2014 IL App (4th) 130208-U

NOS. 4-13-0208, 4-13-0213 cons.

FILED
March 26, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROBBY L. MORSE, Plaintiff-Appellee, v. (No. 4-13-0208) THE MACON COUNTY STATE'S ATTORNEY'S OFFICE, Defendant, and THE DEPARTMENT OF STATE POLICE, Intervenor-Appellant.	)	Appeal from Circuit Court of Macon County No. 12MR293
RICKY L. MORSE, Plaintiff-Appellee, v. (No. 4-13-0213) THE MACON COUNTY STATE'S ATTORNEY'S OFFICE, Defendant, and THE DEPARTMENT OF STATE POLICE, Intervenor-Appellant.	)	No. 12MR292 Honorable Albert G. Webber, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court applied incorrect legal criteria in addressing the Department of State Police's motions to intervene in proceedings under section 10 of the Firearm Owners Identification Card Act (430 ILCS 65/10 (West 2012)). We reverse and remand with directions that the court consider the parties' arguments based on the requirements set forth in section 2-408(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-408(a)(2) (West 2012)) and exercise its discretion only to determine

whether the Department's applications were timely, its interests were adequately represented, and it was bound by an order or judgment in the underlying action.

¶ 2 The Department of State Police (Department) appeals the circuit court's denials of its motions to intervene in separate proceedings brought by plaintiffs, Robby L. Morse (case No. 12-MR-293) and Ricky L. Morse (case No. 12-MR-292), pursuant to section 10 of the Firearm Owners Identification Card Act (FOID Card Act) (430 ILCS 65/10 (West 2012)). The matters have been consolidated on appeal. We reverse and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 The record shows plaintiffs are brothers. They applied separately to the Department for FOID cards and were both denied.

¶ 5 On May 14, 2012, plaintiffs filed separate petitions in the circuit court, naming the Macon County State's Attorney's Office as defendant and seeking orders authorizing the Department to issue FOID cards pursuant to section 10 of the FOID Card Act (430 ILCS 65/10 (West 2012)). Both plaintiffs acknowledged having (1) been convicted in federal court in 1993 of conspiracy to distribute cocaine and (2) prior Macon County theft convictions (case No. 89-CM-1278 for Robby and case No. 91-CF-509 for Ricky). However, they both denied ever having been convicted of a forcible felony or any other criminal offense. Plaintiffs alleged they sought FOID cards "to be able to take part in the activities of hunting and shooting skeet and trap with *** family." Further, each plaintiff asserted (1) his criminal history and reputation were such that he would not be likely to act in a manner dangerous to the public safety, (2) substantial justice had not been done by denying his application for a FOID card, and (3) granting his requested relief would not be contrary to the public interest.

¶ 6 On June 15, 2012, the circuit court conducted a hearing on plaintiffs' petitions.

Plaintiffs presented testimony from two witnesses and each testified on his own behalf. At the conclusion of the hearing, the court granted the petitions and entered orders, directing the Department to issue FOID cards to plaintiffs.

¶ 7 On November 1, 2012, the Department filed motions to intervene in each case pursuant to section 2-408(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-408(a)(2) (West 2012)). It alleged it was not a party to either action but had been bound by the circuit court's orders, directing it to issue plaintiffs FOID cards. The Department also alleged the representation of its interests by existing parties was inadequate. It filed memorandums of law in support of its motions to intervene, arguing as follows:

> "Movant should be permitted to intervene in this matter. As the issuer of FOID cards, *** Movant has a direct interest in the application of [the circuit court's] June 15, 2012, Order. Moreover, Movant's interests were not represented at any stage of the proceedings in this matter. As such, and because it is bound by the Court's Order, Movant should be permitted to intervene ***."

¶ 8 The Department further asserted that, if permitted to intervene, it intended to file petitions for relief from judgment pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)) and supporting memorandums of law. The Department attached those proposed documents to each motion. In connection with Robby's case, it alleged Robby had been denied a FOID card based on his federal felony conviction for conspiracy to distribute cocaine. The Department asserted Robby was prohibited from possessing firearms under both Illinois and federal law. Further, it asserted Robby never filed an appeal of the denial of his FOID card

application with the Department's Director as required by the FOID Card Act. It maintained the circuit court's June 2012 order was, therefore, void for lack of jurisdiction.

