

2017 IL App (1st) 152745-U

No. 1-15-2745

Order filed May 12, 2017

Fifth Division

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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JAY F. SHACHTER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 CH 42601
	)	
THE COUNTY OF COOK, a Body Politic,	)	Honorable
	)	Edmond Ponce de León,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* This court affirmed the circuit court's dismissal of the plaintiff's complaint for declaratory judgment and injunctive relief. The defendant's motion to dismiss was not filed in violation of the supreme court rules and was properly before the court; the complaint failed to state a cause of action for declaratory and injunctive relief; and the dismissal of the complaint with prejudice was not an abuse of discretion where the plaintiff did not request leave to amend the complaint.

¶ 2 The plaintiff, Jay F. Shachter, *pro se*, appeals from orders of the circuit court of Cook County, dismissing his complaint against the defendant, the County of Cook, and denying his

motion for reconsideration. On appeal, the plaintiff contends that: (1) the defendant's motion to dismiss was filed in violation of the supreme court rules; (2) the defendant failed to satisfy the good cause requirement of Illinois Supreme Court Rule 183 (eff. Feb.16, 2011); (3) the dismissal of the complaint for failure to state a cause of action was error; and (4) the dismissal of the complaint with prejudice was error.

¶ 3

## BACKGROUND

¶ 4

### I. Initial Circuit Court Proceedings

¶ 5 On November 28, 2012, the plaintiff filed a two-count complaint for declaratory judgment and injunctive relief against the defendant. In the complaint, the plaintiff alleged the following facts. The plaintiff owed \$13,241.97 in unpaid property taxes. The amount was based on an estimated cost of redemption prepared by the defendant and attached as an exhibit to the complaint. On June 22, 2012, the plaintiff tendered \$13,300 in cash to Jacqueline F. McWilliams, allegedly an agent of the defendant, to redeem his property, telling her to "keep the change." Ms. McWilliams refused to accept the payment. The plaintiff informed Ms. McWilliams and her supervisor that "a debt is discharged through an offer of legal tender, even if the offer is refused."

¶ 6 On the basis of these factual allegations, the plaintiff sought a declaration that his property tax debt to the defendant was discharged as of June 22, 2012. The plaintiff further sought to permanently enjoin the defendant from seizing, authorizing the seizure or otherwise interfering with his enjoyment of and title to his property.

¶ 7 The defendant was served with the complaint on December 7, 2012. On December 20, 2012, the defendant filed its appearance as well as two motions and one amended motion to

transfer the case from the chancery division to the county division. Two of the motions to transfer, one of which was the amended motion,<sup>1</sup> were noticed for presentation on January 17, 2013; the third motion to transfer was noticed for presentation on January 3, 2013. On January 3, 2013, the plaintiff filed a motion for substitution of Judge Kennedy, the chancery judge assigned to the case, as a matter of right, and the case was transferred to Judge Jacobius, the presiding judge of the chancery division, for reassignment. By agreement of the parties, the January 17, 2013, date was stricken. On January 7, 2013, the defendant renewed the motion for transfer for presentation on January 15, 2013. On January 8, 2013, the defendant filed a motion to extend time to answer or otherwise plead to the complaint. On January 15, 2013, over the plaintiff's objection, Judge Garcia, the chancery judge the case had been reassigned to, ordered the case transferred back to Judge Jacobius for reassignment to the presiding judge of the county division. The defendant's motion for an extension of time was entered and continued. On January 17, 2013, the plaintiff filed a notice with the court advising that he would be unavailable between January 27 and February 7, 2013.

¶ 8 On January 18, 2013, the defendant filed a combined motion to dismiss pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012); 735 ILCS 5/2-619 (West 2012)) and noticed it for presentation for January 24, 2013. Also on that date, the case was assigned to Judge Ponce de León. On January 24, 2014, Judge Ponce de León entered an order acknowledging that the plaintiff had notified the court that he would not be present in court on that date. The order granted the plaintiff 21 days to respond to the motion to dismiss and continued the case to February 28, 2013, for status. On February 8, 2013,

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<sup>1</sup> The amended motion named the presiding judge of the chancery division.

the plaintiff filed a motion to vacate the order of January 24, 2013, and a petition to hold the defendant's attorney in contempt and noticed it for presentation on February 13, 2013.

¶ 9 On February 13, 2013, Judge Ponce de León entered an order stating that the case came on for status, that the parties were present and granting the defendant's motion, dismissing the case with prejudice. The plaintiff appealed the dismissal.

