 2010)), along with a memorandum of law in support of the motion. Defendants Benton, Johnson, and the DOC apparently were not represented by the Attorney General in this action; in addition to never being served with summons, none of these three defendants ever filed an answer or otherwise appeared in the circuit court.

¶ 10 In the combined motion to dismiss, the defendants interpreted count 1 of Thompson's complaint as a claim for monetary damages, argued that the circuit court did not have jurisdiction over the claim, and urged dismissal pursuant to section 2-619(a)(1) of the Procedure Code (735 ILCS 5/2-619(a)(1) (West 2012)). As to count 2 of the complaint, which concerned the 60-day limitation period for an inmate's filing of a grievance, the defendants argued that it was substantially deficient in law and failed to state

a cause of action, and they urged its dismissal pursuant to section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2012)). As to count 3 of the complaint, the defendants wrote that Thompson appeared to be asserting a claim that his right to due process had been violated by the issuance of a disciplinary report on insufficient grounds and by a DOC adjustment committee's refusal to call Thompson's desired witnesses at a hearing. According to the defendants, Thompson failed to state a due-process claim because his only punishment was a one-month commissary restriction and this slight punishment did not implicate any protected liberty interest.

¶ 11 On January 12, 2012, the circuit court entered an order granting the defendants' combined motion to dismiss Thompson's complaint. The court found that (1) the court lacked jurisdiction, (2) Thompson lacked a liberty interest requisite for a due-process claim, and (3) Thompson failed to state a claim regarding the deadline for filing a grievance and access to the courts. Thompson filed a motion for rehearing, but the circuit court denied it. Thompson now appeals from the order dismissing his complaint for declaratory judgment.

¶ 12

ANALYSIS

¶ 13 Although the parties have not raised the issue, this court must first consider whether the circuit court's order granting the combined motion to dismiss was a final or nonfinal order. This question arises because some defendants (namely, Benton, Johnson, and the DOC) were not served with notice or summons and did not enter an appearance. In general, this court does not have jurisdiction over nonfinal orders, only final orders. Ill. Const. 1970, art. VI, § 6; *Almgren v. Rush–Presbyterian–St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994). In every case presented to it, this court has an independent obligation to determine whether it has jurisdiction. See *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 387 (2008). In this case, this court has jurisdiction

because the unserved, nonmoving defendants are in a position similar to that of the moving defendants. See *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993) (court may grant motion to dismiss even as to nonmoving defendants "where the nonmoving defendants are in a position similar to that of moving defendants or where the claims against all defendants are integrally related"). Confident of its jurisdiction, this court may proceed with its analysis.

¶ 14 This appeal is from an order granting the defendants' combined motion to dismiss Thompson's complaint for declaratory judgment pursuant to section 2-619.1 of the Procedure Code. A motion under section 2-619.1 allows a party to combine a section 2-615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses. *Edelman, Combs & Lattuner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). On appeal, the grant of a combined motion for dismissal pursuant to section 2-619.1 is reviewed *de novo*. *Carr v. Koch*, 2012 IL 113414, ¶ 27. A reviewing court may affirm the judgment on any basis warranted by the record. See *Reyes v. Walker*, 358 Ill. App. 3d 1122, 1124 (2005).

¶ 15 A declaratory judgment action has three essential requirements: (1) a plaintiff with a legal tangible interest, (2) a defendant having an opposing interest, and (3) an actual controversy between the parties concerning such interests. *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003). An actual controversy is a controversy that involves "a concrete dispute admitting of an immediate and definitive determination of the parties' rights, the resolution of which will aid in the termination of the controversy or some part thereof. [Citations.]" (Internal quotation marks omitted). *Howlett v. Scott*, 69 Ill. 2d 135, 142 (1977). An actual controversy is not a mere potential controversy; it does not present only moot questions; it does not require a court to "pass judgment on mere abstract propositions of law, render an advisory opinion, or give legal advice as to future events. [Citations.]"

(Internal quotation marks omitted). *Id.* at 141-42. "The declaratory judgment procedure allows the court to take hold of a controversy one step sooner than normally—that is, after the dispute has arisen, but before steps are taken which give rise to claims for damages or other relief. The parties to the dispute can then learn the consequences of their action before acting. [Citations.]" (Internal quotation marks omitted). *Beahringer*, 204 Ill. 2d at 372-73.

