

No. 1-12-1139

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**

| | | |
|---|---|------------------|
| BRIAN DEGENHARDT, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County. |
| |) | |
| v. |) | |
| |) | |
| CITY OF CHICAGO, |) | |
| |) | |
| Defendant-Appellee, |) | |
| |) | |
| and |) | No. 11 CH 12729 |
| |) | |
| POLICEMEN'S BENEVOLENT & PROTECTIVE) |) | |
| ASSOCIATION OF ILLINOIS; UNIT 156-) |) | |
| SERGEANTS, a/k/a CHICAGO POLICE) |) | |
| SERGEANTS' ASSOCIATION; LAW OFFICE OF) |) | |
| ROBERT KUZAS; ROBERT KUZAS,) |) | |
| Individually; RICHARD BLASS; and JOSEPH) |) | |
| FITZSIMMONS,) |) | Honorable |
| |) | Michael Hyman, |
| Defendants.) |) | Judge Presiding. |

JUSTICE HARRIS delivered the judgment of the court
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's dismissal of plaintiff's complaint against the city of Chicago is affirmed where plaintiff did not exhaust the grievance procedure mandated by the collective bargaining agreement governing the dispute, and therefore plaintiff lacked standing to file the complaint in court.

¶ 2 Plaintiff, Brian Degenhardt, appeals the order of the circuit court dismissing counts I through III of his declaratory judgment complaint, pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), against defendant, the city of Chicago (City). On appeal, Degenhardt contends the trial court erred in dismissing his complaint because (1) a genuine issue of material fact exists as to whether he exhausted his administrative remedies before filing his claim; (2) his complaint sufficiently alleged that his union, Unit 156-Sergeants' Association (Union), breached its duty of fair representation, and therefore he had standing to file his complaint; and (3) the trial court should have dismissed the counts without prejudice. For the following reasons, we affirm.

¶ 3 **JURISDICTION**

¶ 4 The trial court granted the 2-619 motion to dismiss in favor of the City on November 22, 2011. Plaintiff filed a motion to vacate the dismissal order, and for a rehearing and modification of the order, on December 22, 2011. On February 7, 2012, the trial court granted the motion to the extent that it modified the dismissal of the Union from "with prejudice" to "without prejudice." The trial court denied Degenhardt's remaining claims. He filed his notice of appeal on March 6, 2012. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 5

BACKGROUND

¶ 6 Degenhardt was employed with the Chicago Police Department (CPD) as a sergeant in the animal crimes unit. He was a member of the Union which was a party to a collective bargaining agreement with the City. Degenhardt alleged that on March 14, 2007, he contracted the Coxsakie B virus while executing a search warrant at a residence. He further alleged that the virus directly and proximately caused him to develop a heart condition and resulted in a stroke he suffered on March 22, 2007.

¶ 7 Degenhardt sought certification for injury on duty (IOD). His superiors began the process pursuant to the collective bargaining agreement. The relevant portion of the agreement provides:

"Any Sergeant absent from work on account of an IOD for any period of time not exceeding twelve (12) months shall receive for each such IOD full pay and benefits for the period of absence provided such injury is certified by the Medical Administrator."

The city, however, denied the IOD certification and Degenhardt requested that his Union file a grievance on his behalf which it did in May 2007. Article nine of the collective bargaining agreement set forth the grievance procedure as follows:

"Section 9.1 Definition and Scope

A grievance is defined as a dispute or difference between the parties to this Agreement concerning the interpretation and/or application of the Agreement or its Provisions.

* * *

Section 9.2 Procedures, Steps and Time Limits

Step One: The grievant will first attempt to resolve the grievance with the first

Exempt Commanding Officer in his/her chain of command. ***

Step Two: If the response at Step One is not satisfactory to the grievant, the grievant may pursue an adjustment through his/her designated representative by notifying [the Union] of his/her intent to pursue such grievance within ten (10) days of the Step One response ***. [The Union] shall then determine whether in its opinion a valid grievance exists. Unless [the Union] elects to proceed, there shall be no further action taken under this procedure. ***

Step Three: Within thirty (30) days of the receipt of the Step Two decision or Step Two decision due date, [the Union] may refer the grievance to arbitration.

* * *

Section 9.4 Authority of Arbitrator

A. *** The Arbitrator shall submit, in writing, his/her decision to the [city] and to [the Union] within thirty (30) days following the close of the hearing, unless the parties agree to an extension thereof. The decision shall be based upon the Arbitrator's interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented and shall be final and binding upon the parties."

