

2014 IL App (2d) 130253-U
Nos. 2-13-0253 & 2-13-0653 cons.
Order filed May 7, 2014

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
SECOND DISTRICT

ED FIALA, Individually and on behalf)	Appeal from the Circuit Court
of all other similarly situated persons who)	of Kane County.
reside within the Wasco Sanitary District,)	
)	
Plaintiff-Appellant,)	
)	
v.)	Nos. 10-L-0223
)	10-L-0285
WASCO SANITARY DISTRICT, ROBERT)	
SKIDMORE, RAUL BRIZUELA, GARY)	
SINDELAR, JERRY BOOSE, KENNETH)	
BLOOD, FOX MILL LTD PARTNERSHIP,)	
B&B ENTERPRISES, HUDSON)	
HARRISON, PATRICK GRIFFIN, and)	
CHARLES V. MUSCARELLO,)	Honorable
)	F. Keith Brown,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* Because plaintiff has sufficiently alleged an equitable interest in the sanitary district's monies of which, according to his allegations, defendants illegally deprived the sanitary district, the trial court erred in dismissing his complaint for lack of standing under the public trust doctrine. Therefore, we reversed and remanded for further proceedings.

¶ 2 In October 2012, plaintiff, Ed Fiala, filed his third amended complaint against defendants, Wasco Sanitary District (sanitary district), Robert Skidmore, Raul Brizuela, Gary Sindelar, Charles V. Muscarello, Patrick Griffin, Jeffrey Boose, Kenneth Blood, Fox Mill Limited Partnership (Fox Mill), B&B Enterprises (B&B), and Hudson Harrison (collectively, defendants). The gist of plaintiff's complaint was that defendants engaged in a scheme to defraud several million dollars from the sanitary district's taxpayers by diverting connection fees, which should have been paid to the sanitary district, but were instead paid to defendants B&B and Fox Mill. Defendants filed motions to dismiss plaintiff's complaint pursuant to sections 2-619(a)(1) and (a)(9) of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619(a)(1), (9) (West 2010)). The trial court dismissed plaintiff's complaint with respect to all defendants after concluding that plaintiff lacked standing. Plaintiff now appeals that order, contending that the trial court erred by finding that he lacked standing and further arguing that the trial court erred by finding that its dismissal was an adjudication on the merits with respect to him but not the sanitary district. For the following reasons, we reverse the trial court's dismissal with respect to standing and remand for further proceedings.

¶ 3 The pleadings reflect that plaintiff is a resident of the Village of Campton Hills and a homeowner within the Fox Mill subdivision. The sanitary district is a government entity established pursuant to the Sanitary District Act of 1936 (the Sanitary Act) (70 ILCS 2805/1 (West 2012)). The sanitary district is a municipal taxing body and provides water and sanitary sewer services to plaintiff. Defendants Brizuela, Skidmore, and Sindelar were trustees of the sanitary district, with Brizuela and Sindelar serving as trustees from 2006 through 2011 and Skidmore serving as a trustee from 2006 through the present. Defendant B&B and Fox Mill are entities that conduct business in Illinois. Defendant Muscarello served as legal counsel to the

sanitary district. Defendants Boose and Blood were officers of B&B and Fox Mill. Defendant Harrison is a developer who owned real property in Kane County.

¶ 4 According to plaintiff, defendants engaged in an illegal scheme to misdirect funds from the district to B&B and Fox Mill. The alleged scheme commenced in 1994, when the sanitary district entered into an annexation agreement with Fox Mill. Pursuant to the annexation agreement, the sanitary district would construct a wastewater treatment facility at Fox Mill's expense. However, since 1994, the sanitary district has reimbursed Fox Mill and B&B for the cost of building that facility by permitting Fox Mill and B&B to collect connection fees, even though those entities had no right to reimbursement.

