

2013 IL App (2d) 120592-U  
Nos. 2-12-0592 & 2-12-0676, cons.  
Order filed February 14, 2013

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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DAVID DeMARAIS,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11–MR–243
	)	
LAKE IN THE HILLS PENSION BOARD	)	
and JAMES WALES, Director	)	
of Police and Public Safety,	)	
	)	
Defendants-Appellees	)	
	)	
(Lake in the Hills Pension Board members	)	
Dan Hudson, President; Stan Helgersen,	)	
Vice President; Ted Ziarkowski, Secretary	)	Honorable
Trustee; Mary Frake, Trustee; Larry Howell,	)	Thomas A. Meyer,
Trustee, Defendants ).	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices McLaren and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) The Pension Board’s decision to dismiss the plaintiff’s application for disability benefits was not clearly erroneous because the plaintiff had already resigned from his position as a police officer when he filed his application for disability benefits; (2) the circuit court’s dismissal of the plaintiff’s breach of contract claim was proper.

¶ 2 The plaintiff, David DeMarais, asserted that he was injured while working for the Lake in the Hills police department. After the plaintiff resigned from the police department, he filed an application for a disability pension. The defendant, Lake in the Hills Pension Board (the Board), dismissed the plaintiff's application. The Board determined that it did not have jurisdiction to consider the application because disability pensions were intended only for police officers currently employed by the police department, not for ones who had resigned. The plaintiff subsequently filed a two-count complaint in the circuit court of McHenry County. Count I of the complaint sought administrative review, and count II asserted breach of contract. The circuit court dismissed both counts of the plaintiff's complaint via separate orders. The plaintiff filed a timely notice of appeal from each order. On this court's own motion, we consolidated the plaintiff's appeals. We now affirm.

¶ 3 BACKGROUND

¶ 4 The plaintiff was appointed to the Lake in the Hills (the Village) police department on July 7, 1988. The plaintiff claimed that, on March 29, 2009, while on duty, he injured his left shoulder attempting to lift a fallen tree limb. After his injury, the plaintiff did not work for the police department again until October 2009, when he began doing light duty as a dispatcher.

¶ 5 On December 15, 2009, the Village's police chief and deputy police chief instructed the plaintiff to stop working secondary employment because the plaintiff was receiving benefits under the Public Employee Disability Act (the Disability Act) (5 ILCS 345/1 *et seq.* (West 2008)) as a result of his shoulder injury. The Disability Act prohibits employment "in any other manner." 5 ILCS 345/1(c) (West 2008).

¶ 6 On December 20, 2009, the plaintiff filed an application for retirement benefits with the Board. Trustee Ziarkowski verbally informed the plaintiff that he was not eligible to collect a retirement pension because he was not yet 50 years old. Ziarkowski told the plaintiff that he had to complete a disability application in order to obtain disability benefits.

¶ 7 On January 14, 2010, the Village interrogated the plaintiff regarding six alleged police department violations. The Village initiated an internal affairs investigation because it believed that the plaintiff, in contravention of the Disability Act, was working for the McHenry parks department at the same time he was receiving Disability Act benefits. Following the interrogation, the plaintiff agreed to resign.

¶ 8 On January 15, 2010, the Village's attorney wrote two letters to the plaintiff's attorney regarding the plaintiff's proposed resignation. The first letter provided in pertinent part:

“[Plaintiff's] resignation does not jeopardize his rights to pursue a disability pension before the [Board]. Please note that a voluntary resignation does not sever a police officer's membership in the Police Department nor his right to a pension. It is critical, however, that your client file his disability pension *prior* to his resignation in order to preserve his rights. See *Hahn v. Police Pension Fund of City of Woodstock*, 138 Ill. App. 3d 206, 211 (1985). I spoke with \*\*\* the Pension Board's attorney and I understand he has been in contact with your office to expedite finalizing your client's disability petition. Let me also add that [the plaintiff's] resignation has no effect on the resolution of his worker's compensation claims. Both his pension and worker's compensation claims will stand on their own merits.”  
(Emphasis in original.)

