

Nos. 1-10-1212 & 1-10-1375 (Cons.)

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
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	
IRIT GUTMAN,)	04 CR 2262
)	
Defendant-Appellant,)	
)	
and)	
)	
YORAM GUTMAN,)	Honorable
)	James B. Linn,
Third-Party Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court abused its discretion when it dismissed a petition as a sanction for the petitioner's failure to appear, when the petitioner followed his attorney's advice not to appear and the attorney reasonably believed that the trial court would not have time to hear testimony from the petitioner at the scheduled hearing. A petition states an adequate

ground for relief from a judgment when the petitioner alleges that the plaintiff never properly included in any pleading allegations that could support the award of the relief the court awarded in the judgment. A response to a motion to dismiss a complaint does not qualify as a pleading which can support the award of a judgment on a cause of action never stated in the complaint.

¶ 2 Following the conviction of Irit Gutman for vendor fraud, the State petitioned for forfeiture of several properties Irit allegedly owned. Irit moved to dismiss the petition insofar as the State sought forfeiture of a specific property in Lake County, Illinois, because she did not own the property. She had quitclaimed the property to her son, Yoram Gutman. The State, in a response to Irit's motion, alleged facts that suggested that Irit had transferred the property fraudulently. Yoram filed a motion in which he suggested both procedural and substantive grounds for denying the relief the State requested. The trial court granted Yoram's request for an evidentiary hearing on the substantive allegations of his motion. On the day set for the hearing, Yoram's attorney told Yoram not to appear, because the attorney believed another order in the criminal case against Irit mooted Yoram's motion. The trial court dismissed Yoram's motion and granted the State an order that deprived Yoram of his property, as a sanction for Yoram's failure to appear. Irit filed a notice of appeal, but only Yoram briefed the appeal.

¶ 3 On appeal, we find that Yoram did not act with deliberate contempt for the court's order, and therefore the court abused its discretion when it imposed such a harsh sanction. We also find that the State did not adequately allege, in any pleading, grounds for ruling that Irit fraudulently transferred the property at issue to Yoram. Accordingly, we reverse the trial court's judgment and remand the case for further proceedings.

¶ 4

BACKGROUND

¶ 5

Irit and her business partner, Ilya Lubenskiy, formed Universal Public Transportation Inc. (UPT), a medical transportation service, and UPT began operating in January 2001. By February 2002, UPT had billed the State of Illinois about \$6 million for its services, and the State had paid UPT about \$3 million in response to the bills. Irit and Lubenskiy used their income from UPT to purchase several parcels of real estate. In December 2002, Irit purchased a property located in Lake County, Illinois. She quitclaimed the property to her son, Yoram, in July 2003.

¶ 6

In January 2004, the State indicted Irit for vendor fraud, theft, and money laundering. The State sought to prevent Irit from selling or transferring ownership of the real estate she purchased after February 2002. In May 2004, the trial court entered a temporary restraining order barring Irit from transferring ownership of six listed properties, including the Lake County property. Irit did not inform the court that she had already given that property to Yoram.

¶ 7

Following a bench trial, the trial court found Irit guilty of vendor fraud, theft, and money laundering. The court sentenced her to 66 months in prison and to payment of \$1.2 million in restitution. Irit appealed from the convictions and sentence.

¶ 8

The State petitioned for civil forfeiture of the six properties listed in the May 2004 temporary restraining order. Irit moved to dismiss the petition insofar as the State sought forfeiture of the Lake County property, because Yoram, not Irit, owned that property. In its response to the motion to dismiss, the State for the first time invoked the Uniform Fraudulent

Transfer Act (Act) (740 ILCS 160/1 *et seq.* (West 2002)), arguing that the court should invalidate the transfer of the Lake County property to Yoram. Although the State made several new allegations of fact in its response to Irit's motion, it never amended its petition or its complaint to incorporate the new allegations of fact. The court did not notify Yoram of the proceedings on the motion to dismiss, nor did the court notify Yoram about the petition for forfeiture to the State of the Lake County property.

¶ 9 The court denied Irit's motion to dismiss and held an evidentiary hearing on the petition for forfeiture. At the conclusion of the hearing the court said:

"[R]egarding the [Lake County] property, I find that this was indeed a fraudulent conveyance ***.

I also find that before any seizures can take place on that conveyance, I agree that *** Yor[am] Gutman *** is entitled to notice and to have a chance to be heard. ***

So the finding of the property being a fraudulent conveyance is made without prejudice ***.

So it's up to the government to make notice. *** [I]f somebody appears, then we'll deal with that."

¶ 10 In November 2009, Yoram filed a "Motion to Vacate Judgment of Forfeiture," although the court at that time had not entered a judgment of forfeiture. In the motion,

Yoram raised both procedural and substantive grounds for not granting the State a forfeiture of the Lake County property. At a proceeding in January 2010, Yoram's attorney said,

"I think that *** the motion as it stands now *** is a procedural motion to vacate ***. I don't really think there is a need for an evidentiary hearing on that. ***

I think the appropriate thing to do, however, is to set an evidentiary hearing for the substantive issue here ***. I think we should set that date so we can get Mr. Gutman here."

