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2019 IL App (3d) 170394-U

Order filed May 14, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

BENNIE K. ELLISON,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellant,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois.
v.	)	
	)	
MARCUS HARDY, Warden of Statesville	)	Appeal No. 3-17-0394
Correctional Center; ADAM MONREAL,	)	Circuit No. 12-MR-1709
Chief of the Illinois Prison Review Board;	)	
SALVADOR GODINEZ, Director of	)	
Corrections; ANITA ALVAREZ, Former	)	The Honorable
Cook County State's Attorney; TIMOTHY J.	)	Arkadiusz Z. Smigielski,
JOYCE; and JOSEPH G. KAZMIERSKI,	)	Judge, presiding.
	)	
Defendants-Appellees.	)	

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of plaintiff's petition for a writ of *mandamus* was not error.

¶ 2 Plaintiff filed an emergency petition for a writ of *mandamus*, alleging that defendants violated his constitutional rights when they (1) tampered with his mail packages; (2) failed to comply with his dietary contract; (3) restricted his Internet access contrary to court order; and (4) failed to protect him from and provide him medical treatment for various intentionally inflicted injuries he suffered while incarcerated. Plaintiff also filed a "motion for *sua sponte* '*ab initio*' void and vacate judgment" against defendants for failure to file a timely answer or pleading. Defendants moved to dismiss plaintiff's petition for failure to state a claim, which the trial court granted without prejudice. Subsequently, plaintiff filed two amended petitions and defendants filed motions to dismiss in response to each petition. Ultimately, the trial court denied plaintiff's second amended petition with prejudice. Plaintiff appealed, and we affirm.

¶ 3 FACTS

¶ 4 On August 7, 2012, Plaintiff Bennie Ellison filed an emergency petition for a writ of *mandamus*. He stated that he had been incarcerated at Statesville Correctional Center serving a 10-year sentence for possession of illegal drugs with intent to deliver. He claimed that defendants violated his constitutional rights when they (1) tampered with 25 unrecorded legal mail packages; (2) failed to comply with his dietary contract; (3) restricted his Internet access in violation of a court order; and (4) failed to protect him from, and provide medical treatment for, 12 aggravated bodily harm and excessive force incidents. Ellison requested immediate release from prison and permission to notify various federal agencies to press charges against defendants for illegally and unlawfully abducting and kidnapping him.

¶ 5 On September 21, 2012, Ellison issued summons on each defendant. Defendants were required to return the summons on October 25, 2012. In October, a status hearing was scheduled to review the proof of service of summons and neither party was present. The case was continued

again on January 24, 2013, and February 28, 2013. Ellison filed an emergency motion for summons to reissue, which the trial court granted. The new return date on the summons was May 23, 2013. At the May 23 status hearing, neither party was present and the case was again continued for status. At the July 25 status hearing, the Illinois Attorney General's office appeared on behalf of defendants; however, Ellison was not present and the case was continued for status. On September 26, 2013, the trial court held that Ellison failed to show proper proof of service and dismissed the case for want of prosecution. On December 23, 2013, Ellison filed a motion for reconsideration. The trial court granted the motion and vacated its dismissal on the basis that "Plaintiff has failed to file an original proof of service, but does appear to have obtained service on the Defendants" and continued the case for status. On February 27, 2014, the court gave defendants 28 days to answer or otherwise plead.

