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No. 3--09--0585

Order filed February 15, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

ERIC WALKER,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellant,	)	Will County, Illinois,
	)	
v.	)	No. 07--L--668
	)	
CITY OF JOLIET,	)	Honorable
	)	Edward P. Petka,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justice Wright concurred in the judgment.  
Justice Holdridge dissented.

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**ORDER**

*Held:* The trial court's dismissal of the plaintiff's petition for relief from judgment is reversed. The trial court abused its discretion by dismissing the complaint for the sole reason that the imprisoned plaintiff failed to appear without any consideration as to the expense, security, or logistics of accommodating an appearance or contemplating whether an alternative to a personal appearance was viable.

The plaintiff, Eric Walker, filed a *pro se* negligence complaint against the defendant, the City of Joliet. The trial court dismissed the complaint for want of prosecution (DWP). The

plaintiff filed a petition for relief from judgment (735 ILCS 5/2--1401 (West 2008)), which was stricken. On appeal, the plaintiff argues that the trial court abused its discretion by dismissing his complaint. We reverse and remand.

#### FACTS

The plaintiff filed a *pro se* complaint alleging negligence on the part of the defendant in that on January 13, 2007, he slipped on an accumulation of ice on the defendant's property and sustained injuries. The plaintiff filed the complaint on October 4, 2007, at which time he was serving a six-year prison sentence in an unrelated matter.

On January 24, 2008, the trial court's docket entry indicated:

"The Court is advised the Petitioner has failed to return the completed summons which was provided by the Circuit Clerk's office. On Court's own motion, cause is dismissed for want of prosecution."

On February 1, 2008, the plaintiff placed in the prison mail system a motion to reinstate the case, a request for a blank summons form, and a petition for writ of *habeas corpus* indicating that he was in prison and requesting to be brought before the court on the next hearing date.

On March 27, 2008, the summons and complaint were served on the defendant's city clerk. On April 11, 2008, the court's

docket entry indicated:

"No one appears for the plaintiff or defendant. Cause comes on Plaintiff's motion to reinstate. The Court has received in chambers correspondence from the plaintiff regarding the motion for reinstatement. The defendant, City of Joliet, was served by summons. Case is continued to May 9, 2008."

On May 9, 2008, no one appeared on behalf of the plaintiff, and the trial court denied his motion to reinstate.

On May 27, 2008, the plaintiff placed in the prison mail system another motion to reinstate that was file-stamped on June 10, 2008. On June 26, 2008, the trial court denied the motion to reinstate as untimely. The defendant filed a motion to reconsider. On July 24, 2008, the trial court denied the motion to reconsider and ordered that the matter be stricken, noting that the plaintiff did not appear.

On July 24, 2008, the plaintiff placed in the prison mail system another motion to reinstate and motion to amend the complaint. On September 13, 2008, the plaintiff placed in the prison mail system a motion to vacate the order of May 9, 2008, a motion to reinstate his cause of action, and a petition for a writ of *habeas corpus* requesting to be brought to court for the scheduled hearing on September 25, 2008.

On September 25, 2008, the matter was stricken from the call

because the plaintiff was not present. On October 23, 2008, the matter was set on the *habeas* call, scheduled for status, and scheduled for a hearing on the plaintiff's motions, but the matter was stricken because no one appeared.

On January 30, 2009, the plaintiff placed in the prison mail system a petition for relief from judgment. The petition was file-stamped on February 20, 2009, but was not set for a hearing. On May 2 and 26, 2009, the plaintiff sent the clerk of the circuit court correspondence requesting status on the petition for relief from judgment and requesting to refile the petition for relief from judgment. On May 28, 2009, the clerk entered another file-stamped copy of the plaintiff's petition for relief from judgment into the record.

On June 11, 2009, the docket entry indicated that no one appeared, and the matter was stricken from the call. On July 10, 2009, the defendant filed a notice of appeal.

#### ANALYSIS

The issue on appeal is whether the trial court erred in dismissing the plaintiff's section 2--1401 petition to reinstate his cause of action. The trial court's decision to deny a section 2--1401 petition will not be disturbed on appeal absent an abuse of discretion. *Kulikowski v. Larson*, 305 Ill. App. 3d 110 (1999).

Generally, in order to obtain relief under section 2--1401,

a plaintiff must show that he has a meritorious claim and that he exercised due diligence in presenting the original claim, and exercised diligence in presenting the section 2--1401 petition. *Robinson v. Commonwealth Edison Co.*, 238 Ill. App. 3d 364 (1992). A section 2--1401 petition is used to address the equitable powers of the trial court, which must consider all the circumstances and liberally construe the scope of relief available to prevent an unjust result. *Robinson*, 238 Ill. App. 3d 364. The trial court rules on a section 2--1401 petition within the context of the legal philosophy that litigation should, if possible, be determined on the merits according to the substantive rights of the parties. *Robinson*, 238 Ill. App. 3d 364.

If a plaintiff's action was dismissed for want of prosecution, the plaintiff has the option to refile the action within one year of the entry of the DWP order or within the remaining period of limitations, whichever is greater, under section 13--217 of the Code of Civil Procedure. 735 ILCS 5/13--217 (West 2008). A DWP becomes a final order only when the section 13--217 time for refiling the action expires. *Jackson v. Hooker*, 397 Ill. App. 3d 614 (2010).