¶ 5 In addition, in 2005, Harrison sought to annex into the sanitary district's area known as Norton Farms. The sanitary district initially denied his request, but Harrison renewed his application in 2008 and retained Griffin as his attorney. Griffin was the vice president of B&B and son-in-law to Blood, who owns B&B. Harrison agreed to pay \$2.65 million in exchange for the annexation and for receiving sufficient wastewater capacity for the homes in Norton Farms. The sanitary district approved the 2008 application. According to plaintiff, Harrison directly paid B&B for sanitary district property.

¶ 6 Plaintiff further alleged that defendants perpetrated this scheme through various fraudulent and illegal activities. Plaintiff claimed that Skidmore, Brizuela, and Sindelar, who were trustees for the sanitary district, had undisclosed financial or familial relationships with B&B. Plaintiff claimed that the various defendants filed false certifications and other false documentation concerning the sanitary district's wastewater capacity.

¶ 7 Plaintiff initially filed a complaint regarding this dispute in the United States District Court for the Northern District of Illinois, but voluntarily dismissed that case. Thereafter, plaintiff filed the current matter, which was removed back to federal court based on plaintiff's

allegation that defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (14 U.S.C. § 1961 *et seq.*) along with various claims under Illinois law. The federal court dismissed plaintiff's RICO claim, which resulted in the lawsuit being removed back to the state trial court.

¶ 8 Plaintiff's complaint, as amended, contained three counts. Count I sought declaratory relief under various theories grouped under the "Public Trust Doctrine," "Violation of Public Officer Prohibited Activities Act," "Violation of 70 ILCS 2805/3(d) of the Sanitary Act of 1936," "Removal of the [Sanitary District] Trustee [Skidmore] from Public Office," and "Accounting." This count alleged that plaintiff was a taxpayer and had an interest in the public utilities that the sanitary district provided, along with the connection fees the sanitary district charged to receive sewer and water services. Plaintiff alleged that the connection fees, along with the water and sewer services provided by the sanitary district, were public property held by the sanitary district for the public's benefit. Plaintiff alleged that defendants Skidmore, Brizuela, and Sindelar were elected officials and that each of those defendants voted on matters involving B&B even though they had either direct or indirect financial interests in B&B resulting from family ties. Plaintiff sought to remove Skidmore as a trustee and to request an accounting from the sanitary district and B&B.

¶ 9 Count II alleged common-law fraud against all defendants except the sanitary district. Plaintiff alleged that defendants perpetrated a scheme where the sanitary district would direct plaintiff and the public to wrongfully pay the sanitary district fees to B&B. Plaintiff alleged that defendants made false statements in executing this scheme, plaintiff and the public relied on those false statements, and defendants received plaintiff's property, *i.e.*, cash and connection permits. Count III alleged a civil conspiracy against all defendants except the sanitary district.

¶ 10 Defendants separately filed motions to dismiss pursuant to sections 2-619(a)(1) and (a)(9) of the Code. The trial court granted defendants' motions to dismiss. In doing so, the trial court found that "the essence" of plaintiff's allegations were that defendants, other than the sanitary district, "engaged in fraud, conspiracy, and self-dealing in violation of several Illinois [statutes] and the common law for their own personal (and that of their respective entities) interests, at the expense of [the sanitary district's] interests." The trial court concluded that plaintiff had not alleged "injury to a legally cognizable interest" or a "personal claim, status or right that is capable of being affected by the grant of such relief." With respect to standing, the trial court found that plaintiff failed to identify the public property in which he claimed an interest, which plaintiff claimed to be "the ability of [the sanitary district to process waste]." According to the trial court, "[w]hile [the sanitary district] has an interest in preserving its ability to process waste, that interest is unique to the [sanitary district] and is not public property in which a taxpayer such as [plaintiff] may claim an interest." The trial court concluded that, because plaintiff failed to sufficiently allege the existence of "property" in which he has an interest, the public trust doctrine did not afford him standing to bring a taxpayer lawsuit.

¶ 11 After the trial court amended its order for clarification, plaintiff timely appealed.