¶ 6 On March 26, 2014, Ellison filed a "motion for *sua sponte* '*ab initio*' void and vacate judgment" against defendants for failure to answer his petition or file a pleading by the end of the summons return date. Defendants filed a motion to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)) for failure to state a claim. On September 24, 2015, the trial court dismissed the petition without prejudice, determining that:

> "In the simplest sense, Defendants' argument is that they are unable to determine what the plaintiff is requesting, but nevertheless, nowhere in the complaint is a request to order them to perform one or more ministerial acts which they were obligated to but failed to do. The purpose of a mandamus action is to order just that: do something that you were required to do but failed to do (or do correctly). Plaintiff's complaint seeks to remedy a basket

> of ills claimed including to go back and review the trial procedures in the underlying conviction, medical care provided or not to Plaintiff since his incarceration, treatment of Plaintiff's food, and many other non-ministerial conduct.
>
> The court cannot fix each and every complaint that an inmate has against the facility or its staff. Plaintiff wants everything fixed not only in regard to his incarceration, but also going back to his conviction. Plaintiff's complaint here is certainly vague in its allegations about where the Defendants may have erred in performing acts to, for instance, provide proper security to reduce the likelihood of violence occurring to Plaintiff, but the kernel of a possibility may exist for Plaintiff to properly plead ought to be given the chance to amend his complaint to allege with greater detail and specificity where such failures may have occurred and why the failures are actionable under the law."

¶ 7 On November 12, 2015, Ellison filed an amended petition. In the petition, Ellison argued that he suffered excessive force by officers and aggravated assault by inmates on 17 occasions and that defendants denied him medical treatment for his injuries. As a result, he suffered a dislocated right shoulder and lower back, right hand, and hip injuries. He sought $700,000 in compensatory damages and $450,000 in punitive damages. He also claimed that his conviction was procured by fraud, false pretenses, and bribery and argued that he was entitled to relief from all judgments against him, $15 million in compensatory damages, and $5 million in punitive damages. On May 26, 2016, defendants filed a motion to dismiss under sections 2-615 and 2-619

of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2016)), alleging that Ellison failed to state a claim and that his request for monetary damages was barred by sovereign immunity. On August 25, 2016, the trial court dismissed the petition without prejudice.

¶ 8 On September 27, 2016, Ellison filed a second amended petition. He reasserted the same allegations stated in his first amended petition. Additionally, he requested $700,000 in compensatory damages and $500,000 in punitive damages for defendants' failure to file a timely answer or pleading in response to his petition for *mandamus*; $1,200,000 in damages for the 12 aggravated assaults and excessive force incidents; and $1,000,000 for the concealment of public records. He also sought expungement of his master file, criminal history, and driving history; the issuance of his state identification card and driver's license; protection orders against defendants; $15,000 transferred to his trust account; $150 bi-weekly commissary credit; relief from all judgments and orders; and payment of his court fees.

¶ 9 On December 1, 2016, defendants filed a motion to dismiss under section 2-615 for failure to state a claim. In his response, Ellison argued that defendants failed to file an appearance after they received service of summons, and therefore, he was entitled to a default judgment. Defendants replied, alleging they were allowed to file a motion to dismiss rather than an appearance pursuant to Illinois Supreme Court Rule 181(a) (eff. Jan. 1, 2018), which states that defendants may make their appearance by filing a motion within 30 days after service of summons. The trial court dismissed Ellison's petition with prejudice as to defendants Marcus Hardy, Salvador Godinez, and Adam Monreal and dismissed the petition for want of prosecution as to defendant Anita Alvarez. Ellison appealed.

¶ 10 On November 9, 2018, this court entered a minute order striking portions of Ellison's appellate brief. We found the brief did not comply with Illinois Supreme Court Rule 341(h)

because it (1) did not contain a jurisdictional statement and (2) did not contain adequate argument. We allowed Ellison 14 days to correct these portions of his brief. On November 26, 2018, Ellison filed an amended brief. On November 27, 2018, defendants filed a notice to stand on their original response brief.

¶ 11 ANALYSIS

¶ 12 I. Timely Pleadings

¶ 13 Ellison argues that the trial court erred when it failed to enter a default judgment against defendants for failing to file an appearance or file their March 2014 motion to dismiss before the return date listed in the summons. Relying on *Kupper v. Powers*, 2017 IL App (3d) 160141, ¶ 49-50, defendants claim that Ellison waived any objections with respect to the initial complaint when he filed his second amended complaint. Defendants also assert that they timely filed a motion to dismiss after Ellison filed his second amended petition and, therefore, there was no default.

