2019 IL App (1st) 180643-U

No. 1-18-0643

Order filed on April 30, 2019.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANDREW MORALES, Plaintiff-Appellant and Cross-Appellee, v. VILLAGE OF STONE PARK BOARD OF FIRE AND POLICE COMMISSIONERS, Defendant-Appellee, POLICE CHIEF CHRISTOPHER PAVINI, Defendant-Appellee and Cross-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 2016 CH 12991 The Honorable David B. Atkins Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Where the plaintiff failed to demonstrate that he made a good faith effort to have the summons issued to a necessary party within 35 days of the administrative agency's decision, the trial court was required to dismiss his complaint for administrative review with prejudice.

¶ 2 Following a complaint filed by Police Chief Christopher Pavini, the Village of Stone Park Board of Fire and Police Commissioners (the Board) found just cause to terminate Andrew Morales from his position as a police officer due to misconduct. Morales filed a complaint for administrative review against the Board and, eventually, Chief Pavini. The trial court denied the complaint on its merits, and Morales filed this appeal. Chief Pavini, however, has filed a cross-appeal, asserting that the trial court should have granted his motion to dismiss Morales' action with prejudice (735 ILCS 5/2-619 (West 2016)) because Morales failed to have a summons timely issued to Chief Pavini as required by the Administrative Review Law (Act) (735 ILCS 5/3-101 *et seq.* (West 2016)). For the reasons that follow, Chief Pavini's contention is well-taken.

¶ 3 BACKGROUND

¶ 4 Chief Pavini filed charges against Morales on June 3, 2016, for the theft of time and the failure to perform duties. On August 29, 2016, the Board found Morales violated police department policy by falsifying work-related records, making misleading entries, engaging in work-related dishonesty, and engaging in on-duty conduct which any employee should reasonably know is unbecoming or contrary to good order, morale, efficiency or the appearance of the department. The Board also found Morales' performance was unsatisfactory due to incompetence, inefficiency or delay in carrying out orders and assignments. Consequently, the Board discharged Morales from his position as a police officer.

¶ 5 On September 30, 2016, Morales filed a complaint for administrative review. While Morales does not dispute that Chief Pavini was a necessary party to these proceedings, his complaint did not name Chief Pavini as a defendant. Additionally, Morales' attorney, Laura Scarry, filed an affidavit stating "that the last known addresses of each defendant upon whom

service shall be made in this cause is set forth below," purportedly in compliance with section 3-105 of the Act. The only address provided, however, was her own. Morales also had a summons issued to the Board on September 30, 2016, but did not have a summons issued to Chief Pavini.

¶ 6 On October 24, 2016, Morales filed an amended complaint adding Chief Pavini as a defendant. Morales tendered notice of that filing to the Board but did not tender notice to Chief Pavini. On the same day, however, Scarry's assistant, Tanina Rodriguez, left a voice message asking Chief Pavini's attorney, Timothy Guare, to return her call. According to Guare, the message did not mention the amended complaint or any summons. A phone conversation ensued between Guare and Rodriguez two days later. On the same day, Guare e-mailed Rodriguez, stating that he would "accept electronic service of Mr. Morales' Amended Complaint, adding Chief Pavini as a named party defendant." No summons was issued to Chief Pavini at that time. On June 2, 2017, Morales filed a memorandum in support of his complaint for administrative review but tendered notice of the filing solely to the Board.

¶ 7 On June 15, 2017, Chief Pavini filed a "Section 2-619(9) Motion to Dismiss for Failure to Serve Summons on a Necessary Party." Chief Pavini argued that Morales also failed to file an affidavit containing Chief Pavini's name and address so that a summons would issue to him, as required by section 3-105 of the Act. In response, Morales alleged he had relied on Guare's e-mail accepting electronic service of the amended complaint as a basis to forgo having a summons issued to and served upon Chief Pavini. The Board subsequently joined Chief Pavini's motion to dismiss.

¶ 8 On August 16, 2017, the trial court found that Morales did not dispute that Chief Pavini was a necessary party or that he was not properly served but, instead, argued that he made a good faith attempt to serve Pavini based on Guare's e-mail. The court stated, "[a]s Pavini points out,

Plaintiff must comply strictly with statutory service requirements and cannot rely on a mere good faith attempt which he admits does not fulfill those requirements." The court then dismissed the amended complaint without prejudice, granting Morales additional time to refile his action with service on all parties. The trial court subsequently denied Chief Pavini's motion to reconsider and dismiss the action with prejudice.

¶ 9 On November 1, 2017, Morales filed a second-amended complaint and finally had a summons issued to Chief Pavini, more than one year after the Board's decision was issued. On February 20, 2018, the trial court denied Morales' action for administrative review on its merits. Morales filed a notice of appeal and Chief Pavini filed a notice of cross-appeal.