The court set the matter for an evidentiary hearing on April 1, 2010.

¶ 11 On March 31, 2010, the day before the scheduled hearing, this court handed down its decision on Irit's appeal from her convictions and sentences on the charges of vendor fraud, theft and money laundering. We affirmed the convictions for vendor fraud and theft, but we reversed the conviction for money laundering, and we remanded the case for resentencing. At the hearing on April 1, 2010, Yoram's attorney told the court that he had consulted with Irit's attorney and they concluded that, because this court vacated the conviction for money laundering and remanded for resentencing, the trial court may not have authority to order forfeiture of any of Irit's properties. Because he did not believe the court could proceed to the substantive issues he raised in the motion to vacate the forfeiture, at least not before the court resolved all issues concerning the effect of the appellate court's order, counsel told Yoram that he did not need to appear for the scheduled hearing.

¶ 12 In court, counsel explained, "I am not going to present evidence on a hearing about a forfeiture if I don't know that there has been a forfeiture. *** I don't know if they can uphold the forfeiture without a conviction." Counsel sought a hearing on the effect of the appellate court's decision, or a hearing on his procedural motion to vacate, for which he would not need to present any evidence.

¶ 13 The court said,

"We are not going to have a hearing. Your application is going to be dismissed with prejudice. You can't do that on a date set for hearing, just decide not to show up.

* * *

If [Gutman's procedural motion] were to be denied, then what? Then you would ask for a continuance when your witness is here and available and you told him not to come?

* * *

*** Petitioner declines to participate in an evidentiary hearing, although *** it was at least certainly worthy of a hearing and consideration. If he doesn't want to participate, his petition is dismissed with prejudice."

¶ 14 The court entered an order declaring that the Lake County property constituted contraband subject to civil forfeiture as a penalty for vendor fraud, under section 8A-7 of the Public Aid Code (305 ILCS 5/8A-7 (West 2000)). Thus, the court implicitly held that the

conveyance to Yoram counted as a fraudulent transfer under the Act. The court executed a judicial deed that conveyed the property to the Illinois State Police, with authority to sell the property.

¶ 15 Irit filed a notice of appeal from the judgment. Only Yoram has briefed the appeal.

¶ 16 ANALYSIS

¶ 17 Sanction for Failure to Appear

¶ 18 Yoram argues that we should reverse the trial court's decision because the State failed to plead facts showing that Irit fraudulently conveyed the Lake County property to Yoram. The State answers that we need not address that issue, because the court properly dismissed Yoram's petition as a sanction for his failure to appear at the hearing scheduled for April 1, 2010.

¶ 19 The trial court has inherent authority to dismiss with prejudice a cause of action or a claim for relief as a sanction for a violation of a court order. *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 65 (1995). We will not reverse the imposition of a sanction unless the trial court abused its discretion. *Sander*, 166 Ill. 2d at 67. The *Sander* court explained the circumstances in which a trial court should impose such a sanction:

"Dismissal of a cause of action or sanctions which result in a default judgment are drastic sanctions and should only be employed when it appears that all other enforcement efforts of the court have failed to advance the litigation. [Citations.] The purpose of imposing sanctions is to coerce compliance with court rules and orders, not to punish the dilatory party. [Citations.] Dismissal of a cause

of action for failure to abide by court orders is justified only when the party dismissed has shown a deliberate and contumacious disregard for the court's authority." *Sander*, 166 Ill. 2d at 67.

¶ 20 Here, Yoram's counsel found out on March 31, 2010, that this court had vacated Irit's conviction for money laundering and remanded the case for resentencing on the other convictions. The trial court had scheduled an evidentiary hearing in the civil forfeiture proceeding for the following day, so Yoram's attorney had little time to decide whether he needed his client to appear for the hearing. Because counsel expected the court to resolve procedural issues concerning the effect of the appellate court's order, counsel told Yoram that he did not need to appear.

¶ 21 While counsel's advice appears erroneous, we cannot say that Yoram's failure to appear one time based on counsel's advice shows deliberate contempt and contumacious disregard for the court's authority. We believe that a lesser sanction would have appropriately protected the court's authority. For example, the court could have heard argument on the procedural issues first, and if the court found Yoram's arguments on those issues insufficient to warrant relief, the court could then have proceeded to the evidentiary hearing, or continued the proceedings for one day. Or the court could have required Yoram's attorney to pay attorney fees and costs for the time lost due to counsel's mistaken assessment of the need for his client to appear. See *Perry v. Minor*, 319 Ill. App. 3d 703, 713 (2001). We find that the trial court abused its discretion when it dismissed Yoram's motion to vacate the judgment of forfeiture as a sanction for Yoram's failure to appear one time in court. See

Blakey v. Gilbane Building Corp., 303 Ill. App. 3d 872, 877-80 (1999); *White v. Henrotin Hospital Corp.*, 78 Ill. App. 3d 1025, 1030 (1979).