¶ 8 The Union hired attorney Richard Blass of the Law Office of Robert Kuzas, Ltd. (Kuzas Law Firm), to represent Degenhardt in the grievance process. The city requested information about Degenhardt in August of 2007 but, according to Degenhardt, Blass did not respond. The city proposed a settlement agreement in December 2007, and Degenhardt tried to contact Blass and the firm a number of times because he had a question about the agreement. When Blass eventually returned his call, he could not answer Degenhardt's question. The agreement provided that the city would pay for all "reasonable" bills, but did not issue Degenhardt an IOD

certification. Degenhardt wanted to know whether a heart transplant is considered "reasonable" under the terms of the settlement agreement. Plaintiff returned to work on February 19, 2008, because he did not receive IOD certification, and the following day the City allegedly informed Degenhardt that he must cancel an event to raise money for his treatment or it would charge him with felony fraud. Degenhardt eventually heard from the Kuzas Law Firm that the city took the settlement agreement "off the table."

¶ 9 The parties attempted mediation in March 2008, but it proved unsuccessful. Degenhardt alleged that his attorney informed him he could not attend the mediation. In January 2009, the handling of Degenhardt's grievance was assigned to attorney Joseph Fitzsimmons. Degenhardt suffered an arrhythmia in February 2009 and his doctors told him that returning to work contributed to his ill health. Degenhardt applied for IOD certification for the arrhythmia but he was denied the certification. He then asked his attorneys to file a grievance for the denial, but they stated that they did not want to "muddy the issue." Degenhardt was scheduled to meet with Fitzsimmons but on the morning of the meeting Degenhardt could not attend due to his physical ailments. When Degenhardt arrived for the rescheduled meeting, Fitzsimmons allegedly told him, "My time is money... You don't waste my time. I waste yours."

¶ 10 In March 2009, Fitzsimmons deposed Degenhardt's physician. Fitzsimmons told Degenhardt that the testimony was incomprehensible due to the physician's broken English. Degenhardt's physician, however, told him that after the deposition Fitzsimmons said that he "did a great job" and the testimony was exactly what [Fitzsimmons] needed to win the case. Degenhardt asked to review the transcripts of the deposition, but the Kuzas Law Firm refused his requests.

¶ 11 The Union processed Degenhardt's grievance through step two of the three step grievance procedure. The city, however, denied the grievance through steps one and two, and the grievance proceeded to arbitration. The arbitration hearing was held on April 4, 2009. Fitzsimmons made an opening statement and then moved for a recess. When Degenhardt went into the hall he saw Fitzsimmons, a Union representative, city attorney, Robert Kuzas, and the arbitrator engaged in friendly conversation. The group dispersed when they noticed Degenhardt and the Union representative, Fitzsimmons, and Kuzas approached to talk to Degenhardt. They informed him that the city had an expert who would testify that IOD certification was not appropriate in Degenhardt's situation and there was no way Degenhardt could win. They also told Degenhardt that if the city did not win on the certification issue, he would not get a pension or disability benefits from the pension board. In his complaint, Degenhardt alleges that "[a]fter it became clear that his attorneys were not going to pursue arbitration, [Degenhardt], without agreeing to anything, walked out." Degenhardt "has no information as to what happened after he left."

¶ 12 In an affidavit filed nine months after the complaint, Degenhardt stated that before he left the arbitration proceeding, his attorneys asked him to sign an agreement but he refused. He wanted to arbitrate his grievances at the hearing. Degenhardt stated that "[i]t was my attorneys' insistence that I sign this agreement that caused me to walk out on them. At this point, the arbitration hearing had already been closed without my input. I appeared on that day ready to arbitrate my grievance and due to the actions or inactions of my attorneys, this was not done."

¶ 13 Degenhardt subsequently applied for pension benefits based on disability. He was evaluated by a physician chosen by the pension board. The physician found that Degenhardt contracted the Cocksakie B virus while performing his duties as a sergeant and the condition was

permanent. In July 2010, Degenhardt received IOD certification for the purpose of obtaining disability pension benefits. Degenhardt was awarded pension benefits equal to 75 percent of his salary.

¶ 14 In October 2010, Degenhardt sent a letter to the Union and the Kuzas Law Firm asking that his grievance be reopened in light of the pension board's findings. He did not receive a response. Degenhardt's award of disability pension benefits was made permanent on January 27, 2011.

¶ 15 Degenhardt alleges that if "the same evidence" had been presented at arbitration, he would have been given IOD certification. Degenhardt filed this declaratory action complaint on April 4, 2011. The complaint contained nine counts, with counts I through III against the city for breach of the collective bargaining agreement, and counts IV and V against the Union for breach of its duty of fair representation. Counts VI through IX were alleged against the Kuzas Law Firm, Kuzas, Blass, and Fitzsimmons. The defendants filed motions to dismiss, which the trial court granted pursuant to section 2-619 of the Code. Degenhardt filed this timely appeal in which he challenges only the trial court's dismissal of the city.