¶ 10 In an unpublished order, this court held that the lack of notice and an opportunity to be heard prior to the dismissal of the complaint denied the plaintiff due process. *Shachter v. County of Cook*, 2014 IL App (1st) 130971-U ¶ 27.<sup>2</sup> This court vacated the February 13, 2013, and January 24, 2013, orders and remanded the case to the circuit court for further proceedings. *Shachter*, 2014 IL App (1st) 130971-U, ¶ 30.

¶ 11 **II. PROCEEDINGS ON REMAND**

¶ 12 This court's order placed the case in the posture it was in prior to entry of the orders this court vacated. On remand, Judge Ponce de León ordered the parties to file responsive pleadings to the plaintiff's February 8, 2013, motion to vacate the order of January 24, 2013, and petition to hold defendant's attorney in criminal contempt, and the defendant's January 18, 2013, motion to dismiss the complaint.

¶ 13 **A. The Plaintiff's Motion to Vacate**

¶ 14 In his motion to vacate, the plaintiff alleged that he received the notice of the January 24, 2013, court proceeding late on January 23, 2013, which violated the circuit court rule requiring five court days notice. He further alleged that he attempted to contact the defendant's attorney but that the attorney had given him an incorrect telephone number, that had he been present he

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<sup>2</sup> Justice Gordon specially concurred. *Shachter*, 2014 IL App (1st) 130971-U ¶¶ 33-45.

would have requested more than 21 days to respond and that he would have opposed a stay in proceeding with discovery. He further alleged that the motion to dismiss was filed in violation of Rules 101(d) and 181(a) and that the plaintiff would oppose any extension under Rule 183. In the petition for criminal contempt, the plaintiff alleged that the defendant's attorney violated circuit court rules and rules of professional conduct in that: he failed to inform the court that his notice of motion was filed in violation of the circuit court rules, failed to inform the court that the defendant was in technical default, did not have leave to file his motion to dismiss and failed to represent his client competently. The plaintiff further alleged that the defendant's attorney provided a telephone number at which he could not be reached.

¶ 15 The defendant responded to the plaintiff's motion to vacate the trial court's order of January 24, 2013, by maintaining it was moot since this court vacated the January 24, 2013 order. *Shachter*, 2014 IL App (1st) 130971-U, ¶ 30. In response to the criminal contempt petition, the defendant denied that it had been in default and denied that its attorney had given the plaintiff an incorrect telephone number where he could be reached.

¶ 16 B. Defendant's Motion to Dismiss

¶ 17 In its section 2-615 motion, the defendant maintained that the complaint did not state a cause of action for which relief could be granted because it failed to allege facts entitling him to declaratory or injunctive relief. In its section 2-619 motion, the defendant alleged that the complaint was moot because the taxes on the plaintiff's real property had been sold in error, and the tax lien had been vacated. The defendant further alleged that the circuit court lacked subject matter jurisdiction because the plaintiff's sole remedy was under the Illinois Property Code (35 ILCS 200/1 *et seq* (West 2012)). Finally, the defendant alleged it was not the proper party

defendant in this case because the Cook County clerk who processes the redemption payments was not an employee or agent of the defendant.

¶ 18 In response to the motion to dismiss, the plaintiff moved to strike and dismiss the defendant's motion to dismiss. The plaintiff maintained that the motion to dismiss should be stricken because it was filed more than 30 days after the defendant was served and that the defendant did not show good cause for the untimely filing. The plaintiff further argued that he complied with the statutory redemption procedure by tendering payment of his real property taxes in full and that the case was not moot because the plaintiff had been notified that his real property taxes had been sold again. Finally, the plaintiff argued that his complaint should not have been dismissed with prejudice because he failed to name the Cook County clerk as a party, since he could remedy the omission by amending his complaint.

¶ 19 C. Circuit Court's Ruling

¶ 20 On February 26, 2015, the circuit court issued its memorandum opinion and order. The court denied the plaintiff's motion to strike the motion to dismiss the complaint and his petition for a finding of criminal contempt. The court rejected the plaintiff's argument finding that there was just cause to extend the time for filing the defendant's motion to dismiss the complaint. The court also found that the lack of an affidavit to support the defendant's section 2-619 motion to dismiss did not require the motion be stricken as the court could take judicial notice of the vacatur of the tax sale as a court record. The court found no basis for a finding of criminal contempt against the defendant's attorney since the alleged conduct did not bring the court's authority into disrepute or obstruct it in any way and, even if true, the allegations were insufficient for the imposition of criminal contempt.