The second January 15, 2010, letter to the plaintiff's attorney provided in pertinent part:

“The Director wants to make sure it is clear that he is prepared to go forward with a complaint before the Police Commission, but that he will extend [the plaintiff] an opportunity to resign. However, [the plaintiff] must take all necessary steps to preserve his pension rights and subsequently submit his letter of resignation to the Director as soon as possible and no later than January 20, 2010.”

¶ 9 On January 18, 2010, the Board’s attorney sent to the plaintiff’s attorney an application for disability pension benefits. The application was three pages long and consisted of 22 questions.

¶ 10 On January 19, 2010, the plaintiff submitted his letter of resignation, indicating that he was voluntarily resigning, effective January 29, 2010. The letter was signed by the plaintiff and James Wales, director of police and public safety, for the “Village of Lake in the Hills.” The letter of resignation provided:

“In consideration of my resignation, there is a mutual understanding that my resignation will not jeopardize my rights to pursue a disability pension before the [Board], nor will the Village challenge my rights to pursue a disability pension before the [Board]. \*\*\* Both my pension and my worker’s compensation claims will stand on their own merit.”

¶ 11 On January 29, 2010, the plaintiff’s resignation from the police department took effect. On June 10, 2010, the plaintiff filed his application for disability benefits.

¶ 12 On May 26, 2011, and July 16, 2011, the Board conducted a hearing on the plaintiff’s application for a disability pension. Following the hearing, the Board found that it did not have jurisdiction to consider the plaintiff’s application for disability benefits because he had not filed it before he resigned from the police department.<sup>1</sup>

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<sup>1</sup> Two Board members voted that the Board did not have jurisdiction; two voted that it did;

¶ 13 On August 17, 2011, the plaintiff filed a two-count complaint against the Board and its members and Director Wales. Count I sought administrative review of the Board's decision, and count II alleged breach of contract against Wales. The individual Board members were subsequently dismissed from the complaint, leaving the Board as the sole remaining defendant in count I.

¶ 14 On October 14, 2011, the Village filed a motion to dismiss the plaintiff's breach of contract claim pursuant to both sections 2-615 and 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615, 2-619 (West 2010)). The Village argued that, pursuant to section 2-615 of the Code, the plaintiff had not pled a valid cause of action because he had not sufficiently pled all of the elements of a breach of contract action against Wales. In support of its motion pursuant to section 2-619 of the Code, the Village submitted the affidavit of Wales. In his affidavit, Wales indicated that (1) the plaintiff's personnel file reflected that the plaintiff's departure from the Village was a voluntary resignation; (2) Wales was not a member of the Pension Board; and (3) Wales never challenged the plaintiff's application for a disability pension.

¶ 15 On December 28, 2011, the Board filed a brief in opposition to the plaintiff's complaint for administrative relief. The Board argued that its decision should be affirmed because its finding that it lacked jurisdiction to adjudicate the plaintiff's disability application was not clearly erroneous.

¶ 16 On May 4, 2012, the circuit court granted the Village's motion to dismiss as to count II. The circuit court explained that count II failed to state a valid cause of action.

¶ 17 On May 11, 2012, the circuit court dismissed with prejudice count I of the plaintiff's complaint and entered a finding pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010). The

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one member recused from the matter. The effect of the Board's tie vote was that it could not consider the merits of the plaintiff's application for disability benefits.

circuit court found that the Board's determination that the plaintiff's failure to apply for a disability pension prior to his resignation deprived it of jurisdiction was not clearly erroneous. The plaintiff thereafter filed a timely notice of appeal. That appeal was docketed in this court as appeal number 2-12-0592.

¶ 18 On June 21, 2012, the circuit court denied the plaintiff's motion to reconsider its dismissal of count II. The plaintiff thereafter filed a timely notice of appeal. That appeal was docketed in this court as appeal number 2-12-0676.

¶ 19 ANALYSIS

¶ 20 Appeal No. 2-12-0592

¶ 21 In appeal number 2-12-0592, the plaintiff argues that the Board's decision should be reversed because it had jurisdiction to adjudicate his application for a disability pension. Specifically, the plaintiff argues that under the applicable law, he did not have to file his petition for disability benefits before he retired or resigned. Alternatively, the plaintiff argues that the Board should have considered his petition because he gave the Board reasonable notice that he was seeking disability benefits. The plaintiff insists that he did not resign from his position with the expectation that he was severing all of his rights to a disability pension.