¶ 14 Section 14-102 of the Code of Civil Procedure (735 ILCS 5/14-102 (West 2016)) governs the issuance of summons once a plaintiff files a complaint for *mandamus*. It states:

> "Upon the filing of a complaint for *mandamus* the clerk of the court shall issue a summons, in like form, as near as may be as summons in other civil cases. The summons shall be made returnable within a time designated by the plaintiff not less than 5 nor more than 30 days after the service of the summons."

¶ 15 Section 14-103 of the Code of Civil Procedure (735 ILCS 5/14-103 (West 2016)) sets out a defendant's requirement to respond to the summons by answer or other pleading. It states:

> "Every defendant who is served with summons shall answer or otherwise plead on or before the return day of the summons, unless the time for doing so is extended by the court. If the defendant defaults, judgment by default may be entered by the court. No matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise."

¶ 16 Here, the evidence shows that defendants' initial motion to dismiss was timely filed in accordance with section 14-103. Ellison filed his original petition for *mandamus* in August 2012 and issued summons on defendants in September 2012. Between September 2012 and September 2013, the case was continued for proof that service was made on defendants. On September 26, 2013, the trial court dismissed Ellison's case, determining that he failed to show proof of service upon defendants. In December 2013, Ellison filed a motion to reconsider, which the trial court granted. The court then reinstated the case and continued the case for status. At the February 27, 2014, status hearing, the trial court gave defendants 28 days to answer or otherwise plead. Defendants filed a motion to dismiss before the 28-day deadline on March 25, 2014. Therefore, we hold that although defendants' initial motion to dismiss was not filed until a year and a half after the initial summons issued, it was technically timely filed and, therefore, a default judgment was not warranted.

¶ 17 II. Motion to Dismiss

¶ 18 Next, Ellison argues that the trial court erred when it granted defendants' motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2016)) for failure to state a claim. Defendants allege that the trial court did not err in granting their motion to dismiss because (1) Ellison improperly seeks vacatur of his conviction and

sentence through an action for *mandamus* and (2) Ellison's complaint does not allege facts sufficient to demonstrate an entitlement to relief.

¶ 19 A motion to dismiss under section 2-615 attacks only the legal sufficiency of a complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). A section 2-615 motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Id.* When reviewing the sufficiency of the complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Id.* Illinois is a fact-pleading jurisdiction. *Id.* "While the plaintiff is not required to set forth evidence in the complaint [citation], the plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action [citation], not simply conclusions." *Id.* at 429-30. We review a dismissal under section 2-615 *de novo*. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003).

¶ 20 *Mandamus* is "an extraordinary remedy to enforce, as a matter of right, the performance of official duties by a public officer where no exercise of discretion on his part is involved." (Internal quotation marks omitted.) *Lee v. Findley*, 359 Ill. App. 3d 1130, 1133 (2005). A trial court will grant a writ of *mandamus* "only if a plaintiff establishes a clear affirmative right to relief, a clear duty of the public official to act, and a clear authority in the public official to comply with the writ." (Internal quotation marks omitted.) *Id.* "The remedy of *mandamus* may be used only to compel a public official or body to perform a ministerial duty in which the official exercises no discretion." *Whirl v. Clague*, 2015 IL App (3d) 140853, ¶ 14.

¶ 21 Here, Ellison did not raise facts sufficient to show that he had a clear affirmative right to relief, certainly not the relief he has requested. For instance, in his second amended petition, Ellison claims that defendants failed to file a timely answer or pleading in response to his petition for *mandamus* but does not provide any reasoning to demonstrate that defendants' answer or pleading was untimely. Also, Ellison asserts that defendants refused to follow administrative policies on grievance and emergency grievance when he suffered a dislocated right shoulder, head trauma, and lower back injuries and refused to enforce video camera monitoring to record 12 aggravated assaults and excessive force incidents. However, Ellison does not identify the policies or allege how these policies were not enforced.