¶ 21 In granting the defendant’s motion to dismiss, the circuit court found that the plaintiff failed to allege sufficient facts to state a cause of action for a declaratory judgment and for injunctive relief. The court further found that the complaint was barred by the lack of subject matter jurisdiction and the availability of legal administrative remedies. The plaintiff’s motion for reconsideration was denied on August 26, 2015.

¶ 22 The plaintiff filed a timely notice of appeal from the circuit court’s February 26, 2015, and August 26, 2015, orders.

¶ 23 ANALYSIS

¶ 24 I. Violation of Supreme Court Rules

¶ 25 The plaintiff contends that the January 24, 2013, motion to dismiss was not properly before the court because it was filed in violation of Illinois Supreme Court Rules 101(d) (Ill. S. Ct. R. 101(d) (eff. May 30, 2008)) and 181(a) (Ill. S. Ct. R. 181(a) (Jan. 4, 2013)).

¶ 26 A. Standard of Review

¶ 27 Compliance with a supreme court rule is reviewed *de novo*. *People v. Lloyd*, 338 Ill. App. 3d 379, 384 (2003).

¶ 28 B. Discussion

¶ 29 Rule 101(d) provides in pertinent part as follows: “the summons shall require each defendant to file his answer or otherwise file his appearance within 30 days after service, exclusive of the day of service.” Ill. S. Ct. R. 101(d) (eff. May 30, 2008). Rule 101(d) further provides that the summons must inform the defendant that, “[i]f you fail to do so, a judgment of default may be entered against you for the relief asked for in the complaint.” Ill. S. Ct. R. 101(d) (eff. May 30, 2008).

¶ 30 Rule 181(a) provides in pertinent part as follows: “[t]he defendant may make his or her appearance by filing a motion within the 30-day period, in which instance an answer or another appropriate motion shall be filed within the time the court directs in the order disposing of the motion. If the defendant’s appearance is made in some other manner, nevertheless his or her answer or appropriate motion shall be filed on or before the last day on which he or she was required to appear.” Ill. S. Ct. R. 181(a) (eff. Jan. 4, 2013).

¶ 31 The defendant was served with summons and the complaint on December 7, 2012. The plaintiff acknowledges that because January 6, 2013, was a Sunday, to comply with Rule 181(a), the defendant’s response was due on or before January 7, 2013. The plaintiff maintains that, in the absence of an order granting the defendant’s motion for an extension of time, the defendant’s failure to respond to the complaint on or before January 7, 2013, resulted in the defendant’s technical default. Since the default was never cured, the plaintiff argues that the motion to dismiss was never before the court, and the court had no authority to consider or rule on it. We disagree.

¶ 32 On December 20, 2012, the defendant filed its appearance and moved to transfer the case from the chancery division to the county division of the circuit court. The defendant’s appearance and motion to transfer were filed within 30 days of December 7, 2012, the day it was served with summons and the complaint. The plaintiff argues that by providing that the motion be an “appropriate” one, the legislature must have meant a motion addressing the complaint. The plaintiff provides no authority that a motion to transfer is not an appropriate motion for purposes of Rule 181(a).

¶ 33 Moreover, the defendant's motion to extend time to answer or otherwise plead to the complaint was filed on January 8, 2013, one day beyond the 30 days for answering or otherwise pleading to the complaint. The plaintiff never filed a motion to default the defendant, and the circuit court never entered an order of default against the defendant. Therefore, even if the defendant had failed to file a response within the 30 days, the circuit court was not deprived of its authority to act on the motion to dismiss.

¶ 34 Since the record established that the defendant filed its appearance and the motion to transfer within the 30 days of service, we conclude that the defendant complied with both Rule 101(d) and Rule 181(a). Therefore, we reject the plaintiff's contention that the circuit court had no authority to rule on the motion to dismiss the complaint because it was filed in violation of the supreme court rules.

¶ 35 II. Supreme Court Rule 183

¶ 36 Having found that the defendant did not violate Rules 101(d) and 181(a), we need not address whether the defendant established good cause for an extension of time for filing its motion to dismiss under Illinois Supreme Court Rule 183 (eff. Feb. 16, 2011).

¶ 37 III. Dismissal of the Complaint

¶ 38 The plaintiff contends that the circuit court erred in granting the defendant's motion to dismiss.