¶ 22 In an appeal from an administrative agency's decision, we review the agency's determination, not that of the trial court. *Szewczyk v. Board of Fire and Police Commissioners of Village of Richmond*, 2011 IL App (2d) 100321, ¶ 20. The agency's factual determinations are held to be *prima facie* true and correct, and we will uphold those determinations unless they are against the manifest weight of the evidence. *Goodman v. Morton Grove Police Pension Board*, 2012 IL App (1st) 111480, ¶ 24. A factual finding is against the manifest weight of the evidence when the opposite

conclusion is clearly apparent. *Szewczyk*, 2011 IL App (2d) 100321, ¶ 20. We review *de novo*, as a question of law, an agency's interpretation of a statute or administrative rule. *Id.* Finally, we apply the "clearly erroneous" standard to mixed questions of law and fact. *Id.* An agency's decision is clearly erroneous when the reviewing court comes to the definite and firm conclusion that the agency has committed an error; this standard provides some deference based on the agency's experience and expertise and falls between the *de novo* and manifest weight standards of review. *Id.*

¶ 23 Section 3-114.1 of the Pension Code (40 ILCS 5/3-114.1(a) (West 2010)) provides that a police officer who becomes physically disabled while on duty due to sickness, accident or injury is entitled to a disability pension. In order to be eligible for such a pension, the police officer must be currently employed as a police officer at the time he files his application for disability benefits. *Tucker v. Board of Trustees of the Police Pension Fund of the Village of Park Forest*, 376 Ill. App. 3d 983, 990 (2007). This is because the purpose of a duty-related disability is to help only those police officers who, if not for the disability, would still be employed as police officers and drawing their regular salary. See *DiFalco v. Board of Trustees of the Firemen's Pension Fund of the Wood Dale Fire Protection District*, 122 Ill. 2d 22, 27 (1988) (discussing disability pensions as they apply to firefighters); see also *Tucker*, 376 Ill. App. 3d at 991 (explaining that statutory provisions regarding disability pensions apply equally to firefighters and police officers). The scheme of the Pension Code would not be served by granting a disability pension to an applicant who is no longer employed as a police officer. See *DiFalco*, 122 Ill. 2d at 27. Thus, in order to be eligible for disability benefits, a police officer must seek such benefits before he resigns from the police department. *Tucker*, 376 Ill. App. 3d at 991.

¶ 24 The question of whether the plaintiff timely filed his application for a disability pension was a mixed question of law and fact. Here, the plaintiff did not file his application for disability benefits until after he resigned from the police department. Thus, his application was untimely and the Board's refusal to consider it was not clearly erroneous. See *id.*

¶ 25 In so ruling, we reject the plaintiff's argument that this case is governed by *Freberg v. Board of Trustees of Firemen's Pension Fund of the City of Highland Park*, 128 Ill. App. 2d 369, 371 (1970), and *McGann v. Harris*, 114 Ill. App. 308, 309-10 (1904). *Freberg* involved the Board's ability to adjudicate a disability application filed by a "retired" firefighter. Here, the plaintiff did not retire from his position but rather resigned. Further, even if the terms "retired" and "resigned" could be construed as synonyms, the Pension Code has been modified since the *Freberg* decision in 1970 to remove any suggestion that a retired firefighter or police officer can seek disability benefits. Reflecting this change, more recent precedent clearly establishes that a police officer cannot seek disability benefits after he resigns from the police department. See *DiFalco*, 122 Ill. 2d at 27; *Tucker*, 376 Ill. App. 3d at 991. As to *McGann*, since it is an appellate court case that predates 1935, it is not persuasive as it has no precedential value at all. *Bryson v. News America Publications Inc.*, 174 Ill. 2d 77, 95 (1996) (appellate court decisions issued prior to 1935 have no binding authority).

¶ 26 We also find unpersuasive the plaintiff's equitable argument that, since the Board knew prior to his resignation that he was intending to seek disability benefits, that should have been enough to preserve his rights. The plaintiff's argument fails because he was informed that he needed to file an application for disability benefits before he resigned, yet he did not do that. Even if he was misled into believing that the application that he filed in December 2009 was the "only" one that he needed



to file, this belief was corrected on January 18, 2010 when he was informed of the proper application that he needed to file.