¶ 9 In connection with Ricky's case, the Department's petition for relief from judgment and memorandum of law alleged Ricky had been denied a FOID card based upon a 1983 conviction for burglary. It also noted Ricky's federal felony conviction for conspiracy to distribute cocaine. The Department alleged the issuance of a FOID card to Ricky would violate state and federal law and also contravene both the Department's law enforcement mission and public policy by assisting Ricky in knowingly violating federal law if he were to possess a firearm.

¶ 10 Plaintiffs objected to the Department's motions to intervene. They asserted the FOID Card Act did not give the Department the absolute right to intervene, they complied with the Act by serving the State's Attorney's office, and the State's Attorney's office adequately represented the Department's rights.

¶ 11 On February 7, 2013, the circuit court conducted a hearing on the Department's motions to intervene. Initially, the State's Attorney's office asserted it had no objection to intervention by the Department. The parties then presented argument to the court. The Department argued its interests were not adequately represented by the State's Attorney's office because that office was not the entity "charged with issuing FOID cards and understanding what the specific prohibitions are that would lead [the Department] to deny an application." The following colloquy occurred between the court and the Department's counsel, Assistant Attorney General Erik Lewis:

"THE COURT: [W]hat you're telling me is that because

the state police issues FOID cards, you don't believe the state's attorneys adequately represent the state police, and so in every case like this, what you're doing is essentially engrafting on the statute the requirement that the state police and/or the attorney general be made a part of the proceeding.

MR. LEWIS: Well, that's what happens frequently, Your Honor; and, yes, we would argue that we should be a party to these proceedings because our interests are not being adequately represented.

THE COURT: Isn't your argument addressed best to the legislature?

MR. LEWIS: I do think the legislature probably does need to fix that, but I also think that we do have a right, because our interests are not being represented, that the Court under Section 2-408 allow us to intervene."

¶ 12 Following the parties' arguments, the circuit court denied the Department's motions to intervene. In explaining its ruling, the court stated as follows:

"I guess, Mr. Lewis, what I think is that you're asking me to add some additional requirements to the statute which the legislature chose not to put in there. The legislature only said that the state's attorney shall be notified of proceedings such as this, did not say the Illinois State Police, did not say notify the attorney general.

> We assume the legislature knows because it wrote the other laws that the state police do issue FOID cards, *but the legislature did not see fit to involve the state police in a proceeding like this, and so I think with that, intervening is discretionary*. I think the legislature has made the determination as how the interests of the people are being protected in a case like this, and so *on that basis,* I will deny the motion[s] to intervene." (Emphases added.)

¶ 13 These consolidated appeals followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, the Department argues the circuit court abused its discretion by denying its motions to intervene. It contends its motions should have been granted because, pursuant to section 2-408(a)(2) of the Code (735 ILCS 5/2-408(a)(2) (West 2012)), it had a right to intervene since it was bound by the court's June 2012 orders and its interests were not adequately represented at the hearing that resulted in those orders. The Department further maintains the court failed to consider relevant factors when deciding its motions to intervene. Finally, it argues the relief it sought, vacation of the court's June 2012 orders, should have been granted because the court (1) lacked authority to enter the June 2012 orders where plaintiffs failed to first exhaust their administrative remedies and (2) failed to make the findings required by section 10(c) of the FOID Card Act (430 ILCS 65/10(c) (West 2012)) prior to granting plaintiff's petitions.

¶ 16 With respect to intervention as of right, the Code provides as follows:

> "Upon timely application anyone shall be permitted as of right to

> intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer." 735 ILCS 5/2-408(a) (West 2012).