¶ 39 A. Standard of Review

¶ 40 The defendant's motion to dismiss was brought pursuant to sections 2-615 and 2-619 of the Code. Under either section, this court reviews a motion to dismiss *de novo*. *Dumas v. Pappas*, 2014 IL App (1st) 121966, ¶ 11. We may affirm the circuit court's judgment upon any

ground for which a factual basis exists. *W.W. Vincent & Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 757 (2004).

¶ 41

#### B. Discussion

¶ 42 Under section 2-615 of the Code, a complaint may be dismissed for failure to state a cause of action for which relief may be granted. 735 ILCS 5/2-615. For the purposes of our review, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Dumas*, 2014 IL App (1st) 121966, ¶ 12. We construe the allegations of the complaint in the light most favorable to the plaintiff, and dismissal of the complaint is proper only where no set of facts can be proved entitling the plaintiff to recovery. *Dumas*, 2014 IL App (1st), 121966, ¶ 12. A plaintiff may not rely on conclusions but must set forth sufficient allegations of fact to bring the claim within a legally recognizable cause of action. *Dumas*, 2014 IL App (1st) 121966, ¶ 12.

¶ 43

#### 1. Declaratory Judgment

¶ 44 The plaintiff maintains he complied with redemption procedure under the Property Tax Code in that he tendered the payment to the defendant and that his right to redeem did not depend on whether the defendant accepted the payment. Having done all he could do to redeem his property, the plaintiff asserts that he was entitled to a declaratory judgment that the tax debt had been discharged.

¶ 45 “The essential requirements of a declaratory judgment action are: (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).

In *Beahringer*, our supreme court explained the purpose of the declaratory judgment procedure as follows:

“ ‘The declaratory judgment procedure was designed to settle and fix rights before there has been an irrevocable change in the position of the parties that will jeopardize their respective claims of right. [Citation.] The remedy is used to afford security and relief against uncertainty so as to avoid potential litigation.’ ” *Beahringer*, 204 Ill. 2d at 373 (quoting *First of America Bank, Rockford, N.A. v. Netsch*, 166 Ill. 2d 165, 174 (1995))

A declaration of nonliability for past conduct is not a function of the declaratory judgment statute. See *Eyman v. McDonough District Hospital*, 245 Ill. App. 3d 394, 396 (1993).

¶ 46 The requirements for the redemption of real property sold for unpaid taxes is set forth in section 21-355 of the Property Tax Code (35 ILCS 200/21-355 (West 2012)). Section 21-355 provides in pertinent as follows:

“Any person desiring to redeem shall deposit an amount specified in this Section with the county clerk of the county in which the property is situated, in legal money of the United States, or by cashier’s check, certified check, post office money order or money order issued by a financial institution \*\*\* payable to the county clerk of the proper county. \*\*\* The deposit shall be in an amount equal to the total of the following:”

Section 21-355(a) through (k) sets forth the costs to be included in the amount of the redemption deposit. See 35 ILCS 200/21-355 (a) through (k) (West 2012).

¶ 47 The plaintiff failed to allege facts which, if proved, established that the defendant had an opposing interest to that of the plaintiff and that an actual conflict existed between the defendant and the plaintiff. The complaint alleged that the defendant provided the plaintiff with the

estimated redemption amount, and its employee refused the payment. The plaintiff did not allege what reason he was given for the refusal of his payment and failed to allege any facts which, if true, established that the defendant had an opposing interest to that of the plaintiff, other than requiring him to follow the statutory redemption procedure. Moreover, the facts alleged established that no actual controversy existed since the plaintiff had informed the defendant's employees that his debt was discharged and the plaintiff did not allege that the defendant was or would take any action against his property.

¶ 48 In *Eyman*, the plaintiff sought a declaratory judgment that she had properly terminated a contract between the defendant and her and that she was entitled to keep funds previously advanced to her as damages. The reviewing court held that the plaintiff was seeking a declaration of nonliability for past conduct in that “[s]he had already embarked on a course of conduct and wanted the court to find her not liable for that conduct. She was not seeking to learn the consequences of her actions before acting.” *Eyman*, 245 Ill. App. 3d at 396. Likewise, in the present case, the plaintiff is seeking a declaration that by tendering the redemption amount, he complied with the statutory redemption procedure and was no longer liable for his property tax debt.

¶ 49 The plaintiff acknowledges that the defendant refused to accept his tender of the redemption funds, but maintains that payment or deposit was not required. The plaintiff's contention that his tendering of payment complied with the Property Tax Code redemption procedure is contrary to the requirements of section 21-355, which requires that a person wishing to redeem “shall deposit an amount specified in this Section.” 35 ILCS 200/21-355 (West 2012);

see 35 ILCS 200/21-345(a) (West 2012) (property sold under the Property Tax Code may be redeemed only in accordance with the Property Tax Code).

