

NOTICE
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2014 IL App (5th) 130197-U

NO. 5-13-0197

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).

MADISON COUNTY MASS TRANSIT)	Appeal from the
DISTRICT, an Illinois Municipal Corporation,)	Circuit Court of
)	Madison County.
Plaintiff-Appellant,)	
)	
v.)	No. 10-ED-21
)	
SERGIO TORRES and JANET TORRES,)	Honorable
)	Barbara L. Crowder,
Defendants-Appellees.)	Judge, presiding.

PRESIDING JUSTICE WELCH delivered the judgment of the court. Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's award of attorney fees to the defendants following the dismissal of the plaintiff's condemnation petition is reversed where the defendants' request for attorney fees was filed more than 30 days after the final dismissal order was entered.

¶ 2 The plaintiff, Madison County Mass Transit District, appeals from the order of the circuit court of Madison County awarding the defendants, Sergio Torres and Janet Torres, attorney fees and costs in the amount of \$22,661, following the court's dismissal of the plaintiff's complaint for condemnation that was filed against the defendants. For the reasons which follow, we reverse the decision of the circuit court.

¶ 3 On December 27, 2010, the plaintiff filed a complaint for condemnation of certain private parcels of land owned or controlled by the defendants (Madison County case number 10-ED-21) for the purpose of the construction, operation, and maintenance of a bikeway trail. In response, on February 18, 2011, the defendants filed a traverse, which was later amended. The defendants subsequently submitted a brief in support of their motion to traverse, arguing, *inter alia*, that the enabling resolution of the Madison County Mass Transit District was deficient because it failed to set forth the proper legal description of the land to be taken, *i.e.*, the resolution described the relevant property in its entirety instead of the portions of property sought to be acquired.

¶ 4 On November 10, 2011, the trial court entered an order dismissing the condemnation complaint filed by the plaintiff. Specifically, the court concluded that the resolution authorizing the plaintiff's use of eminent domain to acquire the tracts of land was deficient because it inadequately described the property to be taken. The court concluded that the error was fatal and that the plaintiff had failed to establish the necessary elements required by section 10-5-10 of the Eminent Domain Act (the Act) (735 ILCS 30/10-5-10 (West 2010)) to sustain an eminent-domain action and complaint for condemnation.

¶ 5 On July 5, 2012, the defendants filed a motion for attorney fees pursuant to section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)), requesting that the circuit court enter an order requiring the plaintiff to pay all costs, expenses, and attorney fees incurred by the defendants as a result of the plaintiff filing the condemnation complaint. On August 9, 2012, the plaintiff filed an objection to the motion for attorney fees, arguing

that the trial court did not have jurisdiction to consider the attorney-fees issue because the motion was filed more than 30 days after entry of the final judgment. The plaintiff noted that the final order of dismissal was entered on November 10, 2011, and the 30-day period expired on December 10, 2011. The plaintiff argued that the plain language of section 10-5-70 of the Act (735 ILCS 30/10-5-70 (West 2010)) did not expand the general rule that postjudgment motions must be filed within 30 days from the date of the final judgment. The plaintiff further argued that the defendants' application for attorney fees was not a collateral matter, which would result in the circuit court retaining jurisdiction past the 30-day deadline.

¶ 6 On November 2, 2012, the trial court entered an order granting the defendants' motion for attorney fees, finding that the motion was not untimely under section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)). As support for its conclusion, the court cited *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066, 1072-73 (1987), which held that a trial court had jurisdiction to consider a fee application made within 30 days of the entry of the final order where a notice of appeal was previously filed from the dismissal order. The court noted that the eminent-domain statutes must be strictly construed and found that the defendants' request for fees was not untimely. Thereafter, following a hearing on the defendants' motion for attorney fees, the court awarded the defendants \$22,661 for attorney fees and costs. The plaintiff appeals.