¶ 22 Adequacy of Petition to Vacate Forfeiture

¶ 23 The State argues that we should affirm the judgment of forfeiture because Yoram has not shown sufficient grounds for vacating the forfeiture order. The trial court did not rule on any of Yoram's arguments for vacating the forfeiture order, so we will affirm on this basis only if the State proves, as a matter of law, that Yoram has not stated an adequate basis for the relief he seeks. See *Landau v. CNA Financial Corp.* 381 Ill. App. 3d 61, 63 (2008).

¶ 24 Yoram argues that we should reverse the judgment because the State never adequately pled a cause of action for voiding his quitclaim deed as a fraudulent transfer. Our case law supports Yoram's position. In general, the court cannot afford a party relief, despite the presence of evidence supporting such relief, without a corresponding pleading. *Tembrina v. Simos*, 208 Ill. App. 3d 652, 656 (1991). In *In re J.B.*, 312 Ill. App. 3d 1140 (2000), the appellate court elaborated:

"In civil proceedings, it is well settled that a party may not succeed on a theory that is not contained in the party's complaint. [Citation.] Any proof presented to the court that is not supported by proper pleadings is as defective as pleading a claim that is not supported by proof. [Citation.] Thus, a party can only win the case according to the case the party has presented in the pleadings." *J.B.*, 312 Ill. App. 3d at 1143.

¶ 25 The court in *William J. Templeman Co. v. Liberty Mutual Insurance Co.*, 316 Ill. App. 3d 379, 388 (2000), applied the principle articulated in *J.B.* In *Templeman*, one party filed a motion for sanctions in which it asserted facts that might support an award of relief for malicious prosecution. However, that party never alleged those facts in a proper pleading for malicious prosecution. The appellate court held that the trial court lacked jurisdiction to award relief for malicious prosecution in the absence of a proper pleading for that relief. *Templeman*, 316 Ill. App. 3d at 388. Thus, under the principle stated in *Tembrina, J.B.*, and *Templeman*, the trial court should not have declared that Irit transferred the property to Yoram fraudulently unless the State filed a pleading which properly stated a cause of action for declaring the transfer fraudulent.

¶ 26 Section 8 of the UFTA provides, "In an action for relief against a transfer or obligation under this Act, a creditor *** may obtain *** avoidance of the transfer *** to the extent necessary to satisfy the creditor's claim." 740 ILCS 160/8 (West 2002). "[A] party is required to allege the elements contained in the Fraudulent Transfer Act to properly plead a fraudulent transfer claim." *Rush University Medical Center v. Sessions*, 2011 Ill. App. (1st) 101136, ¶33. Thus, to obtain an order voiding a transfer of property as fraudulent, a plaintiff must plead and prove the elements stated in the UFTA.

¶ 27 In the circumstances of this case, the State needed to plead and prove that:

"the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

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(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

* * *

(B) *** believed or reasonably should have believed that he would incur[] debts beyond his ability to pay as they became due." 740 ILCS 160/5(a)(1), (a)(2) (West 2002).

¶ 28 Here, the State does not contend that its petition to declare a forfeiture of Irit's properties included allegations of the elements necessary for a cause of action for fraudulent transfer. Instead, the State points to its response to Irit's motion to dismiss the petition for forfeiture, claiming that it included all necessary allegations in that document.

¶ 29 A motion to dismiss a complaint does not count as a pleading. *Firkus v. Firkus*, 200 Ill. App. 3d 982, 987-88 (1990); *Opalka v. Yellen*, 14 Ill. App. 3d 779, 781 (1973). One court held that a motion for a preliminary injunction did not require verification, even though all pleadings subsequent to the complaint in the case required verification, because the motion did not constitute a subsequent pleading. *Interstate Material Corp. v. City of Chicago*, 150 Ill. App. 3d 944, 958 (1986). The State cites us no case in which a response to a motion to dismiss counted as a pleading, and our research uncovered no such case. Thus, the State never included in its pleadings any of the allegations necessary for a finding of a fraudulent transfer. Accordingly, we agree with Yoram that the State never properly pled a cause of action to declare void, as fraudulent, the transfer of the Lake County property

to Yoram. In the absence of a pleading containing the necessary allegations, we find that the trial court should not have granted the State this relief.

¶ 30 The State points out that it could have moved to amend its pleadings at any time, even after judgment, to conform to the proofs it presented. See 735 ILCS 5/2-616(c) (West 2008); *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). However, the State may do so only "upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(c) (West 2008). The State never moved to amend its pleadings to include the allegations needed as a basis for the court's order declaring fraudulent the transfer of property to Yoram.

¶ 31 CONCLUSION

¶ 32 In this case we find that Yoram did not act maliciously or with a deliberate and contumacious disregard of the court's authority when he followed his counsel's erroneous advice and failed to appear in court one time for a hearing. Therefore, we find that the court abused its discretion when it dismissed Yoram's petition as a sanction for failing to appear. We further find that Yoram's petition states an adequate ground for relief because he correctly pointed out that the State never pled a cause of action to declare void, as fraudulent, the transfer of the Lake County property to him. Accordingly, we reverse and remand for further proceedings in accord with this order.

¶ 33 Reversed and remanded.