¶ 10 ANALYSIS

¶ 11 On appeal, Morales asserts that (1) Chief Pavini's charges before the Board should have been dismissed as time barred; (2) Chief Pavini administered police department policies in a discriminatory manner; and (3) Chief Pavini condoned Morales' actions. We cannot resolve Morales' claims, however, without first addressing Chief Pavini's assertion that the trial court should have dismissed Morales' action with prejudice under section 2-619 due to Morales' failure to have a summons issue to Chief Pavini within 35 days of the Board issuing its decision. A section 2-619 motion to dismiss asserts some affirmative matter that defeats the plaintiff's claim. *Smith v. Vanguard Group, Inc.*, 2019 IL 123264, ¶ 9. We review the trial court's ruling on a section 2-619 motion *de novo*. *RS Investments Limited v. RSM US LLP*, 2019 IL App (1st) 172410, ¶ 2.

¶ 12 Final administrative decisions are appealable only "as provided by law." (Internal quotation marks omitted.) *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2016 IL 120236, ¶ 45 (quoting Ill. Const. 1970, art. VI § 9). The Act's specific

requirements limit a trial court's ability to review a final administrative decision. *Id*. In addition, those requirements are generally not subject to forfeiture or waiver. *Palos Bank & Trust Co. v. Illinois Property Tax Appeal Board*, 2015 IL App (1st) 143324, ¶¶ 12, 26; *Burns v. Department of Employment Security*, 342 Ill. App. 3d 780, 786 (2003); *Lacny v. Police Board of the City of Chicago*, 291 Ill. App. 3d 397, 402 (1997). Similarly, a defendant cannot be estopped from challenging the plaintiff's failure to timely serve a summons. *Veazey v. Baker*, 322 Ill. App. 3d 599, 606 (2001).

¶ 13 Section 3-102 of the Act states, "[u]nless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision." 735 ILCS 5/3-102 (West 2016). In addition, "[e]very action to review a final administrative decision shall be commenced by the filing of a complaint *and the issuance of summons within 35 days* from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision[.]" (Emphasis added.) 735 ILCS 5/3-103 (West 2016). Section 3-105 governs the summons:

> "Summons issued in any action to review the final administrative decision of any administrative agency shall be served by registered or certified mail on the administrative agency *and on each of the other defendants*[.] *** The form of the summons and the issuance of alias summons shall be according to rules of the Supreme Court. *** The clerk of the court shall also mail a copy of the summons to each of the other defendants, addressed to the last known place of residence or principal place of business of each such defendant. *The plaintiff shall, by affidavit filed with the complaint, designate the last*

known address of each defendant upon whom service shall be made." (Emphases added.) 735 ILCS 5/3-105 (West 2016).

This statute dictates where, how and upon whom a summons must be served. *Collinsville Community Unit School District No. 10 v. Regional Board of School Trustees of St. Clair County*, 218 Ill. 2d 175, 188 (2006).

¶ 14 The 35-day period for the issuance of a summons is not jurisdictional but is nonetheless mandatory. *Lockett v. Chicago Police Board*, 133 Ill. 2d 349, 355 (1990) (overruled in part on other grounds by *Nudell v. Forest Preserve District of Cook County*, 207 Ill. 2d 409, 424 (2003)). Furthermore, the affidavit required by section 3-105 is the means by which the clerk of the court learns of the defendant's address. *Burns*, 342 Ill. App. 3d at 788. Where the record does not show that the plaintiff filed that affidavit, no proper service may be found. *Id*.

¶ 15 In *Lockett*, the plaintiff failed to have a summons issued to the superintendant of the Chicago police department within the 35-day period. *Lockett*, 133 Ill. 2d at 352. The supreme court found that as a result, the complaint for administrative review was barred. *Id*. at 354. Because the 35-day period was intended to expedite the procedure for administrative review and avoid undue delay, a plaintiff must show he made a good-faith effort to obtain the issuance of a summons within the 35-day period in order to avoid dismissal. *Id*. at 355. Additionally, the court overruled prior appellate court decisions holding that "a failure to name *and issue summons* against necessary parties within the 35-day time limit can be cured by subsequent amendment." (Emphasis added.) *Id*. at 356; see also Ill. S. Ct. R. 103(b) (eff. July 1, 2007) (stating that "[i]f the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice"). Following *Lockett*, to avoid dismissal with prejudice, a plaintiff in an action for administrative

review must ensure that a summons issues within 35 days or demonstrate that he made a good faith effort to have a summons issue during that period.