¶ 12 Plaintiff's first contention on appeal is that the trial court erred in dismissing his complaint for a lack of standing. In support of this contention, plaintiff argues that he has standing under the public trust doctrine because he is a taxpayer and has an interest in the sanitary district's property, which he defines as the sanitary district's ability to process waste and the money that was allegedly misdirected from the sanitary district's funds to B&B's private bank accounts. The defendants counter that "[s]tanding cannot be conferred simply because [plaintiff] claims an equitable interest in capacity, contract rights or 'stuff' which is not clearly

property even if there is a dollar amount a purchaser is willing to pay for the rights encompassed by the ‘stuff.’ ”

¶ 13 A motion to dismiss pursuant to section 2-619 of the Code admits the legal sufficiency of a complaint but raises defects, defenses, or other affirmative matters appearing on the face of the complaint or established by external submissions that defeat the action. 735 ILCS 5/2-619 (West 2012); *Zahl v. Kruppa*, 365 Ill. App. 3d 653, 657-58 (2006). A motion pursuant to section 2-619 admits all well-pleaded facts and reasonable inferences therefrom, and the motion should be granted only if the plaintiff can prove no set of facts that would support a cause of action. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 277-78 (2003). When ruling on a motion pursuant to section 2-619, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). A party may raise lack of standing as an affirmative matter under section 2-619(a). *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 739 (2008). A motion pursuant to section 2-619(a)(9) of the Code asserts the claim is “barred by other affirmative matter avoiding the legal effect of or defeating the claim.” 735 ILCS 5/2-619(a)(9) (West 2012). Our supreme court has explained the phrase “ ‘affirmative matter’ encompasses any defense other than a negation of the essential allegations of the plaintiff’s cause of action.” *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). This court reviews *de novo* a section 2-619 order of dismissal. *Id.* at 116.

¶ 14 Under the “public trust doctrine” taxpayers have an equitable interest in public property and therefore have standing to bring a common-law action when public property is allegedly being disposed of illegally. *Paepcke v. Public Building Comm’n of Chicago*, 46 Ill. 2d 330, 341 (1970). As our supreme court noted in *Paepcke*, “[t]o tell [taxpayers] that they must wait upon governmental action is often an effectual denial of the right for all time.” *Id.* For a taxpayer to

have standing to bring a common-law claim, however, he or she must make a claim that the alleged injury resulted from a public official's act. *County of Cook ex rel. Rifkin v. Bear Stearns & Co., Inc.*, 215 Ill. 2d 466 (2005). By definition, a taxpayer action is one brought by private persons:

“on behalf of themselves and as representatives of a class of taxpayers similarly situated within a taxing district or area, upon a ground which is common to all members of the class, and for the purpose of seeking relief from illegal or unauthorized acts of public bodies or public officials, which acts are injurious to their common interests as such taxpayers.” *Scachitti v. UBS Financial Services*, 215 Ill. 2d 484, 500 (2005).

Conversely, where the State is the “real party in interest,” *i.e.*, the party that has an actual and substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical interest in, or connection with, the case, individual taxpayers have no standing to bring a cause of action. *Lyon v. Ryan*, 201 Ill. 2d 529, 535 (2002).

¶ 15 Plaintiff relies on *Mueller v. City of Highland Park*, 166 Ill. App. 3d 114 (1988), in support of his argument that he has standing. In *Mueller*, the Village of Deerfield purchased water from Highland Park pursuant to a 25-year agreement at \$.67 per cubic feet. *Id.* at 116. Because the contract was set to expire on June 30, 1985, Deerfield and Highland Park began contract negotiations for a new contract in April 1985. Deerfield continued paying \$.67 per cubic feet for water until March 1986, when the parties reached a new agreement for Deerfield to pay \$.99 per cubic feet. *Id.* In February 1986, the plaintiff filed his lawsuit, claiming that he had standing as a taxpayer and citizen of Highland Park as a result of his equitable interest in the money due to Highland Park for the water it distributed to Deerfield from July 1, 1985, until he brought his lawsuit. *Id.* The plaintiff claimed that Deerfield agreed to pay the \$.99 rate during

that period. *Id.* The trial court found that the plaintiff had standing and ultimately entered a judgment against Deerfield. *Id.* at 117-18.

