

NOTICE

Decision filed 09/19/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 100227-U  
NO. 5-10-0227  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

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).

ANTHONY M. ROCHE,  
Plaintiff-Appellant,

v.

THE DEPARTMENT OF EMPLOYMENT  
SECURITY,  
Defendant-Appellee.

) Appeal from the  
) Circuit Court of  
) Richland County.  
)  
) No. 08-MR-13  
)  
)  
) Honorable  
) Kimbara Harrell,  
) Judge, presiding.

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court. Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the plaintiff failed to timely name and have summons issued to the proper necessary defendant in this civil court review of an administrative decision, the court's dismissal was proper. When an amendment to a statute would allow the plaintiff to amend his complaint, but the amendment expressly provides that its application is prospective only, the amendment does not apply to the plaintiff's complaint, which was filed prior to the effective date of the amendment.

¶ 2 **FACTS**

¶ 3 Anthony M. Roche sought unemployment benefits. Details of this claim are not available to this court. The record on appeal to this court does not contain the original application for benefits, any subsequent paperwork, the transcript of the hearing, or the referee's decision. The record contains a copy of the Board of Review's decision, dated June 27, 2008, in which the Board affirmed the referee's May 1, 2008, decision denying Roche's application for unemployment benefits. Thereafter, on July 30, 2008, Roche filed his

complaint for administrative review against one defendant—the Illinois Department of Employment Security (IDES). By this complaint, Roche alleged that the IDES's June 27, 2008, decision was erroneous.

¶ 4 The Illinois Attorney General entered a special and limited appearance in this case on August 11, 2008, on behalf of the IDES. Along with the special and limited appearance, the Attorney General's office filed its motion to dismiss the complaint for lack of subject matter jurisdiction. The IDES argued that the Board of Review—a separate and distinct entity within the IDES—which issued the decision which was the subject of Roche's complaint, is the actual administrative agency and as such is required to be made a party defendant to any action seeking review of its decision. Additionally, the IDES noted that the 35-day time frame within which a complainant can appeal a decision of the Board of Review had passed and that, therefore, no attempted amendment by Roche would serve to keep his complaint alive.

¶ 5 In response to the motion to dismiss, Roche claimed that the caption of his complaint clearly indicated that he was appealing from a decision of the Board of Review. The caption of his complaint read, "Board Docket No. ABR-08-5529." He argued that this reference to the "Board," coupled with the fact that he attached the Board of Review's decision to his complaint, satisfied the legal requirement of naming the Board of Review as a party defendant in this case.

¶ 6 The motion to dismiss was called for hearing and later denied by the trial court on October 19, 2009. In its order, the court found that the Board of Review was not named as a defendant and that Roche's reference in the caption of his complaint was insufficient. Because Roche did not properly name the Board of Review as a defendant and issue summons within 35 days from the date of service of the order from which relief was sought, the defect could not be cured. The court noted that the statute at issue was amended as of August 14, 2008, and that this amendment would allow complainants to amend their

pleadings. 735 ILCS 5/3-103 (West 2008). However, the court determined that it was constrained to follow the preamendment version of the statute which was the law at the time Roche filed his complaint and that therefore his complaint must be dismissed with prejudice.

¶ 7 Roche asked the court to reconsider its order. On April 14, 2010, the court denied this motion. From this order, Roche appeals.

¶ 8 **LAW AND ANALYSIS**

¶ 9 On appeal from an order dismissing a case pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)), our review is *de novo*. *Estate of Mayfield v. Estate of Mayfield*, 288 Ill. App. 3d 534, 542, 680 N.E.2d 784, 789 (1997). In our review of the trial court's decision, we must determine " 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Doyle v. Holy Cross Hospital*, 186 Ill. 2d 104, 109-10, 708 N.E.2d 1140, 1144 (1999) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17, 619 N.E.2d 732, 735 (1993)).

¶ 10 The Illinois Department of Employment Security is an administrative department within the State. 820 ILCS 405/201 (West 2008); 2 Ill. Adm. Code 1301.120(b) (2011). The entire process of seeking unemployment benefits, appealing from a denial, and seeking further review is subject to administrative law. The Illinois Constitution only allows appeals from final administrative decisions "as provided by law." Ill. Const. 1970, art. VI, § 9. Therefore, a final decision of an administrative agency—in this case the Board of Review of the IDES—can only be appealed as allowed by statute. *Van Milligen v. Department of Employment Security*, 373 Ill. App. 3d 532, 534, 868 N.E.2d 1083, 1087 (2007). Because the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2008)) is a departure from common law, its provisions must be strictly followed. *Id.*; *Veazey v. Doherty*, 327 Ill. App. 3d 522, 523, 763 N.E.2d 816, 817 (2002). "Unless review is sought of an administrative

decision within the time and in the manner \*\*\* provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision." 735 ILCS 5/3-102 (West 2008).