¶ 16 An actual or real controversy is also requisite for appellate jurisdiction, and where a reviewing court has notice of facts that render moot all of the questions in an appeal, the court generally will dismiss the appeal, even if those facts do not appear in the record. *La Salle National Bank v. City of Chicago*, 3 Ill. 2d 375, 379 (1954). A question is moot when its resolution by a court would not have any practical effect on the existing controversy. *Maybell v. Illinois Liquor Control Comm'n*, 246 Ill. App. 3d 14, 19 (1993) (citing Black's Law Dictionary 909 (5th ed. 1979)). This rule requiring the dismissal of an appeal in which all the questions are moot applies even where the event(s) that rendered the questions moot occurred while the case was on appeal. *Dixon v. Chicago & North Western Transportation Co.*, 151 Ill. 2d 108, 116-17 (1992). In that situation, the facts that render the questions moot shall be proved by extrinsic evidence. *La Salle National Bank*, 3 Ill. 2d at 379.

¶ 17 The defendants now argue that all of the questions in the instant case have been rendered moot by virtue of Thompson's release on parole, and that this appeal must be dismissed for that reason. The defendants are correct on this point.

¶ 18 The record on appeal does not reveal that Thompson has been released on parole. However, the website of the DOC states that Thompson was paroled on July 26, 2013. This court may take judicial notice of information on the DOC's website. *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 8. This appeal was pending at the time of

Thompson's release. All of Thompson's claims relate to his rights as an offender assigned to a DOC facility. Specifically, his first claim relates to his right to possess certain items of personal property while assigned to a DOC facility, while the second and third claims relate to grievance or disciplinary procedures applicable to an offender assigned to a DOC facility. Thompson no longer is an inmate assigned to a DOC facility. He is now a releasee, *i.e.*, he has been released under conditional supervision in Illinois due to parole or mandatory supervised release. (The DOC, however, retains "custody" of Thompson pursuant to section 3-14-2(a) of the Unified Code of Corrections (730 ILCS 5/3-14-2(a) (West 2012)).)

¶ 19 Now that Thompson has been paroled from prison, no practical effect would be achieved by this court's declaring that he had a contractual right to possess and enjoy his stapler, lamp, etc., for the duration of his time behind bars. (Upon Thompson's release from prison, the DOC was obliged to return his personal property to him. See 20 Ill. Adm. Code § 535.110 (2011). Similarly, no practical effect would be achieved by declaring that section 504.810's 60-day limitation period is invalid, or by declaring that the Open Meetings Act requires the DOC's administrative review board to keep written minutes of its meetings, or that the Freedom of Information Act requires the DOC to maintain a searchable database related to grievance and disciplinary hearings. All of the rules and procedures at issue in those counts of the complaint relate to grievances or disciplinary procedures applicable to inmates assigned to DOC facilities. Now that Thompson is a releasee, different rules and procedures apply to him. For example, any grievance he might have as a releasee is handled according to sections 504.900 to 504.940 of Title 20 of the Illinois Administrative Code (20 Ill. Adm. Code § 504.900 to 504.940 (2011)); section 504.810 no longer applies to him.

¶ 20 In his reply brief, Thompson acknowledged that he is on parole, but asserted that he

is "under electronic detention, which under the standard set by *People v. Moss*, turns this facility into a penitentiary." This court presumes that "this facility" refers to a halfway house at which Thompson is residing temporarily while on parole. Thompson's wearing an electronic monitoring device would not transform a halfway house into a DOC facility. Nothing in *People v. Moss*, 217 Ill. 2d 511 (2005), suggests otherwise. Thompson is no longer an inmate assigned to a DOC facility, notwithstanding his contrary assertion.

¶ 21 In another apparent response to the defendants' mootness argument, Thompson asserted in his reply brief that "this is a situation which is clearly capable of repetition yet evading review." Where a case involves an event of short duration which is "capable of repetition, yet evading review," it may qualify for review even if it would otherwise be moot. *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998). "To receive the benefit of this exception, the complaining party must demonstrate that: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* Here, Thompson has not demonstrated, or even attempted to demonstrate, either of those two prongs. He merely asserted in his reply brief that "this is a situation which is clearly capable of repetition yet evading review." This "argument" was not developed in the slightest, and no authority was cited. Therefore, this court will not consider Thompson's "argument" concerning this exception to the mootness doctrine. See *Chicago Title & Trust Co. v. Weiss*, 238 Ill. App. 3d 921, 927 (1992).

¶ 22 This court adds that an examination of the record does not reveal any reason to think that the "capable of repetition, yet evading review" exception applies here. Certainly the record does not reveal any reasonable expectation that Thompson will be subjected to the same actions again. Of course, Thompson potentially could violate a term of his parole, and the violation could lead to a revocation of parole and Thompson's return to a DOC

facility, at which point he could be subjected to the same actions again. However, nothing in the record suggests that this unfortunate scenario is any more likely with Thompson than with any other offender who is released on parole or mandatory supervised release. A mere potential that some scenario will come to pass is not the same as a reasonable expectation that it will do so.

¶ 23 Having concluded that all of the questions raised in this appeal are moot, this court must dismiss this appeal.

¶ 24 Appeal dismissed.