¶ 17 "Intervention as of right is distinguishable from permissive intervention insofar as the trial court's exercise of discretion is concerned." *Citicorp Savings of Illinois v. First Chicago Trust Co. of Illinois*, 269 Ill. App. 3d 293, 298, 645 N.E.2d 1038, 1043 (1995). When intervention is asserted as a matter of right pursuant to section 2-408(a)(2), the trial court's discretion is limited to determining timeliness of the motion to intervene, inadequacy of representation, and whether the movant will or may be bound by an order or judgment in the underlying action. 735 ILCS 5/2-408(a)(2) (West 2010); see also *City of Chicago v. John Hancock Mutual Life Insurance Co.*, 127 Ill. App. 3d 140, 144, 468 N.E.2d 428, 431 (1984) (With respect to intervention as of right "the trial court's discretion is limited to determining timeliness, inadequacy of representation and sufficiency of interest."). "The decision to allow or deny intervention, whether permissively or as of right, is a matter of sound judicial discretion that will not be reversed absent an abuse of that discretion." *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 58, 779 N.E.2d 875, 888 (2002). "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the

same view." *Rosen v. Ingersoll-Rand Co.*, 372 Ill. App. 3d 440, 448, 865 N.E.2d 451, 458 (2007). "An application of impermissible legal criteria also justifies reversal." *Rosen*, 372 Ill. App. at 448, 865 N.E.2d at 458.

¶ 18 Additionally, section 2-408(e) provides that "[a] person desiring to intervene shall present a petition setting forth the grounds for intervention, accompanied by the initial pleading or motion which he or she proposes to file." 735 ILCS 5/2-408(e) (West 2012). A party seeking intervention is "required to allege specific facts that demonstrate that he has a right to intervene." *Warbucks Investments Limited Partnership v. Rosewell*, 241 Ill. App. 3d 814, 817, 609 N.E.2d 832, 834 (1993). "Allegations that are conclusory in nature and merely recite statutory language are insufficient to meet the requirements of section 2-408." *Warbucks*, 241 Ill. App. 3d at 817, 609 N.E.2d at 834.

¶ 19 After reviewing the record, we find the circuit court applied an incorrect legal standard for analyzing the Department's motions to intervene and failed to address the particular requirements set forth in section 2-408(a)(2). Reversal of the court's orders is warranted on that basis.

¶ 20 In denying the Department's motions to intervene, the circuit court stated that, because "the legislature did not see fit to involve the state police in [proceedings pursuant to section 10 of the FOID Card Act] ***, intervening is discretionary." However, intervention under section 2-408(a)(2) "shall be permitted as of right" when the requirements of that section have been met. 735 ILCS 5/2-408(a)(2) (West 2012). In such circumstances, the court may only exercise discretion in determining timeliness of the motion to intervene, whether the movant's interests have not been adequately represented, and whether the movant is bound by an order or

judgment in the proceedings. Where those requirements have been met, the court has no discretion and must allow intervention. Here, the record, and specifically the court's comments, indicate it did not confine its analysis to a consideration of the above three requirements but instead mistakenly determined it had discretion to permit or deny intervention because the FOID Card Act does not provide for the Department's involvement in section 10 proceedings before the circuit court.

¶ 21 In reaching this conclusion, we note the Department's motions and argument before the circuit court were flawed and likely hindered the court's resolution of the matter. First, the Department's motions contained conclusory allegations and merely recited statutory language without setting forth specific facts which would entitle it to intervention. In particular, the Department's motions and memorandums of law in support of the motions stated only that representation of its interests by existing parties was inadequate, but failed to provide specific examples of alleged inadequacies. Second, at the hearing on its motions, the Department argued only that it was inadequately represented because, pursuant to the FOID Card Act, it was the entity responsible for issuing FOID cards. It did not contend, as it does now on appeal, that its interests were not adequately represented because no party alerted the court to plaintiffs' failures to exhaust administrative remedies or to the fact that it was illegal under federal law for plaintiffs to possess firearms. See *Joyce v. Explosives Technologies International, Inc.*, 253 Ill. App. 3d 613, 617, 625 N.E.2d 446, 450 (1993) (One consideration affecting the adequacy of existing representation is the existing parties' vigor in representing the potential intervenor's interests.).