¶ 27 The plaintiff complains that this late notice was insufficient because it gave him “only” two days to complete the application before he was subject to termination. The plaintiff’s argument is disingenuous. Although the plaintiff tendered his letter of resignation on January 19, 2010, it indicated that he was not actually resigning until January 29, 2010. Thus, the plaintiff had 12 days to submit his application for disability benefits before he resigned. Twelve days was ample time for him to complete a 3-page, 22-question application.

¶ 28 Further, despite the plaintiff’s insistence to the contrary, the Village did nothing that violated its mutual understanding with the plaintiff that it would not “jeopardize [his] rights to pursue a disability pension before the [Pension Board].” The plaintiff jeopardized his own rights by not filing his application for disability benefits before he resigned. For all these reasons, the plaintiff’s request for equitable relief is without merit. See *Tucker*, 376 Ill. App. 3d at 981 (reviewing court would not apply equitable principles so as to consider police officer’s second application for disability benefits where Pension Board had previously warned him that withdrawing his initial application might result in its loss of jurisdiction over a subsequent filing); *Donnells v. Woodridge Police Pension Board*, 159 Ill. App. 3d 735, 737-41 (1987) (plaintiff not entitled to equitable relief where he received notice of an opportunity for pension benefits but he failed to timely file for benefits).

¶ 29 Appeal No. 2-12-0676

¶ 30 In appeal number 2-12-0676, the plaintiff argues that the circuit court erred in dismissing his breach of contract claim against Wales. The plaintiff contends that his letter of resignation, which was signed by both him and Wales, constituted a valid contract. In exchange for his resignation,

Wales agreed that the plaintiff's disability pension rights would not be jeopardized. According to the plaintiff, this agreement was breached when the Board refused to consider the merits of his disability application, which resulted in tremendous damages to him. As the plaintiff insists that he set forth a valid cause of action, he contends that the circuit court should not have dismissed count II of his complaint.

¶ 31 In dismissing count II of the plaintiff's complaint, the trial court did not specify whether it was dismissing that count pursuant to section 2-615 or 2-619 of the Code. However, as the circuit court indicated in its oral comments that it did not believe that the plaintiff had alleged a cause of action against Wales, we will consider the trial court's dismissal of count II of the complaint as pursuant to section 2-615 of the Code. A motion to dismiss brought under section 2-615 tests the legal sufficiency of the complaint. On review, the inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to establish a cause of action upon which relief may be granted. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 305 (2008). Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish his or her claim as a viable cause of action. *Vernon v. Schuster*, 179 Ill. 2d 338, 344 (1997). A claim should not be dismissed pursuant to section 2-615 unless no set of facts can be proved which would entitle the plaintiff to recover. *Iseberg v. Gross*, 227 Ill. 2d 78, 86 (2007). We review *de novo* the circuit court's dismissal of the plaintiff's action. *Vitro v. Mihelic*, 209 Ill. 2d 76, 81 (2004).

¶ 32 Here, the circuit court properly dismissed count II of the plaintiff's complaint. Even if we were to construe the plaintiff's letter of resignation, which was attached as an exhibit to his

complaint, as a contract between himself and Wales, it is apparent that Wales did not breach the contract. The plaintiff contends that the letter of resignation encompassed a promise from Wales that the plaintiff's application for disability benefits "would not be affected." However, that is not what the letter of resignation states. The resignation letter indicates that the plaintiff's resignation "will not jeopardize [his] rights to pursue a disability pension." The plaintiff's complaint makes no allegations as to how Wales interfered with the plaintiff's rights to "pursue" a disability pension. Indeed, our review of the record indicates that plaintiff's rights to a disability pension were jeopardized, not because of anything Wales did, but because the plaintiff failed to file his application for disability benefits in a timely fashion. As such, the circuit court properly found that count II of the plaintiff's complaint failed to state a valid cause of action.

¶ 33

#### CONCLUSION

¶ 34 For the reasons stated, we affirm the decision of the circuit court of McHenry County.

¶ 35 Affirmed.