¶ 16 We note that section 3-103 permits a plaintiff to amend a timely-filed complaint to add a police chief, in a municipality with a population under 500,000, as a defendant after the 35-day period. See 735 ILCS 5/3-103 (West 2016). Notwithstanding this provision pertaining to the complaint, the Act includes no parallel exception for the failure to have a summons timely issued to a police chief within 35 days. Morales has failed to develop a cohesive argument acknowledging the distinction between the Act's requirements for the complaint and the Act's requirements for the summons. See Ill. S. Ct. R. 341(h) (7) (eff. May 25, 2018) (stating that points not argued are forfeited); *Wing v. Chicago Transit Authority*, 2016 IL App (1st) 153517, ¶ 11 (stating that a reviewing court is entitled to clearly defined issues and cohesive arguments). On the contrary, Morales' briefs repeatedly conflate the summons requirement and other requirements of the Act. For example, Morales conflates section 3-105, which governs the "Service of summons," with section 3-107, which governs joinder. 735 ILCS 5/3-105, 3-107 (West 2016); *Collinsville Community Unit School District No. 10*, 218 Ill. 2d at 189. As our supreme court has stated, "Neither statute speaks to the other." *Id*. at 188-89. Morales has not explained how section 3-107 and case law interpreting it has any bearing on his failure to have the summons timely issued to Chief Pavini.

¶ 17 Here, it is undisputed that Morales did not have a summons issued to Chief Pavini within the requisite 35-day period. Consequently, to salvage this action, he was required to demonstrate a good-faith effort to have a summons issued in a timely fashion.

¶ 18 "The good-faith-effort exception to the requirement that summons timely issue is established but narrow." *Carver v. Nall*, 186 Ill. 2d 554, 559 (1999) (overruled in part on other

grounds by *Nudell*, 207 Ill. 2d at 424). The 35-day requirement has been relaxed where plaintiffs made good-faith efforts to have the summons issue within the requisite statutory period, but "due to some circumstance beyond their control," the summons was not issued in time. *Lockett*, 133 Ill. 2d at 355. In addition, a finding of good faith does not require an error by the clerk of the court. *Beggs v. Board of Education of Murphysboro Community Unit School District No. 186*, 2015 IL App (5th) 150018, ¶ 7 (affirmed by *Beggs*, 2016 IL 120236). That being said, the good-faith exception does not apply where a plaintiff makes no attempt at all to have a summons issued within 35 days. *Lacny*, 291 Ill. App. 3d at 401.

¶ 19 In the instant case, the Board issued its decision on August 29, 2016. While Morales filed a complaint for administrative review on September 30, 2016, he failed to file a section 3-105 affidavit that designated Chief Pavini as a defendant and provided his address. Instead, Morales' attorney submitted a section 3-105 affidavit providing her own address. Morales has not identified any effort to have a summons issued to Chief Pavini within 35 days. Nor has he identified any factor beyond his control that impeded having a summons issued during this time. See *Carver*, 186 Ill. 2d at 560-61 (stating that where the plaintiff did not ask the clerk to issue summons and did not provide the clerk with the necessary addresses," she made no efforts whatsoever, much less those that could be considered diligent or made in good faith"); *Palos Bank and Trust Co.*, 2015 IL App (1st) 143324, ¶ 17 (stating that substantial compliance was not sufficient to invoke the exception where the plaintiff identified no factor beyond its control).

¶ 20 Moreover, any effort to have a summons issued to Chief Pavini *after* the 35-day period would be insufficient to fall within the exception. We also find that the representation of Chief Pavini's attorney on October 26, 2016, that he would "accept electronic service of Mr. Morales' *Amended complaint*" (emphasis added), does not show he was willing to forgo the service of a

summons. See also *New York Carpet World, Inc. v. Department of Employment Security*, 283 Ill. App. 3d 497, 501, 504 (1996) (finding that dismissal was required where the administrative agency was not named in the body of the complaint or the summons and was not served, notwithstanding that the administrative agency may have actually received a copy of the complaint). In any event, we reiterate that the Act's summons requirement is not subject to forfeiture, waiver or estoppel. Contrary to Morales' contention, the record also shows that Chief Pavini was inconvenienced by the failure to have a summons issued to him, as Chief Pavini was excluded from the court's electronic filing system and was not tendered notice of filings.

¶ 21 Here, Morales did not submit the affidavit required by section 3-105 and failed to ensure the timely issuance of a summons to Chief Pavini as required by that statute. For purposes of section 3-105, he made no effort at all, let alone a good faith effort. Accordingly, the trial court was required to dismiss the action with prejudice. This is not a hypertechnical excuse to avoid deciding the case on the merits: this is adherence to a mandatory rule.

¶ 22 For the foregoing reasons, we vacate the trial court's judgment and remand for the court to dismiss Morales' action for administrative review.

¶ 23 Judgment vacated; Remanded with directions.