

2012 IL App (2d) 110627-U
No. 2-11-0627
Order filed April 3, 2012

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

JAMES MacRUNNELS,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 10-MR-592
)	
KAREN McCONNAUGHAY, Individually)	
and as Kane County Board Chairman,)	Honorable
)	Thomas E. Mueller,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

Held: The trial court erred in dismissing plaintiff's complaint pursuant to defendant's section 2-619 motion to dismiss where it incorrectly determined that the county ordinance was directory, not mandatory.

ORDER

¶ 1 Plaintiff, James MacRunnels, appeals a judgment dismissing his complaint for declaratory judgment, *mandamus*, and injunctive relief against defendant, Karen McConnaughay, individually and as the chair of the Kane County board. We reverse and remand.

¶ 2 Plaintiff's complaint, filed December 14, 2010, alleged as follows. Plaintiff is a Kane County resident and taxpayer. Defendant is the elected chair of the Kane County board. At all times, a county ordinance (the Ordinance) provided as follows:

“[(a)](3) *Executive [Committee]*: ***

Subject to the approval of the county board, this committee shall also have jurisdiction over all matters pertaining to the compensation of the members of the county board, the rules of order of the county board, fees, salaries, and clerk hiring for and in all departments of the county, and the amount of the salary and per diem compensation of all county officers not otherwise set by law.” Kane County Code, § 2-48(a)(3) (amended Dec. 12, 2006).

¶ 3 Plaintiff's complaint alleged as follows. Throughout her tenure as county board chair, defendant had given raises to, or set salaries for, 13 named county officers and employees. She did so without complying with the Ordinance, obtaining the approval of neither the executive committee nor the county board. These unauthorized payments cost taxpayers such as plaintiff substantially.

¶ 4 Count I of the complaint, directed against defendant as county board chair, requested a declaration (see 735 ILCS 5/2-701 (West 2010)) that defendant is obligated to “bring all issues” relating to granting county employees or officers raises or setting their pay levels before the executive committee and the county board. Count II, directed against defendant individually, requested a declaration that defendant's actions exceeded her authority and violated the Ordinance. Count III requested an order of *mandamus* requiring defendant to follow the Ordinance whenever

a raise or a new salary is established for any county employee or officer. Count IV requested preliminary and permanent injunctions requiring defendant to comply with the Ordinance.

¶ 5 Defendant moved to dismiss the complaint as barred by affirmative matter (735 ILCS 5/2-619(a)(9) (West 2010)). As pertinent here, she argued that, even if her disputed actions had initially been unauthorized, the county board had ratified them via its annual appropriations resolutions (copies of which were attached to the motion). Defendant also argued that, even had she violated the Ordinance, plaintiff could obtain no relief, because the Ordinance was directory, not mandatory. Defendant noted that the Ordinance prescribed no consequences for noncompliance.

¶ 6 Plaintiff responded that (1) defendant had yet to prove that any ratification was informed; and (2) the directory-mandatory distinction did not apply, because he was seeking not to require the county board to follow its own rules but to restrain defendant from acting without authority.

¶ 7 On April 20, 2011, the trial court dismissed the complaint without prejudice and allowed plaintiff to file an amended complaint. Relying on *DMS Pharmaceutical Group v. County of Cook*, 345 Ill. App. 3d 430 (2003), the court held that the Ordinance was not mandatory but directory, as it prescribed no consequences for noncompliance. It also stated that it did not believe the word “shall” made it a mandatory ordinance. The order stated that plaintiff had 28 days to replead. Plaintiff moved to make the order “final and appealable,” stating that he wished to stand on the complaint. On May 24, 2011, the trial court entered an order stating that the order of April 20, 2011, was “as of this date, a final and appealable order.” On June 22, 2011, plaintiff filed a notice of appeal.