¶ 7 First, the plaintiff argues that the trial court lacked jurisdiction to grant the defendants' motion for attorney fees because it was filed more than seven months after the entry of the final judgment dismissing the condemnation complaint. The plaintiff

argues that the plain language of section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)) requires that an application for fees be brought before the trial court in the original condemnation action, while the court maintained jurisdiction. The plaintiff argues that because the trial court only has jurisdiction for 30 days following entry of a final order or judgment, the court cannot entertain an application for fees filed after that 30-day deadline. In response, the defendants argue that the statutory language is clear that the plaintiff is responsible for paying the defendants' fees and costs associated with the eminent-domain complaint because the plaintiff ultimately did not acquire the defendants' land through condemnation. The defendants argue that it would be unjust and absurd to force the defendants to pay the substantial fees and costs incurred in defending against the plaintiff's "defective complaint." Alternatively, the defendants argue that in their brief in support of their motion to traverse, they asked the trial court for "any other relief that this court deems just," which contemplated an award of attorney fees and costs.

¶ 8 Statutory construction is a matter of law and therefore subject to *de novo* review. *Detrana v. Such*, 368 Ill. App. 3d 861, 867 (2006). The primary rule of statutory construction is to ascertain and give effect to the legislative intent. *Augustus v. Estate of Somers*, 278 Ill. App. 3d 90, 97 (1996). The most reliable indicator of the legislature's intent is the language of the statute. *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill. 2d 103, 117 (2007). The statutory language must be given its plain and ordinary meaning. *Detrana*, 368 Ill. App. 3d at 867. Eminent-domain statutes are required to be strictly construed. *Town of Libertyville*, 152 Ill. App. 3d at 1070.

¶ 9 Section 10-5-70(a) of the Act provides the following with regard to requests for attorney fees in eminent-domain proceedings:

"If the plaintiff dismisses the complaint before the entry of the order by the court first mentioned in this subsection (a) or fails to make payment of full compensation within the time named in that order or if the final judgment is that the plaintiff cannot acquire the property by condemnation, the court shall, upon the application of the defendants or any of them, enter an order in the action for the payment by the plaintiff of all costs, expenses, and reasonable attorney fees paid or incurred by the defendant or defendants in defense of the complaint, as upon the hearing of the application shall be right and just, and also for the payment of the taxable costs." 735 ILCS 30/10-5-70(a) (West 2010).

¶ 10 In the present case, the defendants filed a motion requesting attorney fees pursuant to section 10-5-70(a) of the Act approximately seven months after the trial court dismissed the plaintiff's condemnation petition. The trial court granted the defendants' request for attorney fees, concluding that the defendants' request for fees was "not untimely." The court relied on *Town of Libertyville v. Bank of Waukegan*, 152 Ill. App. 3d 1066 (1987), in reaching this decision.

¶ 11 *Town of Libertyville*, 152 Ill. App. 3d at 1072, involved the issue of whether the circuit court had jurisdiction to consider the defendants' application for fees in an eminent-domain proceeding because the plaintiff had previously filed a notice of appeal from the dismissal of its condemnation petition. The defendants had requested attorney fees based on section 7-123(a) of the Code of Civil Procedure (the Code) (Ill. Rev. Stat.

1985, ch. 110, ¶ 7-123(a)), now section 10-5-70 of the Act (735 ILCS 30/10-5-70 (West 2010)). *Id.* The fee request was made within 30 days of the final judgment dismissing the condemnation petition. *Id.* The Second District concluded that the filing of the notice of appeal did not deprive the circuit court of jurisdiction to consider the fee request, reasoning that the circuit court retained jurisdiction to determine matters collateral or incidental to the final judgment or order, which included those matters lying outside the issues in the appeal or arising subsequent to the judgment appealed from. *Id.* at 1072-73. The court further reasoned that an application for attorney fees and costs could not be made until final judgment was entered in a condemnation suit. *Id.* at 1073. The court concluded that an application for attorney fees and costs made pursuant to section 7-123(a) of the Code "lies outside the issues in the underlying judgment" and that section 7-123(a) of the Code did not set forth a time limit for seeking these expenses. *Id.* The court noted that a "litigant may wish either to wait until the appeal process ends before filing an application or to proceed at a time after the judgment is entered." *Id.* Accordingly, the court concluded that the filing of a notice of appeal from the final judgment in the condemnation action did not deprive the circuit court of jurisdiction to entertain "the collateral or supplemental matter of fees and costs pursuant to section 7-123(a)." *Id.*