In this case, the DWP became final on January 24, 2009, at the time the one-year refiling period from the entry of the DWP

order had expired.<sup>1</sup> On January 30, 2009, the defendant sought relief from final judgment under section 2--1401. In accordance with section 2--1401, the plaintiff exercised due diligence in presenting the original claim. In presenting the 2--1401 petition, the plaintiff exercised diligence in notifying the trial court that he was incarcerated and requesting to appear before the court. The plaintiff was also diligent in repeatedly following up on the status of his petition, refiling the petition, and requesting a hearing date.

Based on these facts, the trial court abused its discretion by striking the petition and dismissing the complaint for the sole reason that the plaintiff failed to appear, without any explanation or consideration as to the factors of expense, security, or logistics, or whether a telephonic appearance or other alternative to a personal appearance was a viable option in this case. Accordingly, we reverse the trial court's judgment dismissing the plaintiff's petition, allow reinstatement of the cause of action, and remand this matter to the trial court for

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<sup>1</sup> A one-year statute of limitations for actions against local public entities (745 ILCS 10/8--101(a) (West 2008)) would have expired as of January 13, 2008, and the two-year general statute of limitations for personal injury actions (735 ILCS 5/13--202 (West 2008)) would have expired as of January 13, 2009.

further proceedings.

#### CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded for proceedings consistent with this order.

Reversed and remanded.

JUSTICE HOLDRIDGE, dissenting:

I respectfully dissent. As the majority notes, in order to obtain relief from judgment under section 5/2-1401, a plaintiff must show that he has a meritorious claim and that he has exercised due diligence in presenting both the original claim and the section 5/2-1401 petition. *Robinson v. Commonwealth Edison Co.*, 238 Ill. App. 3d 436, 441 (1992). Here, there is no evidence in the record suggesting that the plaintiff's claim against the City of Joliet had merit. In his complaint, the plaintiff alleged that he sustained injuries when he slipped and fell on an accumulation of ice and snow in a park owned by the City. He claimed that the City negligently allowed the snow and ice to accumulate in the park. However, "landowners—whether public or private—are not liable for the failure to remove natural accumulations of ice and snow on their property." *Ziencina v. County of Cook*, 188 Ill. 2d 1, 10 (1999). Moreover, section 3-105(a) of the Local Governmental and Governmental

Employees Tort Immunity Act immunizes public entities and employees from liability for injuries "caused by the effect of weather conditions as such on the use of \*\*\* sidewalks or other public ways, or places, or the ways adjoining any of the foregoing," including "the effect of \*\*\* ice or snow \*\*\*"). 745 ILCS 10/3-105(a). Further, a public entity or employee is not liable for any injury based on the condition of any public property within a park or other recreational facility unless the public entity or employee is "guilty of willful and wanton conduct proximately causing such injury." 745 ILCS 10/3-106. Thus, the plaintiff can prevail in this case only if he can show that the ice and snow at issue accumulated unnaturally as the result of some action undertaken by the City (e.g., through the City's snow removal efforts) and that the City's actions in allowing the snow or ice to accumulate in this fashion was willful and wanton. The plaintiff did not make either showing in his section 5/2-1401 petition, and his complaint does not allege willful and wanton conduct by the City. Nor did the plaintiff make any allegation or argument in his section 5/2-1401 petition regarding the merits of his underlying claim.

This would have been reason enough for the trial court to deny the petition. See, e.g., *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986) (to be entitled to relief under section 2-1401, the petitioner "must affirmatively set forth specific

factual allegations supporting \*\*\* the existence of a meritorious defense or claim"); *Kulhavy v. Burlington Northern Santa Fe R.R.*, 337 Ill. App. 3d 510, 516-17 (holding that trial court did not abuse its discretion in denying plaintiff's section 2-1401 petition where plaintiff's underlying claim was barred by governing statute of limitations). Absent some allegation or argument by the plaintiff plausibly demonstrating the merits of his underlying claim, I cannot conclude that the trial court abused its discretion in dismissing the 5/2-1401 petition.

In addition, the trial court could reasonably have found that the plaintiff did not exercise due diligence in presenting his original claim. Although the plaintiff filed his initial complaint within the applicable statute of limitations, he did not effectuate service of the complaint and summons upon the City until March 27, 2008, almost six months after he filed his complaint and more than two months after the trial court dismissed his complaint for failure to return the completed summons. The fact that the plaintiff was incarcerated during this time period might have made it impossible for him to appear personally at court proceedings, but it does not excuse his failure to effect timely service.<sup>2</sup>

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<sup>2</sup> It is worth noting that the trial court dismissed the plaintiff's complaint because he failed to complete and return the court's pre-printed summons form, not, as the majority

We may find that the trial court abused its discretion only if its ruling is "arbitrary, fanciful, or unreasonable" such that "no reasonable man would take the view adopted by the trial court." *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). Moreover, because we review the trial court's judgment, not its rationale, we can affirm on any grounds supported by the record regardless of whether the trial court relied on those grounds. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995); *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005). As shown above, there is ample evidence in the record to support the trial court's decision to deny the plaintiff's petition, and I do not believe that the trial court's ruling was unreasonable. Accordingly, I would affirm.

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asserts, "for the sole reason that the plaintiff failed to appear."