¶ 50 In effect, the plaintiff is asking for a declaration creating a new right under the Property Act Code. However, a declaratory judgment action is strictly remedial and merely affords a new, additional and cumulative procedural method for the judicial determination of the parties' rights; it does not create substantive rights or duties. *Beahringer*, 204 Ill. 2d at 373.

¶ 51 We conclude that in count I of his complaint, the plaintiff did not alleged sufficient facts establishing a cause of action for a declaratory judgment.

¶ 52 *2. Injunction*

¶ 53 “In order to be entitled to a permanent injunction, the party seeking the injunction must demonstrate: (1) a clear and ascertainable right in need of protection; (2) that he or she will suffer irreparable harm if the injunction is not granted; and (3) that there is no adequate remedy at law.” *New Light Cemetery Association v. Baumhardt*, 373 Ill. App. 3d 1013, 1018 (2007). In seeking an injunction, the plaintiff realleged the facts supporting his request for a declaratory judgment.

¶ 54 The facts alleged in the complaint do not state a cause of action for a permanent injunction. The plaintiff has no “clear and ascertainable right in need of protection” because as we have determined, he did not comply with the redemption procedure under the Property Tax Code and therefore, will not suffer irreparable harm if denied the protection of an injunction.

¶ 55 Finally, the plaintiff failed to allege any facts showing that he was without a remedy at law. Section 22-45 of the Property Tax Code provides for an appeal from an order issuing a tax

deed and additional relief is available under sections 2-1203 and 2-1401 of the Code (735 ILCS 5/2-1203, 2-1401(West 2012)). See 35 ILCS 200/22-45 (2012).

¶ 56

#### IV. Leave to Amend

¶ 57 The plaintiff maintains that his complaint should not have been dismissed with prejudice and that he should be allowed to amend his complaint to state a cause of action and to name the correct party. He maintains that under section 2-616(a) of the Code, he should be allowed to amend his complaint to enable him to state a cause of action and asserts that it is an abuse of discretion to deny leave to amend where an amendment would allow the plaintiff to state a cause of action. *Brown Leasing, Inc. v. Stone*, 284 Ill. App. 3d 1035, 1045 (1996) (dismissal with prejudice on the pleadings should not be granted if, by amending, the complaint could state a cause of action). However, unlike the plaintiff in *Brown Leasing, Inc.*, the plaintiff here did not seek leave to amend his complaint in the circuit court other than naming the Cook County clerk as a party.

¶ 58 “[W]here a trial court dismisses a complaint and plaintiff does not seek leave to amend, the cause of action must stand or fall on the sufficiency of the stricken pleading.” *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 435 (2004). While there are exceptions to the general rule, none of them apply in this case. See *Bajwa*, 208 Ill. 2d at 436 (*i.e.* where the invalidity of the plaintiff’s legal theory is determined for the first time in the reviewing court or the trial court’s reason for the dismissal renders a request to amend futile). Moreover, after the final judgment has been entered as it was in this case, a plaintiff has no statutory right to amend. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 332 (2008); see 735 ILCS 5/2-616(a)(c) (West 2012) (after final judgment pleadings may be amended only to conform the

pleadings to the proof). As this court explained in *Phillips v. DePaul University*, 2014 IL App (1st) 122817: “Plaintiffs here never sought leave to amend their first-amended class action complaint and, accordingly, the circuit court committed no abuse of discretion in dismissing it with prejudice.” *Phillips*, 2014 IL App (1st) 122817, ¶ 91 (citing *Matanky Realty Group, Inc. v. Katris*, 367 Ill. App. 3d 839, 844 (2006) (no abuse of discretion in the dismissal of the complaint with prejudice; since the plaintiff never sought leave to amend its complaint, the trial court was not requested to exercise its discretion)).

¶ 59 In the absence of any request by the plaintiff for leave to amend the cause of action in his complaint, the circuit court did not abuse its discretion in dismissing the complaint with prejudice.

¶ 60 CONCLUSION

¶ 61 The complaint failed to allege a cause of action for declaratory judgment and for an injunction. The dismissal of the complaint with prejudice was not an abuse of discretion where the plaintiff failed to request leave in the circuit court to amend the complaint.

¶ 62 The judgment of the circuit court is affirmed.

¶ 63 Affirmed.