¶ 12 Unlike *Town of Libertyville*, the application for fees filed in the present case was not filed within 30 days of the dismissal of the underlying condemnation action, while the circuit court had jurisdiction over the case. The issue in the present case is whether the court has jurisdiction to entertain a motion for attorney fees pursuant to section 10-5-70

of the Act where the motion was filed outside the 30-day window, after the circuit court lost jurisdiction in the underlying condemnation action. The plaintiff cites *Illinois Department of Financial & Professional Regulation v. Rodriquez*, 2012 IL 113706, a case that distinguished *Town of Libertyville*, in support of its position that the circuit court did not have jurisdiction to entertain the defendants' fee request. In that case, the circuit court granted summary judgment in favor of Rodriquez, concluding that an administrative rule of the Illinois Department of Financial and Professional Regulation was invalid. *Rodriquez*, 2012 IL 113706, ¶ 4. More than one year after the rule was invalidated, Rodriquez filed a petition for litigation expenses pursuant to section 10-55(c) of the Illinois Administrative Procedure Act (the Administrative Procedure Act) (5 ILCS 100/10-55(c) (West 2010)), which allowed a plaintiff to recover litigation expenses where he successfully had an administrative rule invalidated. *Rodriquez*, 2012 IL 113706, ¶ 4-6. The circuit court found that Rodriquez's claim for litigation expenses was barred by *res judicata* because it could have been brought with the previous litigation seeking to invalidate the administrative rule. *Id.* ¶ 6. The appellate court reversed, finding that section 10-55(c) of the Administrative Procedure Act allowed for the plaintiff to bring an independent action for attorney fees and that *res judicata* was not applicable because the "operative facts giving rise to the claim for litigation expenses did not arise until the rule was invalidated." *Id.*

¶ 13 On appeal, the Department argued that section 10-55(c) of the Administrative Procedure Act did not create an independent cause of action for the recovery of litigation expenses and therefore a request for those expenses must be brought while the court had

jurisdiction over the underlying action. *Id.* ¶ 8. Rodriguez countered that section 10-55(c) created a separate cause of action and the court retained indefinite jurisdiction to hear a petition for fees filed pursuant to section 10-55(c) of the Administrative Procedure Act. *Id.* ¶ 9. He also argued that *res judicata* did not apply because the claim for litigation expenses was not available to him until the rule was invalidated. *Id.*

¶ 14 The supreme court looked at the language of the statute, which stated as follows:

" 'In any case in which a party has any administrative rule invalidated by a court for any reason, including but not limited to the agency's exceeding its statutory authority or the agency's failure to follow statutory procedures in the adoption of the rule, the court shall award the party bringing the action the reasonable expenses of the litigation, including reasonable attorney's fees.' " *Id.* ¶ 12 (quoting 5 ILCS 100/10-55(c) (West 2010)).

¶ 15 In construing this statute, the supreme court reasoned that the phrase "the court" may not be read in isolation and concluded that when read together with the rest of section 10-55(c) of the Administrative Procedure Act, it was "clear that the fees are to be awarded by the court that invalidated the rule." *Id.* ¶ 15. The court further concluded that section 10-55(c) established a time limitation on the filing of a petition for fees because it required that a fee request be brought in the case in which the rule was invalidated. *Id.* ¶ 17.

¶ 16 The supreme court reasoned that *Libertyville* was inapplicable because the fee request in *Libertyville* was made within 30 days of the final judgment, while the court maintained jurisdiction, and the issue in that case was whether the circuit court had lost

jurisdiction to rule on a fee request filed after the plaintiff had filed a notice of appeal. *Id.* ¶ 20. Additionally, the court rejected the argument that a fee request was a collateral matter, which would allow the circuit court to retain indefinite jurisdiction to consider the request. *Id.* ¶ 29. The court concluded that the plain language of section 10-55(c) of the Administrative Procedure Act did not create a separate cause of action and that an application for attorney fees under section 10-55(c) must be brought while the court that invalidated the rule had jurisdiction over the underlying issue. *Id.* ¶ 37.