¶ 11 The Illinois Unemployment Insurance Act expressly adopted the Administrative Review Law. 820 ILCS 405/1100 (West 2008). Therefore, in order to review an agency decision, the complainant must comply with the review process set forth in the Administrative Review Law. Section 3-103 of the Administrative Review Law requires that a review of a final administrative decision must be commenced by complaint and service of process within 35 days from the date that a copy of the decision was served. 735 ILCS 5/3-103 (West 2008). The Administrative Review Law specifically states that the administrative agency and all persons other than the plaintiff who were parties of record before the agency shall be made defendants. 735 ILCS 5/3-107(a) (West 2008). Noncompliance with the requirements mandates dismissal of the administrative review complaint. *Van Milligen*, 373 Ill. App. 3d at 535, 868 N.E.2d at 1087. These two statutes have been construed by the courts to mandate dismissal if the agency is not made a defendant to the action and if the complaint is not filed within the 35-day time frame. *Van Milligen*, 373 Ill. App. 3d at 534-35, 868 N.E.2d at 1087; *McGaw Medical Center of Northwestern University v. Department of Employment Security*, 369 Ill. App. 3d 37, 40, 42-43, 860 N.E.2d 471, 476 (2006).

¶ 12 In Illinois, the law is settled that the Board of Review is the requisite administrative agency that must be named as a defendant. *Cuny v. Annunzio*, 411 Ill. 613, 616-17, 104 N.E.2d 780, 782 (1952); *Van Milligen*, 373 Ill. App. 3d at 535, 868 N.E.2d at 1087; *McGaw Medical Center of Northwestern University*, 369 Ill. App. 3d at 45, 860 N.E.2d at 478 (quoting *Veazey v. Baker*, 322 Ill. App. 3d 599, 602-03, 749 N.E.2d 1060, 1062 (2001)). Furthermore, this requirement is not satisfied by including the Board of Review in the caption of the pleading. *New York Carpet World, Inc. v. Department of Employment*

*Security*, 283 Ill. App. 3d 497, 501, 669 N.E.2d 1321, 1323-24 (1996); *Associated General Contractors of Illinois v. Chun*, 245 Ill. App. 3d 750, 754, 615 N.E.2d 386, 389-90 (1993) (involving the same issue and the Department of Labor). Inclusion of the name in the caption or body of the complaint is insufficient as that unnamed defendant would not have a summons prepared or served upon it. *New York Carpet World, Inc.*, 283 Ill. App. 3d at 501, 669 N.E.2d at 1324. Additionally, attaching a copy of the Board of Review's decision to the complaint does not equate to naming the Board of a Review as a defendant. *Central States Trucking Co. v. Department of Employment Security*, 248 Ill. App. 3d 86, 89, 618 N.E.2d 430, 432-33 (1993).

¶ 13 If the plaintiff does not obtain issuance of summons within the 35-day statutory period, the noncompliance will lead to dismissal of the complaint unless a good-faith effort at compliance with this service requirement was made by the plaintiff. *Burns v. Department of Employment Security*, 342 Ill. App. 3d 780, 786-87, 795 N.E.2d 972, 977 (2003); *Blumhorst v. Department of Employment Security*, 335 Ill. App. 3d 1075, 1078-79, 783 N.E.2d 654, 657 (2002). The good-faith effort at compliance exception does not, however, apply in situations where the plaintiff neglected to name a proper and necessary party defendant. *Central States Trucking Co.*, 248 Ill. App. 3d at 90, 618 N.E.2d at 433; *Stanley v. Department of Employment Security*, 235 Ill. App. 3d 992, 997, 602 N.E.2d 73, 76 (1992).

¶ 14 Roche did not name the proper administrative agency—the Board of Review—within the statutory time frame, and thus, this failure was fatal. The trial court's decision to dismiss his complaint with prejudice was proper.

¶ 15 Alternatively, Roche argues that the legislative amendment, which would allow amendments to a complaint after the 35-day time frame, should apply retroactively. Section 3-107(a) of the Administrative Review Law was amended with an effective date of August 14, 2008. The amended language provides:

"If, during the course of a review action, the court determines that an agency or a party of record to the administrative proceedings was not made a defendant as required \*\*\*, then the court shall grant the plaintiff 35 days from the date of the determination in which to name and serve the unnamed agency or party as a defendant. The court shall permit the newly served defendant to participate in the proceedings to the extent the interests of justice may require." 735 ILCS 5/3-107(a) (West 2008).

The statute unambiguously states that the changes to this particular statutory section are to be applied in the prospective—"to all actions filed on or after the effective date of this amendatory Act." 735 ILCS 5/3-107(d) (West 2008).

¶ 16 The effective date of this amendment was August 14, 2008. Roche's complaint was filed prior to this effective date—on July 30, 2008. The amendment at issue, therefore, does not apply to Roche's situation. He is not able to remedy the defect to his complaint by failing to name and have summons issued naming the proper defendant.

¶ 17 **CONCLUSION**

¶ 18 For the foregoing reasons, the judgment of the circuit court of Richland County is hereby affirmed.

¶ 19 Affirmed.