¶ 22 Nevertheless, despite the deficiencies with the Department's motions and arguments before the court, under the circumstances presented, we cannot ignore the circuit

court's failure to confine its consideration to the requirements of section 2-408(a)(2). The record shows the Department's filings clearly asserted it was seeking intervention pursuant to section 2-408(a)(2) of the Code, providing for intervention as of right. Its motions, memorandums of law, and arguments before the court referenced the relevant statutory language and set forth the requirements of that section. Further, as required by section 2-408(e), the Department attached proposed petitions for relief from judgment to its motions to intervene, which set forth issues relating to plaintiffs' failure to exhaust administrative remedies and their federal firearm disabilities. We note a movant's section 2-408(e) filings assist the trial court in "assess[ing] the appropriateness of the petition to intervene." *Soyland Power Cooperative v. Illinois Power Co.*, 213 Ill. App. 3d 916, 920, 572 N.E.2d 462, 465 (1991). Thus, the court had information before it from which it could have considered the Department's motions under the appropriate legal analysis.

¶ 23 As the circuit failed to use appropriate legal criteria in addressing the Department's motions to intervene, reversal is warranted. We remand with directions that the court consider the parties' arguments based on the requirements set forth in section 2-408(a)(2) of the Code and exercise its discretion only to determine whether the Department's applications were timely, its interests were not adequately represented, and it was bound by an order or judgment in the underlying proceedings.

¶ 24 Finally, we address two cases cited by the Department on appeal. First, the Department cites *In re Detention of Hayes*, 321 Ill. App. 3d 178, 190, 747 N.E.2d 444, 455 (2001), for the proposition that a state agency has nonparty standing to appeal a circuit court order that exceeds the court's statutory authority. The Department asserts the circuit court in this

case exceeded its statutory authority by ordering it to issue FOID cards to plaintiffs when they failed to exhaust their administrative remedies under the FOID Card Act. Here, however, unlike in *Hayes*, the Department is appealing the circuit court's denials of motions to intervene in the underlying proceedings and not final orders of the circuit court which it contends were entered without statutory authority. In fact, no timely, direct appeal was ever taken from the court's June 2012 orders, directing the Department to issue plaintiffs FOID cards. We find *Hayes* has no application to the issues presented by this appeal, which concern only the correctness of the court's denial of the Department's motions to intervene.

¶ 25 Second, both on appeal and before the circuit court, the Department cited *Hanson v. De Kalb County State's Attorney's Office*, 391 Ill. App. 3d 902, 903-04, 909 N.E.2d 903, 905 (2009), wherein the circuit court entered an order under section 10 of the FOID Card Act, directing the Department to issue a FOID card to the plaintiff and the Department filed a motion to vacate 32 days after the court's order, which the court denied. On appeal, the Second District stated the Department's motion was effectively a section 2-1401 petition. *Hanson*, 391 Ill. App. 3d at 904, 909 N.E.2d at 905. The appellate court also concluded the Department had standing to appeal the ruling on its own section 2-1401 petition. *Hanson*, 391 Ill. App. 3d at 907, 909 N.E.2d at 907. However, in so holding, it noted "the parties assume[d] that the Department *was* a party in the trial court" and did not "dispute whether the Department had standing to bring the section 2-1401 petition in the first place." (Emphasis in original.) *Hanson*, 391 Ill. App. 3d at 906, 909 N.E.2d at 907.

¶ 26 Again, *Hanson* has no application and is distinguishable from the facts of the present case. This case involves the denial of the Department's motions to intervene whereas

Hanson concerned an appeal from the denial of the Department's section 2-1401 petition. The section 2-1401 petitions in these consolidated cases were never actually filed and only attached to the Department's motions to intervene as proposed filings. Moreover, in *Hanson*, the parties did not dispute the Department's standing to file the section 2-1401 petition in the underlying proceedings or on appeal. Here, however, the Department's right to intervene in the underlying proceedings was contested. To the extent the Department suggests (or suggested before the circuit court) that *Hanson* permits resolution of its proposed section 2-1401 petitions in its favor at this stage of the proceedings, we disagree.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we reverse the circuit court's judgment and remand with directions that it consider the parties' arguments based on the requirements set forth in section 2-408(a)(2) of the Code and exercise its discretion only to determine whether the Department's applications were timely, its interests were adequately represented, and it was bound by an order or judgment in the proceedings.

¶ 29 Reversed and remanded with directions.