¶ 22 Furthermore, Ellison argues that "fraudulent" judgments were entered against him in several cases because (1) defendants "aided and abetted" in concealing Ellison's "1st degree aggravated bodily harm, kidnapping, aggravated trafficking on interstate highways, fraud scheme, false imprisonment, and wrongful conviction" and (2) defendants provided "fraudulent and inaccurate" information to the trial judge and, consequently, imposed "malicious fraudulent procedures, malicious prosecution, and abusive process measure." However, Ellison does not explain the "fraudulent and inaccurate" information or the actions that constituted defendants' "aiding and abetting."

¶ 23 Also, the damages that Ellison seeks are not appropriate remedies in a *mandamus* action. In Ellison's petition, he sought monetary damages for various allegations. It is well-established that this court cannot award monetary damages in a *mandamus* action unless the plaintiff obtains a writ of *mandamus* from the court. *Hatch v. Szymanski*, 325 Ill. App. 3d 736, 741 (2001). Ellison has not obtained a writ of *mandamus* in this case. Also, Ellison seeks to have relief from all judgments and orders pertaining to this case; expungement of his master file, criminal history,

and driving history; reissuance of his state identification card and driver's license; and protection orders against defendants. However, Ellison has failed to show a clear affirmative right to this relief because the *mandamus* may be used only to "compel a public official or body to perform a ministerial duty in which the official exercises no discretion." *Whirl*, 2015 IL App (3d) 140853, ¶ 14. A "writ of *mandamus* cannot be used as a substitute for an appeal or to correct judicial error." *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 218 (1957). Therefore, we find that the trial court did not err in granting defendants' motion to dismiss under section 2-615.

¶ 24 Next, we address whether the trial court improperly dismissed the petition with prejudice. "If, by amendment, a plaintiff can state a cause of action, a case should not be dismissed with prejudice on the pleadings." *Bowe v. Abbott Laboratories, Inc.*, 240 Ill. App. 3d 382, 389 (1992). Generally, the trial court has sound discretion to determine whether it will allow plaintiff to amend the complaint. *Id.* In determining whether the trial court abused its discretion, the reviewing court must consider (1) whether a proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by the proposed amendment; (3) whether the proposed amendment was timely; and (4) whether the plaintiff had previous opportunities to amend the pleading. *Id.*

¶ 25 The trial court was careful and patient and sifted through Ellison's escalating attempts to secure relief not available through a *mandamus* writ—release from prison prior to his scheduled date and becoming a millionaire at the taxpayers' expense—and recognized that he had one or more *potentially* meritorious claims and gave him three opportunities to amend the *mandamus* petition to state a proper claim. Like the trial court, we believe Ellison may actually have one or more redressible grievances for which he could state a viable *mandamus* claim. For example, Ellison has asserted that he had a dietary contract which obligated the defendants to provide him

with a particular kind of food. If he were able to prove those allegations, his relief would be limited to the court ordering defendants to comply with that contract. He does not get out of jail free; he does not get a million dollars; he gets the food he bargained for. Similarly restricted relief would be available for any other claims on which he prevailed.

¶ 26 However, the trial court understood, as Ellison apparently did not, that the relief afforded by *mandamus* is limited to correction of the alleged wrongdoing. (*Supra* ¶¶ 20, 23). Moreover, the trial court advised Ellison of this problem with his pleadings in its initial order granting defendants' motion to dismiss. In particular, the court identified the same factual defects this court reiterates above that Ellison failed to request proper relief in a mandamus action and Ellison's vague allegations failed to show how defendants did not to perform certain ministerial acts. Therefore, we do not find that the trial court abused its discretion because no amendment filed by Ellison would have cured the defects in his petitions.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.