

FOURTH DIVISION
Order filed July 21, 2016
Modified upon denial of rehearing September 8, 2016

No. 1-15-3014

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SCOTT W. HOLZRICHTER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 15 M1 119319
)	
UNITED STATES POSTAL SERVICE and)	
USPS CONTRACT UNIT 940,)	Honorable
)	Leon Wool,
Defendants-Appellees.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's order dismissing plaintiff's complaint for lack of jurisdiction is affirmed because plaintiff failed to exhaust his administrative remedies prior to filing suit.
- ¶ 2 Plaintiff, Scott Holzrichter, filed a *pro se* complaint in the circuit court of Cook County against defendants, the United States Postal Service (USPS) and USPS Contract Unit 940 for

breach of contract. Defendants did not answer or appear. The trial court *sua sponte* dismissed plaintiff's complaint for lack of jurisdiction. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Plaintiff's *pro se* complaint for breach of contract arises from plaintiff's attempt to mail a letter by certified mail with return receipt requested. The complaint alleges that plaintiff paid to send a letter by certified mail with return receipt requested, but his receipt was returned to him without documentation of "if, when, and where" the letter was delivered.¹ Plaintiff's complaint prayed for a refund of his return receipt requested certified mail fee of \$6.49, plus court costs.

¶ 5 Plaintiff attached to the complaint a photocopy of the blank return receipt he received from the postal service. The return receipt contains a space labeled "COMPLETE THIS SECTION UPON DELIVERY" with items and checkboxes to document certain information, including: the signature of the person who received the mail and whether that person was the addressee or an agent of the addressee (item "A" on the return receipt), the printed name of the person who received the mail (item "B"), the date of delivery (item "C"), and a space to document whether or not the delivery address was different than the one the mail was addressed to (item "D").

¶ 6 Plaintiff alleged he returned the blank return receipt to the local post office with a copy of the original letter he had mailed before, "which USPS accepted to document delivery in Card's [*sic*] Sections A-D." Plaintiff further alleged the card was again returned to him "with no documentation supplied for Section A-D," which "suggested that USPS was in breach of

¹ Plaintiff alleged the blank return receipt was returned to him on or about March 3, 2015. Plaintiff attached to his complaint a printout from the online tracking service associated with his certified letter stating that his letter was delivered on February 25, 2015.

contract.” Plaintiff took the second blank return receipt to the postal unit² he paid to send the letter, which refused to refund plaintiff’s payment.

¶ 7 Plaintiff filed his complaint on August 14, 2015. On September 4, 2015, plaintiff filed a motion for default judgment on the grounds defendants failed to timely file an appearance. On September 17, 2015, the trial court dismissed the case for lack of jurisdiction. Plaintiff filed a motion to reconsider, which the trial court denied. This appeal followed. Defendants failed to file an appearance or a brief in this court. On June 17, 2016, this court, on its own motion, ordered that this case would be taken on the record and appellant’s brief only.

¶ 8 ANALYSIS

¶ 9 Plaintiff, who also appears *pro se* on appeal, argues the circuit court of Cook County had concurrent jurisdiction with the United States district court to hear and decide cases against the USPS, and the trial court erred in *sua sponte* dismissing his complaint for lack of jurisdiction. “Subject matter jurisdiction can be raised *sua sponte* by the trial court at any time, since the lack of subject matter jurisdiction deprives the trial court of all power except to dismiss the action.” *Brandon v. Bonell*, 368 Ill. App. 3d 492, 501-02 (2006). “Orders of dismissal for lack of subject matter jurisdiction are reviewed *de novo*.” *People ex rel. Madigan v. Excavating & Lowboy Services, Inc.*, 388 Ill. App. 3d 554, 557 (2009). “*De novo* consideration means we perform the same analysis that a trial judge would perform and give no deference to the judge’s conclusions or specific rationale.” *In re Marriage of Kehoe & Farkas*, 2012 IL App (1st) 110644, ¶ 18.

² Plaintiff attached a payment receipt for the certified mail to his complaint from a business named “Chicago Charlie’s Express Inc.” According to the USPS website, that business is a “contract postal unit.” A contract postal unit is “a supplier-owned or supplier-leased site operated by the supplier, under contract to the Postal Service to provide products and services to the public at U.S. Postal Services prices.” The list of services provided at contract postal unit locations includes certified mail. (<http://usps.gov> visited July 6, 2016.)