¶ 17 In the present case, the defendants did not file their application for attorney fees within 30 days of the final judgment, while the circuit court had jurisdiction over the condemnation action. Relying on *Libertyville*, the circuit court concluded that the defendants' request for fees pursuant to section 10-5-70 of the Act was not untimely because the statute did not establish a time limit for filing fee requests in eminent-domain proceedings and that the application for fees and costs lies outside the issues in the underlying eminent-domain proceedings. We disagree. As previously stated, section 10-5-70(a) of the Act (735 ILCS 30/10-5-70(a) (West 2010)) provides as follows with regard to fee applications: "the court shall, upon the application of the defendants or any of them, enter an order *in the action* for the payment by the plaintiff of all costs, expenses, and reasonable attorney fees paid or incurred by the defendant." (Emphasis added.) Like *Rodriguez*, the statutory language "in the action" indicates that the application for attorney fees must be brought in the same action as the underlying condemnation proceeding and therefore must be made while the circuit court in the original condemnation action has jurisdiction. Therefore, the request for attorney fees is not a

collateral matter, which would allow the court to retain indefinite jurisdiction to hear the fee request. Additionally, as in *Rodriquez*, we find *Libertyville* to be inapplicable to the issue at hand because the fee application in *Libertyville* was filed within 30 days of the final judgment, while the circuit court maintained jurisdiction over the underlying action. Accordingly, we conclude that the circuit court had jurisdiction to entertain a motion for attorney fees filed under section 10-5-70(a) of the Act within 30 days of the entry of the final judgment. Because the defendants failed to file a timely request for attorney fees, we conclude that the circuit court did not have jurisdiction to consider their fee request.

¶ 18 Next, the defendants argue, in the alternative, that a request for attorney fees and costs was made in their brief in support of their motion for traverse. They point to the language in the brief where they requested "any other relief that this court deems just" and argue that this language contemplated an award of fees and costs. Accordingly, they argue that their request for attorney fees and costs was timely because it was made before the court dismissed the condemnation action. We disagree. The defendants' request for "any other relief that this court deems just" was contained in the defendants' memorandum of law supporting their motion for traverse. We conclude that the generic request for "any other relief that this court deems just" is insufficient to be considered a request for attorney fees and costs because it does not put the trial court or opposing counsel on notice that attorney fees and costs were being requested. Accordingly, we find that the defendants' request for attorney fees and costs, made over seven months after the court entered its final order, was untimely.

¶ 19 Finally, we note that the trial court's November 2, 2012, order granting the

defendants' motion for attorney fees contained language indicating that the defendants' motion was filed pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). Despite this language in the trial court's order, we note that the defendants' motion does not meet the requirements of section 2-1401. Specifically, the motion that the defendants filed in the circuit court was not supported by an affidavit. See *Storz v. O'Donnell*, 256 Ill. App. 3d 1064, 1069 (1993) (in order to be legally sufficient, the petition must be supported by the sworn allegations of a party having personal knowledge of the relevant facts, set forth by either verified petition or attached affidavit). Additionally, there is no indication in the trial court record that counsel alleged the existence of a meritorious defense, that it was through no fault of his own that the defense was not presented to the trial court, that he had exercised due diligence in defending the original action, and that he had exercised due diligence in filing the section 2-1401 petition. See *Storz*, 256 Ill. App. 3d at 1069 (to obtain relief under section 2-1401, the petitioner must allege and prove (1) the existence of a meritorious defense, (2) that it was through no fault of his own that the defense was not presented to the trial court, (3) that he had exercised due diligence in defending the original action, and (4) that he had exercised due diligence in filing the section 2-1401 petition). Therefore, we have limited our analysis to the issue of whether the defendants' motion for attorney fees was timely filed under section 10-5-70(a) of the Act. As stated above, we have concluded that the motion was untimely and therefore the trial court erred in granting the defendants' motion for attorney fees.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Madison County is

hereby reversed.

¶ 21 Reversed.