¶ 8 Before addressing the merits of this appeal, we must first examine our jurisdiction to hear it. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 251-52 (2010) (court of review has

independent duty to consider its jurisdiction). Here, the trial court originally dismissed plaintiff's complaint without prejudice. A dismissal without prejudice is not immediately appealable. *Smith v. Illinois Central Regional Airport*, 207 Ill. 2d 578, 587 (2003). Even if a plaintiff states that he intends to stand on his complaint, the dismissal is not appealable until the trial court enters an order dismissing the case with prejudice. *Id.*

¶ 9 Here, after the dismissal without prejudice, plaintiff stated that he would stand on his complaint. The trial court then entered an order that did not explicitly dismiss the complaint with prejudice but stated only that its prior order was now "final and appealable." That, of course, was a bare conclusion of law; merely saying that an order is final or appealable does not make it so. We do not know why the court used such empty phraseology rather than simply stating, "The complaint is dismissed with prejudice." Nonetheless, the context of the May 24, 2010, order satisfies us that it was intended as a dismissal with prejudice. Therefore, we have jurisdiction of the appeal.

¶ 10 Plaintiff contends that the trial court erred in dismissing the complaint and, specifically, that it erred in holding that the Ordinance is directory, not mandatory. Defendant counterargues that the Ordinance is directory, and even if construed as mandatory, the county board ratified her decisions and there is no relief that plaintiff can obtain. We agree with plaintiff.

¶ 11 A motion to dismiss under section 2-615 tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint, but asserts an affirmative matter outside the complaint that defeats the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Under either section, our standard of review is *de novo*. *Id.* Further, when the propriety of a trial court's dismissal rests on an issue of statutory construction, our review is also *de novo*. *Id.* This case involves construction of an ordinance, and ordinances are

interpreted using the same general rules of statutory construction. *Landis v. Marc Realty, LLC*, 235 Ill. 2d 1, 7 (2009).

¶ 12 The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Landis*, 235 Ill. 2d at 6. The best indicator of the legislature's intent is the language in the statute, which must be accorded its plain and ordinary meaning. *Id.* Where the language in the statute is clear and unambiguous, this court will apply the statute as written without resort to extrinsic aids of statutory construction. *Id.* at 7. Whether a statutory command is mandatory or directory is a question of statutory construction, and the answer is found in the legislative intent. *People v. Robinson*, 217 Ill. 2d 43, 54 (2005). Statutes are mandatory if the intent of the legislature dictates a particular consequence for failure to comply with the provision. *People v. Delvillar*, 235 Ill. 2d 507, 514 (2009). In the absence of such intent, the statute is directory and no particular consequence flows from noncompliance; at least no consequences that are triggered by the failure to comply. *Id.* Stated another way, whether a statute is mandatory or directory determines the consequences of a failure to comply with it. *Id.* at 517. “[W]e presume that language issuing a procedural command to a government official indicates an intent that the statute is directory.” *Id.* This presumption is overcome under either of two conditions: (1) where there is negative language prohibiting further action in the case of noncompliance; or (2) when the right the provision is designed to protect would generally be injured under a directory reading. *Id.* In this case, plaintiff argues that the Ordinance is intended to protect the public from wasteful government spending by requiring that an executive committee, and not an individual, authorize employee salary increases, and therefore, the Ordinance is mandatory despite its lack of a consequence for a failure to comply with the provision. Use of the word “shall” is not dispositive of the question of whether a statute

or ordinance is mandatory or directory; legislative intent is what leads to a dispositive answer. *Robinson*, 217 Ill. 2d at 54.

¶ 13 We begin by reviewing the Kane County Code itself. Section 1-2 of the Code sets forth the rules of construction and definitions to be used in construing its ordinances and resolutions and includes the following relevant definitions:

“*Joint authority*. All words giving a joint authority to three (3) or more persons or officers shall be construed as giving such authority to a majority of such persons or officers.

* * *

Shall. The word “shall” is mandatory.” Kane County Code, § 1-2 (amended Dec. 12, 2006).