¶ 16 On appeal, this court affirmed the trial court's determination that the plaintiff had standing. Finding *Paepcke* controlling, we noted that the plaintiff claimed that he had an equitable interest in "all monies due and owing" for the water that Highland Park supplied to Deerfield as well as "all of Highland Park's water supply and service which [was] being illegally distributed without compensation." *Id.* at 118-19. We concluded that the plaintiff had "clearly identified the public property in which he claim[ed] an interest." *Id.* at 119.

¶ 17 We find *Mueller* analogous and its reasoning persuasive. We conclude that plaintiff has sufficiently alleged the property in which he has an equitable interest. Plaintiff alleged that the sanitary district was a taxing body that provides water and sanitary services, and further, that he was a taxpayer. Plaintiff alleged that the sanitary district's water and sewer services, along with the connection fees that it collected for those services, were public property held for the public's benefit. Like *Mueller*, in which the plaintiff claimed an equitable interest in money owed to Highland Park from selling its water, we believe that plaintiff has an equitable interest in the monies that the sanitary district was, according to his allegations, illegally deprived of by B&B collecting connection fees that belonged to the sanitary district. Further, as we read *Mueller*, the plaintiff also had an equitable interest Highland Park's "water supply *and service*" that was allegedly distributed in violation of a contract. (Emphasis added.) *Id.* We fail to see the distinction between the plaintiff in *Mueller* having an equitable property interest in Highland Park's water supply and service that was allegedly disposed of through noncompliance with a contract, and plaintiff's interest in the sanitary district's sanitation service illegally disposed through alleged fraud and conspiracy. Finally, plaintiff alleged that public officials, *i.e.*, Brizuela, Skidmore, and Sindelar, were trustees of the sanitary district. Thus, he alleged that his

injuries resulted from a public official's act. *Cf. Bear Sterns*, 215 Ill. 2d at 483 (holding that plaintiffs lacked standing because they did not claim that the alleged harm resulted from a public official's act).

¶ 18 Defendants attempt to distinguish this case from *Mueller* in various ways. The sanitary district emphasizes that plaintiff never alleged that it would be unable to process waste from plaintiff's home or that it would not receive fair compensation from processing such waste. The sanitary district further emphasizes that the value of water in *Mueller* was clear, whereas the value of the ability to process waste "is not so clear" and that plaintiff characterized the connection fees at issue as bribes "which would not have found way into the [the sanitary district's] coffers." Harrison argues that *Mueller* is distinguishable because the sanitary district's property in which plaintiff has claimed an interest was built with private funds, not public funds; plaintiff does not bring any claims against the sanitary district; plaintiff does not allege that sanitary district's property has been disposed of; and that plaintiff is attempting to bring a claim on behalf of a sanitary district as opposed to on behalf of a city or village.

¶ 19 We are not persuaded by defendants' attempts to distinguish *Mueller*. In *Mueller*, the plaintiff never alleged that Highland Park would be unable to provide water service, but only that Highland Park sold water to Deerfield at a price below what a contract required. We are also unaware of any case law holding that a plaintiff must be able to specify in the pleading the precise value of the public service in which the plaintiff claims an equitable interest to have standing. We believe that plaintiff is alleging that, absent fraud or the conspiracy, the connection fees would have been collected by the sanitary district, and therefore, would have ended up in its "coffers." In addition, plaintiff is claiming an equitable interest in the sanitary district's ability to process waste, similar to Highland Park's ability to provide water service. Further, as noted above, although plaintiff is not attempting to recover from the sanitary district,

he does make allegations against the sanitary district's trustees. Finally, as we read the public trust doctrine, a plaintiff does not need to bring a claim against a city or village so long as the plaintiff alleges that the injury resulted from a public official's act. *Bear Sterns*, 215 Ill. 2d at 483.