¶ 16 ANALYSIS

¶ 17 In his complaint, Degenhardt alleged three counts of collective bargaining agreement breach against the city. Counts I and II pertain to the IOD certification issue, and count III alleged breach of the agreement regarding an optional group plan life insurance contained in article 25. However, Degenhardt does not raise the life insurance issue in his brief, nor does he make any argument in support of his position. Therefore, he has forfeited review of this issue on appeal pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) (arguments in briefs "shall contain the contentions of the appellant and the reasons therefor, with citation of the

authorities and the pages of the record relied on.") *TruServ Corp. v. Ernst & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007).

¶ 18 The trial court dismissed the complaint against the city under section 2-619 of the Code. A section 2-619 motion to dismiss "admits the legal sufficiency of the complaint, but asserts affirmative matter outside the complaint that defeats the cause of action." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). In reviewing a section 2-619 motion to dismiss, this court accepts as true all well-pled facts contained in the complaint and in any uncontradicted affidavit attached to the motion. *Napleton v Great Lakes Bank, N.A.*, 408 Ill. App. 3d 448, 450 (2011). Once the moving party satisfies its burden on the motion, the burden shifts to the plaintiff to establish that the affirmative defense asserted is either unfounded or requires resolution of an essential element of material fact. *Barrett v. Fonorow*, 343 Ill. App. 3d 1184, 1189 (2003). The trial court's grant of a section 2-619 motion to dismiss is reviewed *de novo*. *Hooker v. Retirement Board of the Fireman's Annuity and Benefit Fund of Chicago*, 2014 IL App (1st) 131568, ¶ 20.

¶ 19 The issue here is whether a union employee covered by a collective bargaining agreement has standing to file a complaint in court challenging a grievance proceeding contained in the agreement. When a collective bargaining agreement provides for a grievance procedure for resolving disputes, that procedure is the exclusive method for addressing violations of the agreement until it has been exhausted. *Amalgamated Transit Union, Local 308 v. Chicago Transit Authority*, 2012 IL App (1st) 112517, ¶ 17. Furthermore, under section 16 of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/16) (West 2010)), suits challenging any procedure mandated by the collective bargaining agreement may only be brought by the parties to the agreement. Since the union and the city are the parties to the collective bargaining agreement, an individual employee represented by the union generally cannot bring a suit

challenging the outcome of a grievance procedure. *Stahulak v. City of Chicago*, 184 Ill. 2d 176, 181 (1998). An exception exists, however, if the employee "proves that the union's conduct in processing the grievance was arbitrary, discriminatory, or in bad faith." *Id.*

¶ 20 Here, however, the allegations in Degenhardt's complaint clearly show that the grievance procedure was not exhausted. The union processed his grievance through step two of the three-step procedure, and requested arbitration, the third step. At the arbitration hearing, Degenhardt was dissatisfied with how his attorneys and the union were handling his grievance and, he alleges, "[a]fter it became clear that his attorneys were not going to pursue arbitration, [Degenhardt], without agreeing to anything, walked out." Degenhardt "has no information as to what happened after he left." In his affidavit, Degenhardt stated that before he left the arbitration proceeding, his attorneys asked him to sign an agreement but he refused because he wanted to arbitrate his grievances at the hearing. He further stated that "[i]t was my attorneys' insistence that I sign this agreement that caused me to walk out on them. At this point, the arbitration hearing had already been closed without my input. I appeared on that day ready to arbitrate my grievance and due to the actions or inactions of my attorneys, this was not done." The parties do not dispute that the arbitrator never had the opportunity to conclude the hearing or to issue a ruling on the matter. Instead, Degenhardt walked away from the arbitration hearing and filed a complaint in court.

¶ 21 Degenhardt argues that a fact question exists as to whether it would be futile for him to exhaust the grievance procedure before filing his claim, because the union and his attorneys were not interested in supporting him or in presenting his grievance through arbitration without a settlement. While futility is an exception to the exhaustion doctrine, it applies in situations where a similar grievance had been denied on the merits and other employees would have no

reason to believe that their grievances would result in a different outcome. *Zelenka v. City of Chicago*, 152 Ill. App. 3d 706, 714 (1987). Degenhardt, however, does not allege facts showing that continuing the arbitration would have been futile. The situation here is not one where the union refused to proceed to arbitration, nor does Degenhardt point to prior cases where his union refused to proceed to arbitration on a similar case. Rather, the facts show that the union agreed to process Degenhardt's grievance and did so through the last step of the procedure, arbitration. The parties held an arbitration hearing to resolve Degenhardt's grievance. The arbitrator, however, never had the opportunity to move forward with the hearing or make a ruling because Degenhardt walked away.