¶ 14 Section 2-48 states that the executive committee, which shall consist of the chairpersons of all standing committees and led by the chairman of the county board, shall have jurisdiction over all matters pertaining to the compensation of the members of the county board, the rules of the county board, fees, salaries, and clerk hiring for and in all county departments, and the salary amounts of all county officers not otherwise set by law. Reading the basic language of the Ordinance and using the Code’s overall rules of construction and definitions, leads to the conclusion that the Ordinance mandated that the executive committee, or a majority thereof, had jurisdiction over salaries, subject to the approval of the county board. Defendant, as county board chairman, was the chairman of the executive committee. However, no other provision of the Ordinance allows for the chairman to unilaterally change salaries. Therefore, despite the Ordinance’s lack of a consequence for the failure to comply with it, we conclude that given the Code’s definition of “shall” to be construed as mandatory and its definition of joint authority, the Ordinance was intended to be mandatory.

¶ 15 In so holding, we find *DMS*, which the trial court relied upon, distinguishable. There, the plaintiffs alleged that, in awarding certain contracts, the defendant county had violated its own ordinance. The ordinance read, “ ‘Purchases of contracts and supplies, materials, equipment, and contractual services *** shall be based on competitive bids.’ ” *DMS*, 345 Ill. App. 3d at 434 (quoting Cook County Appropriations and Bidding Ordinance § 10-18 (1994)). The trial court dismissed the complaint. The appellate court affirmed. It held that, despite the ordinance’s use of “shall,” the county’s failure to comply strictly with the ordinance did not invalidate the contracts at issue. *DMS*, 345 Ill. App. 3d at 443. The *DMS* court held that the county’s alleged failure to adhere to the competitive-bidding requirement did not invalidate its action, because two characteristics of the ordinance demonstrated that it had not been intended to be mandatory. First, it did not prescribe any consequence if the required acts were not done. Second, the ordinance (although obviously related to the public interest in frugal government) merely directed a manner of conduct for the guidance of officials and was not designed to safeguard individual rights. *DMS*, 345 Ill. App. 3d at 444. Unlike in *DMS*, the Kane County Code provides that the word “shall” is to be construed as mandatory, and further, the Ordinance prescribing joint authority over government expenditures was likely intended to safeguard the taxpayers’ right to prevent wasteful government spending.

¶ 16 We turn to defendant’s second argument: that, even if the Ordinance is mandatory, the dismissal of plaintiff’s complaint was correct because the county board ratified defendant’s acts by later appropriating money in satisfaction of the disputed salaries and pay raises. We agree with plaintiff that this matter should not have been resolved via the section 2-619 motion. A section 2-619 motion should be used to dispose of issues of law or easily proved issues of fact. *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 912-13 (1993). However, if it cannot

be determined with reasonable certainty that the alleged defense exists, the motion should be denied. *Id.* at 913. The trial court may not decide disputed factual issues without an evidentiary hearing. *LaSalle Bank National Ass'n v. Village of Bull Valley*, 355 Ill. App. 3d 629, 635 (2005).

¶ 17 Here, the trial court did not decide defendant's defense of ratification. The defense raises potential factual issues relating to whether the ratification was informed (see *Knuepfer v. Fawell*, 96 Ill. 2d 284, 291 (1983)), such as whether the county board was aware that defendant had acted in place of the executive committee and whether it retroactively granted her the authority to do so (see *Bethune v. Larson*, 188 Ill. App. 3d 163, 168-69 (1989) (although defendant exceeded his authority in discharging plaintiff, record showed agency that did have authority later learned of defendant's action and knowingly ratified it). Therefore, although defendant's affirmative defense of ratification might prevail after a trial (a matter on which we express no opinion), it does not justify the dismissal.

¶ 18 As a final caution, we stress that our holding is limited to the issues before us at this preliminary stage. We do not construe the Ordinance beyond what is needed to resolve this appeal, which was merely whether the Ordinance was mandatory or directory. Specifically, we express no opinion on the size or definition of the class of people whose salaries the Ordinance makes subject to the jurisdiction of the executive committee or how the committee was supposed to vote on salary increases or how it was to submit such increases for county board approval. In other words, we do not consider the sufficiency of plaintiff's complaint nor do we determine any factual issues that are intended for a factfinder. Plaintiff's complaint asserted that certain named individuals are within this class and that defendant unilaterally raised salaries, and defendant, for purposes of her motion to dismiss, conceded the truth of that assertion.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed, and the cause is remanded.

¶ 20 Reversed and remanded.