¶ 10 The Postal Reorganization Act (PRA) grants USPS the power “to sue and be sued in its official name.” 39 U.S.C. § 401(1). Section 409(a) of the PRA provides in pertinent part as follows:

“Except as otherwise provided in this title, the United States district courts shall have original but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provisions of chapter 89 of title 28.” 39 U.S.C. § 409(a).

¶ 11 Section 409(a) of the PRA confers concurrent jurisdiction on both the state and federal courts over actions brought by or against the USPS. See *Continental Cablevision of St. Paul, Inc. v. U.S. Postal Service*, 945 F.2d 1434, 1436 (8th Cir. 1991). See also *Standard Oil Division, American Oil Co. v. Starks*, 528 F.2d 201, 203 (7th Cir. 1975) (holding that with passage of the PRA Congress intended the “sue and be sued” clause to embrace garnishment procedures to effect judgments in state courts). Section 409(b) of the PRA incorporates the rules of procedure in the Federal Tort Claims Act (FTCA) “to *non-tort actions brought against the USPS* unless otherwise provided in the PRA.” (Emphasis added.) *Snow v. U.S. Postal Service*, 778 F. Supp. 2d 102, 108 (USDC D. Maine 2011). Section 409(b) of the PRA states as follows:

“Unless otherwise provided in this title, the provisions of title 28 [(the Judicial Code)] relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties, *and the rules of procedure adopted under title 28* for suits in which the United States, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.” (Emphasis added.) 39 U.S.C. § 409(b).

¶ 12 Although plaintiff filed a complaint for breach of contract rather than a tort claim the rules of procedure adopted under Title 28 for tort claims apply to plaintiff's contract claim. *Id.*; *Snow*, 778 F. Supp. 2d at 108. Therefore, plaintiff was required to exhaust administrative remedies before filing suit against the United States:

“An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.*” (Emphasis added.) 28 U.S.C. § 2675.

See also *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (“The FTCA is a limited waiver of sovereign immunity which requires compliance with the conditions enacted by Congress. These conditions are construed narrowly and include the requirement that before filing an FTCA action the claimant ‘present’ an administrative claim requesting a sum certain in damages to the appropriate federal agency and that the claim be finally denied.”) (citing 28 U.S.C. § 2675(a)).

¶ 13 In proceedings in the circuit court, failure to exhaust administrative remedies is usually an affirmative defense that is waived if not raised in the trial court. *Hawthorne v. Village of Olympia Fields*, 204 Ill. 2d 243, 254 (2003). In this case, defendants did not appear in the trial court. However, “[p]roper presentation of a tort claim against the United States to the appropriate federal agency is a prerequisite to any later court action under the [FTCA].” *Chodos v. F.B.I.*, 559 F. Supp. 69, 73 (S.D. New York 1982). Under the procedural rules of the FTCA, which are applicable to suits against USPS pursuant to section 409(b) of the PRA (39 U.S.C. §

409(b)), exhaustion is a jurisdictional prerequisite. *Chodos*, 559 F. Supp. at 73 (“Failure to comply with the statutory procedures [under the FTCA], a jurisdictional prerequisite to suit ***, requires that the complaint be dismissed.”). Because “[p]resentment of an administrative claim is jurisdictional [it] must be pleaded and proven by the FTCA claimant. [Citations.]” *Bellecort*, 994 F.2d at 430. Where a plaintiff who is bound by the procedural requirements of the FTCA, as is plaintiff in this case (*Snow*, 778 F. Supp. 2d at 107-08), fails to establish exhaustion, the claim must be dismissed for lack of jurisdiction. *Id.*

¶ 14 USPS has an administrative procedure in place to address customer requests for refunds of fees paid for certified mail. The USPS Domestic Mail Manual (DMM) states that a full refund of postage fees may be made when “[f]ees are paid for special handling, Certified Mail, USPS Tracking, Adult Signature, or Signature Confirmation, and the article fails to receive the extra service for which the fee is paid.” DMM paragraph 9.2.3 (available at <http://pe.usps.com/DMM300/Index> visited July 11, 2016). The DMM further provides as follows:

“For refunds under 9.2 *** the customer must apply for a refund on Form 3533; submit it to the postmaster; and provide the envelope, wrapper (or a part of it) showing the names and addresses of the sender and addressee, canceled postage and postal markings, or other evidence of postage and fees paid. The local postmaster grants or denies refund requests under 9.2. *** Adverse rulings may be appealed through the postmaster to the manager, Pricing and Classification Service Center (see 608.8.0), who issues the final agency decision.” DMM paragraph 9.2.5.