¶ 22 Degenhardt insists that the hearing was futile because the parties wanted a settlement but he wanted to proceed with arbitration. Even if true, an individual employee has no absolute right to have his grievance taken to arbitration, nor does the union have a duty to investigate a claim once it has information that the claim has no merit. *Parks v. City of Evanston*, 139 Ill. App. 3d 649, 653 (1985). While it is understandable that Degenhardt felt frustrated with the behavior of his attorneys as alleged in his complaint, Degenhardt did not exhaust the grievance procedure as mandated by the collective bargaining agreement; therefore, we must affirm the trial court's dismissal because he lacks standing to bring this suit to court. See *Mahoney v. City of Chicago*, 293 Ill. App. 3d 69, 72 (1997) (individual employees wishing to bring a claim covered by the collective bargaining agreement must "at least attempt to exhaust their remedies under [the agreement] before they are able to bring suit" in circuit court).

¶ 23 Degenhardt argues that he also has standing because his complaint alleged that the union breached its duty of fair representation, which is "[a]ll that is required" under *Swieton v. City of*

Chicago, 129 Ill. App. 3d 379 (1984), *Stahulak v. City of Chicago*, 184 Ill. 2d 176 (1998), and *Mahoney*, 293 Ill. App. 3d at 74.

¶ 24 In *Swieton*, the plaintiff was a firefighter who was discharged. *Swieton*, 129 Ill. App. 3d at 380. The union representing plaintiff processed his grievance through the first two steps, but after the city of Chicago refused to reinstate plaintiff, the union refused to request arbitration. *Id.* at 381. The court found that in his complaint, the plaintiff pled sufficient facts which, if proved, would support a finding of discrimination and bad faith on the part of the union in refusing to invoke arbitration. *Id.* at 383. It reasoned that to require the plaintiff in this situation to exhaust internal procedures, when the time for invoking arbitration had passed, "would be a useless gesture." *Id.* at 385. Therefore, the trial court erred in dismissing the complaint and requiring the plaintiff to exhaust the internal union procedures. *Id.*

¶ 25 *Stahulak* involved a city of Chicago firefighter who was discharged prior to the completion of a probationary period mandated by the collective bargaining agreement. *Stahulak*, 184 Ill. 2d at 178. The union filed a grievance on his behalf and processed the grievance through arbitration, where the arbitrator issued an award reinstating the firefighter to probationary status. After reinstatement, he was eventually placed on administrative leave and ultimately discharged for violating the residency requirement. He filed a two-count complaint against the city and the union, requesting that the court vacate the arbitration award. *Id.* Our supreme court held that a challenge to an arbitration award must be brought by the parties to the collective bargaining agreement, and not an individual employee, unless he can show the union's conduct was arbitrary, discriminatory, or in bad faith. Since the firefighter did not allege union misconduct, the court ruled he lacked standing to bring a suit challenging the arbitration award. *Id.* at 179.

¶ 26 In *Mahoney*, the plaintiff and other firefighters filed a class grievance against the city of Chicago, alleging that the city filled vacancies with minority firefighters who scored lower on a promotional exam in violation of the collective bargaining agreement. *Mahoney*, 293 Ill. App. 3d at 70. The union processed the grievance, which the city denied, but refused to pursue arbitration. The plaintiffs subsequently filed a complaint against the city in court, alleging violations of their constitutional rights and breach of the collective bargaining agreement. *Id.* However, the complaint did not allege that the union breached its duty of fair representation in refusing to pursue arbitration. *Id.* at 72. The court found that the "plaintiffs need not exhaust their remedies if they claim and prove that the union has breached its duty of fair representation." *Id.* at 74.

¶ 27 *Swieton*, *Stahulak*, and *Mahoney* are distinguishable from the case at bar. In *Stahulak*, the union processed the grievance through arbitration and an award was issued, and in *Swieton* and *Mahoney*, the union refused to proceed to arbitration after the city denied the grievance. Here, however, Degenhardt's union willingly requested arbitration and was going forward with the hearing. Degenhardt admittedly walked away from the arbitration hearing before anything was resolved, and the arbitrator did not have an opportunity to make a ruling. It would be difficult, if not impossible, for a plaintiff to prove that the union breached its duty of fair representation when the union did not have the opportunity to proceed with the arbitration to its conclusion. We find that *Swieton*, *Stahulak*, and *Mahoney* do not support Degenhardt's arguments. Due to our disposition of the appeal, we need not address whether the trial court erred in dismissing the complaint due to lack of subject matter jurisdiction.

¶ 28 Degenhardt next argues that the trial court erred in dismissing his complaint against the city with prejudice. Illinois Supreme Court Rule 273 states that "an involuntary dismissal of an

action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. Jan. 1, 1967). The trial court properly dismissed Degenhardt's complaint against the city finding he lacked standing to bring the complaint. Pursuant to Rule 273, the dismissal was an adjudication on the merits and the trial court did not err in dismissing the counts against the city with prejudice. See *Fitch v. McDermott, Will and Emery, LLP*, 401 Ill. App. 3d 1006, 1028 (2010).

¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 30 Affirmed.