¶ 20 We find further support for our determination in *Egidi v. Town of Libertyville*, 218 Ill. App. 3d 596 (1991). In *Egidi*, the plaintiff brought a taxpayer action against Libertyville, challenging Libertyville's authority to purchase real property pursuant to the Township Open Space Act (Ill. Rev. Stat. 1987, ch. 139, par. 321 *et seq.*). *Egidi*, 218 Ill. App. 3d at 599. The plaintiff alleged that the acreage involved did not meet the statutory requirement. *Id.* The trial court granted summary judgment in the plaintiff's favor. *Id.* at 600.

¶ 21 On appeal, Libertyville argued that the plaintiff's complaint was inadequate because it failed to allege that the public suffered harm resulting from Libertyville's conduct. *Id.* at 601. This court rejected that argument, noting that taxpayers have an equitable right to sue to protect their interests in public funds. *Id.* The court noted that "the right of a taxpayer to bring suit is based upon misappropriation of general public funds and flows from the proposition that the taxpayer has equitable ownership of the funds and is liable to replenish the treasury in the event of misappropriation." *Id.* The court emphasized that the plaintiff had identified the injury as the wrongful expenditure of funds to acquire real estate and that "[s]ince it is tax revenue that is of concern here [citation], misappropriation and wrongful expenditure of that revenue are direct and blatant assaults on the taxpayers." *Id.* The court concluded:

"The taxpayers furnish the money in the first place and must replace it if necessary. The taxpayers' injury is the misuse and potential loss of their tax money. We find the complaint sustainable." *Id.*

¶ 22 Although the opinion in *Egidi* did not specifically address standing under the public trust doctrine, its reasoning is instructive here. While plaintiff's third amended complaint is not a model of clarity, plaintiff specifically alleged that he is a taxpayer of the sanitary district and that the connection fees collected by B&B and Fox Mill should have gone to the sanitary district "to pay for the costs associated with running and improving services provided by [the sanitary district]." Thus, like *Egidi*, the essence of plaintiff's alleged injury is the misuse and potential loss of taxpayer money. See *id.*

¶ 23 In sum, and contrary to the trial court's determination, the essence of plaintiff's complaint is that, through defendants' fraudulent scheme, the sanitary district was deprived of money that it should have collected through connection fees. We believe that, similar to *Mueller*, plaintiff has sufficiently alleged a property interest in the sanitary district's water and sewage service, which necessarily includes money belonging to the sanitary district that was allegedly disposed of illegally through fraud or conspiracy.

¶ 24 Because we conclude that plaintiff has standing under the public trust doctrine to bring a common law action against defendants, we need not address the remaining issue of whether the trial court's dismissal for a lack of standing was an adjudication on the merits pursuant to Supreme Court Rule 273 (eff. Jan. 1, 1967). See *In re John Doe Investigation*, 2011 IL App (2d) 091355, ¶ 9 (noting that a reviewing court will not issue advisory opinions to set precedent or guide future litigation). Nonetheless, we note that plaintiff's complaint is not barred by the doctrine of *res judicata* as a result of the federal court dismissing the RICO claim. See *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 392 (2001) (holding that state law claims raised in federal court were not barred by *res judicata* after that court dismissed the federal cause of action and declined to exercise supplemental jurisdiction over the state law claims). We also take this opportunity to note that plaintiff did not attempt to bring a claim pursuant to the Recovery of

Fraudulently Obtained Public Funds Act (735 ILCS 5/20-104 (West 2012)), and we are uncertain as to why the trial court considered whether defendant had standing under that statutory provision. For the foregoing reasons, we reverse the trial court's dismissal of plaintiff's complaint and remand for further proceedings.

¶ 25 Reversed and remanded.