¶ 15 In this case, plaintiff pled only that he presented documentation supporting his claim to the contract postal unit where he paid for the certified mail with return receipt requested, and it

refused to refund plaintiff's money. Plaintiff did not demonstrate that he complied with paragraphs 9.2.3 and 9.2.5 of the DMM by applying for a refund on Form 3533, or that he appealed a request for a refund to the Pricing and Classification Service Center. Plaintiff's complaint in the circuit court did not seek review of a final administrative decision denying a refund, therefore the court lacked subject-matter jurisdiction and the complaint was properly dismissed. *Bellecort*, 994 F.2d at 430; *Snow*, 778 F. Supp. 2d at 108. See also *In re Agent Orange Product Liability Litigation*, 818 F.2d 210, 214 (2d Cir. 1987) ("The burden is on the plaintiff to both plead and prove compliance with the statutory requirements.").

¶ 16 This court entered an order resolving plaintiff's appeal as stated above on July 21, 2016. On August 11, 2016, plaintiff filed a *pro se* petition for rehearing (PFR). Plaintiff's PFR points out that section 9.2.7 of the DMM states that "For refunds for fees paid for extra services, as allowed under applicable standards in 9.2, the customer must apply for a refund online at www.usps.com/domestic-claims." Plaintiff argues section 9.2.4(h) of the DMM classifies "the certified and return-receipt mail services at bar *** as 'extra services' " that do not use Form 3533 to request a refund. Plaintiff also argues that section 9.2.4(h) of the DMM required him to request a refund within 60 days of the date he purchased the mail services. Plaintiff argues he "did not and could not have known of the ultimate alleged failure of the USPS to provide the purchased mail services until the 59th day after the date that the services were purchased;" therefore, administrative remedies were not available to him.

¶ 17 "The purpose of a petition for rehearing is to allow parties to call a reviewing court's attention to matters it might have overlooked or misapprehended. [Citation.] *** Generally, points not previously argued are deemed forfeited and may not be urged for the first time in a petition for rehearing." *Compass Group v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 121283WC, ¶ 52. Plaintiff's PFR argues USPS made its administrative remedies

“impracticable” by failing to return the return receipt for 59 days and rendered their administrative remedies unavailable by failing to provide him with the proper guidance to request a refund. In a separate argument plaintiff argues that USPS’s administrative remedies are invalidated by being impossible for its customers without access to the internet or the necessary knowledge to navigate the internet. Plaintiff effectively argues this court overlooked the time frame in which he could have utilized the administrative remedies provided by USPS and misapprehended the sections of the DMM governing how plaintiff should have requested a refund and thus exhausted his administrative remedies, and that both alleged mistakes resulted in an erroneous determination that plaintiff’s failure to exhaust administrative remedies deprived the circuit court of jurisdiction over his claim. For the following reasons, we reject plaintiff’s arguments and deny his PFR.

¶ 18 First, plaintiff’s claim that he could not have known sooner of the failure to provide the service he requested is based on certain allegations in his complaint. Specifically, in addition to the date he purchased the services (February 20, 2015), plaintiff relies on the date USPS returned a second return receipt without documenting the information contained in Section A through D of the return receipt (April 20, 2015). While plaintiff is correct that if he received the second return receipt on April 20 it would have been 59 days past the date he purchased the mail services, plaintiff ignores the allegation in his own complaint that “[o]n about March 3, Defendant USPS *** returned green FORM 3811 postcard receipt *** blank.” Plaintiff alleged he took the first blank return receipt to USPS and that USPS accepted it “to document delivery.” He does not allege that he paid a second fee. Plaintiff’s PFR does not argue why the sixty-day limitations period did not begin anew when plaintiff made a second request for services from USPS whether or not USPS required a second fee.

¶ 19 Regardless, plaintiff has either misconstrued or selectively read section 9.2.4(h) of the DMM. That section states when refunds are not available and reads in its entirety as follows:

“For fees paid for extra services, as allowed under 9.2.3, when refund request is made by the mailer less than 10 days, or more than 60 days, from the date the service was purchased, *unless otherwise authorized by the manager, Revenue Field Accounting* (see 608.8.0 for address).” (Emphasis added.) DMM paragraph 9.2.4(h)

Moreover, the USPS’s website “FAQ” section reads, in pertinent part, as follows:

“Return Receipt fees are refunded only if the USPS® fails to provide the recipient's signature (if not otherwise refused, unclaimed, or returned to sender). Visit your origin Post Office™ to request a refund, not less than 10 days, or more than 60 days from the date of mailing. If you have purchased a Return Receipt at a retail Post Office location and have not received the return receipt (or receive an incomplete receipt), you may request a refund or replacement record either:

- After 21 calendar days from date of mailing.
- Any time after you know the item has been delivered.

The applicable fee is not charged at retail if the sender can produce their receipt showing the return receipt fee was paid.

¶ 20 Plaintiff’s argument this court overlooked the time frame in which he learned of USPS’s failure to provide the service he paid for, and thus failed to recognize that administrative remedies were not available to him pursuant to section 9.2.4 of the DMM because (almost) 60 days passed before he knew, fails because section 9.2.4(h) does not foreclose the possibility of a refund through administrative procedures after 60 days have passed. Based on the language of

the DMM and the information before this court, administrative remedies were available to plaintiff.

¶ 21 Second, we find that plaintiff's argument that this court misapprehended the sections of the DMM governing how plaintiff should have requested a refund is not persuasive and, regardless, would not change the outcome of plaintiff's appeal. "It is axiomatic that it is the court's decision that is the subject of reconsideration on a petition for rehearing rather than the language or reasoning employed therein." *Schlenz v. Castle*, 132 Ill. App. 3d 993, 1018 (1985). Section 9.2.4(h) of the DMM does not "classify" certified and return-receipt mail services as "extra services" that do not use Form 3533 to request a refund. Section 9.2.4(h) refers to fees paid for extra services "as allowed under 9.2.3." Section 9.2.3 lists circumstances when a "full refund (100%) may be made" and includes when fees are paid for certified mail or signature confirmation "and the article fails to receive the extra service for which the fee is paid" (DMM paragraph 9.2.3(e)), and when fees are paid for return receipt and USPS "fails to furnish the return receipt or its equivalent" (DMM paragraph 9.2.3(g)).

¶ 22 Section 9.2.3 also allows for refunds in the following nonexhaustive list of situations:

"f. Surcharges are mistakenly collected on domestic Registered Mail or collected over the proper amount, or represented by stamps affixed to matter not actually accepted for registration.

* * *

h. An annual presort mailing fee is paid for Presorted First-Class Mail, Standard Mail, Presorted Media Mail, or Presorted Library Mail or a destination entry mailing fee is paid for Parcel Select or Bound Printed Matter and no mailings are made during the corresponding 12-month period. The permit holder should

request a credit to its advance deposit account, unless an advance deposit account is not used or is unavailable and a refund is requested.

i. Customs clearance and delivery fees are erroneously collected.

j. Fees are paid for registry or insurance service on mail addressed to a country to which such services are not available, unless claim for indemnity is made.

k. Priority Mail Express is not delivered according to the applicable service standard, except as provided in 9.5.5.

¶ 23 Section 9.2.7 then reads as follows: “For refunds for fees paid for extra services, as allowed under applicable standards in 9.2, the customer must apply for a refund online at www.usps.com/domestic-claims.” DMM paragraph 9.2.7. It is clear that under section 9.2 of the DMM refunds are available for numerous “services” provided by USPS. Notably, neither section 9.2.3(e) nor 9.2.3(g) refers to the services described therein as “extra services” and section 9.2.3(e) calls certified mail and signature confirmation “special handling.” Thus, this court looked to www.usps.com/domestic-claims for guidance on what types of refund requests should be processed on Form 3533 and which should be submitted online. Our review of USPS’s domestic claims site revealed that online refund requests are processed for “Priority Mail Express,” “Priority Mail Express International (PMEI),” “PMEI with Guarantee Service,” “Global Express Guaranteed,” “Unused Click-N-Ship Labels,” as well as claims for “Lost, damaged, or delayed items” and “insured, registered, or COD shipments.” <https://www.usps.com/help/refunds.htm>? (visited August 15, 2016). Based on the types of services for which refunds were available through USPS’s domestic claims website, this court concluded that section 9.2.7 of the DMM’s reference to “extra services” did not include certified mail, return receipt requested.

¶ 24 The provisions governing refunds are found in section 604 of the DMM titled “Postage Payment Methods and Refunds.” Since plaintiff filed his PFR, although not directed to it by plaintiff, this court has further learned that the DMM contains a separate section 503 titled “Extra and Additional Services.” That section does list certified mail and return receipt requested in a table listing “Extra Service.” However, we find that a different result is not warranted. As demonstrated above, there is no clear indication in section 9.2.7 that a refund of the type plaintiff sought should be requested through the website listed in that section, regardless of the usage of the term “extra service.” Federal courts recognize that “identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute.” *Yates v. U.S.*, 135 S. Ct. 1074, 1082 (2015).

“Most words have different shades of meaning and consequently may be variously construed ***. Where the subject matter to which the words refer is not the same in the several places where [the words] are used, or the conditions are different *** the meaning well may vary to meet the purposes of the law, to be arrived at by a consideration of the language in which those purposes are expressed, and of the circumstances under which the language was employed.” (Internal quotation marks omitted.) *Id.* (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

Applying these principles to the DMM, it is reasonable to conclude that the use of the generic term “extra service” does not refer to the same list of services in every context in which it is used. We find our original conclusion further bolstered by the fact the USPS website “FAQ” section provides the following information:

“Certified Mail™ is eligible for a refund of the service fee, excluding the postage, if the mailing receipt and electronic verification have not been received after 30

days, but you know your mailpiece has been delivered. (Refunds are rewarded at the discretion of the local Post Office™.)

- Submit the request in duplicate at the local Post Office using PS Form 3533, Application and Voucher for Refund of Postage and Fees.

- Provide evidence of mailing and postage.” <http://faq.usps.com/> (visited August 15, 2016).

The “Return Receipt” FAQ directs customers to “Visit your origin Post Office™ to request a refund, not less than 10 days, or more than 60 days from the date of mailing.”

¶ 25 The entire context in which the language in section 9.2.7 of the DMM is used leads to a conclusion that plaintiff was not required to submit his refund request via the website listed in that section. Regardless, nothing in plaintiff’s PFR would change the outcome of his appeal. This court expressly held that “[p]laintiff’s complaint in the circuit court did not seek review of a final administrative decision denying a refund, therefore the court lacked subject-matter jurisdiction and the complaint was properly dismissed.” *Supra* ¶ 15. We also noted that the “burden is on the plaintiff to both plead and prove compliance with the statutory requirements.” *Id.* (quoting *In re Agent Orange Product Liability Litigation*, 818 F.2d at 214. Even if plaintiff is correct and the DMM required that he submit a refund request via the website, or by any other means, neither in his complaint to the trial court nor in his PFR does plaintiff allege that he ever took any steps to avail himself of any remedies provided by USPS. We have already determined that despite plaintiff’s claim to the contrary, administrative remedies were available to him. We note that despite the argument being forfeited by reason of his failure to raise it in his initial appeal (*Compass Group*, 2014 IL App (2d) 121283WC, ¶ 52), plaintiff does not assert he does not have access to the internet or the wherewithal to use it. Regardless of what plaintiff’s remedies were or how they were to be pursued, the outcome would not change. In this case,

exhaustion of administrative remedies is a jurisdictional prerequisite to filing suit and plaintiff was required to plead and prove he exhausted his administrative remedies. *Supra* ¶ 13. His failure to do so deprived the circuit court of jurisdiction. See *id.* A court considering its own jurisdiction is not acting as a proxy for the defendant as plaintiff's PFR complains. "A reviewing court has a duty to ascertain its jurisdiction before proceeding in a cause of action and must dismiss the appeal if the court lacks jurisdiction." *Cushing v. Greyhound Lines, Inc.*, 2012 IL App (1st) 100768, ¶ 83. "Where the tribunal below has no jurisdiction an appeal can confer no jurisdiction on the reviewing court. [Citation.]" (Internal quotation marks omitted.) *In re Estate of Gagliardo*, 391 Ill. App. 3d 343, 349 (2009).

¶ 26 The trial court properly dismissed plaintiff's complaint for lack of jurisdiction and its judgment is affirmed.

¶ 27 **CONCLUSION**

¶ 28 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 29 Affirmed.