2015 IL App (5th) 140473-U

NO. 5-14-0473

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SCOTT BUEKER, DAWN BUEKER, JASON MOSS, CHRISTINE MOSS, RICHESON REAL ESTATE, LLC, VIRGIL STRAETER, and GERALYN LINDOW, *et al.*, Plaintiffs-Appellants, v. MADISON COUNTY, ILLINOIS, FRED BATHON, KURT PRENZLER, in His Official Capacity as Madison County Treasurer, JIM FOLEY, ALAN J. DUNSTAN, MARK VON NIDA, BARRETT ROCHMAN, KENNETH ROCHMAN, BLUE SKY VINEYARDS, LLC, CDBR, LLC, SABRE GROUP, LLC, S.I. SECURITIES, LLC, DENNIS BALLEINGER, JR., EMPIRE TAX CORPORATION, VISTA SECURITIES, INC., JOHN VASSEN, JOSEPH VASSEN, VI, INC., SCOTT McLEAN, LAND OF LINCOLN SECURITIES, LLC, PRAIRIE STATE SECURITIES, LLC, ROBERT LUKEN, LUKEN INVESTMENT COMPANY, SCOTT SIERON, RAVEN SECURITIES, INC., ILLINOIS MOBILE HOMES, LLC, ILLINOIS REALTY GROUP HOLDINGS, LLC, ILLINOIS REALTY GROUP, LLC, JOHN W. SCOTT, EDWARD BEASLEY, and WESTERN SURETY COMPANY, Defendants, and RLI INSURANCE COMPANY, Defendant-Appellee.	Appeal from the Circuit Court of Madison County. No. 13-L-276 Honorable Dennis E. Middendorff, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Stewart and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of the action is affirmed where the plaintiffs were not proper claimants under the bond.

¶ 2 This appeal arises out of a lawsuit for an alleged conspiracy perpetrated by Fred Bathon, the former treasurer and collector of Madison County, to "rig" tax lien auctions with various parties. The result of this scheme was that those who were delinquent in paying their Madison County real estate property taxes were required to pay the maximum allowable interest to the buyer defendants to discharge the liens and redeem their properties. The buyer defendants, in turn, provided financial support to Fred Bathon. The original action sought redress from those responsible for and who benefited from the rigged sales during the period of time when Bathon held his offices. Count VII of the plaintiffs' complaint alleged a cause of action directly against RLI Insurance Company (RLI), the entity acting as the surety on the public official bonds on which Bathon was the named bonded principal and "Madison County Government" was the named obligee.[1]

[1]As required by statute, Bathon obtained a public official's bond upon his assumption of the offices of county treasurer and county collector. See 55 ILCS 5/3-10003 (West 2014) (stating the bond form requirements for county treasurer); 35 ILCS 200/19-40 (West 2014) (stating the bond form requirements for the county collector as

¶ 3 The bond issued by RLI contains the following language:

"Know by all men these presents:

That we, Fred Bathon, as Principal, and RLI Insurance Company, a corporation duly licensed to do business in the State of Illinois, as Surety, are held and firmly bound unto the Madison County Government in the penal sum of One Million Dollars ($1,000,000) to the payment of which sum, well and truly to be made, we jointly and severally bind ourselves and our legal representatives firmly by these presents."

¶ 4 RLI filed a motion to dismiss count VII of the complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)), asserting that it should be dismissed with prejudice "as the individual plaintiffs in this lawsuit are not proper claimants under the terms of the bond or under the statutes that required its procurement."

¶ 5 A hearing on the motion was held on May 29, 2014, at which the parties appeared through counsel. At the hearing, RLI argued that the plaintiffs did not have standing to sue under the public official bond, as Madison County is the named obligee; while the statute indicates that the claimant or obligee should be named as "the People of the State of Illinois," RLI asserted that the law in Illinois, through the Fifth District case *Hicks v.*

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well as the language of the oath: "I do solemnly swear that I will support the Constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of county collector according to the best of my ability"); 35 ILCS 200/19-35 (West 2014) ("The treasurers of all counties shall be *ex-officio* county collectors of their counties.").

Aetna Insurance Co., 97 Ill. App. 3d 828 (1981), definitively holds that "the People of the State of Illinois" refers to the body politic, and therefore no individual right of action existed against RLI as a direct defendant. RLI noted that its dismissal as a direct defendant in the individual claims would not result in RLI "disappear[ing] from these set of facts" because "[a]t some point [the named obligee] Madison County may very well assert a claim against RLI for some of the alleged conduct here."

¶ 6 In response, the plaintiffs argued that the public official bonds were given to protect not only the interest of the county, but to protect the interest of anyone who may be injured by the official acts of the clerk. The plaintiffs asserted that *Hicks* was decided in error because "it was looking at the wrong type of bond, and actually seems to ignore common law precedent." The plaintiffs noted that case law existing prior to that decision indicates that independent action against RLI is proper, and argued that RLI's liability is co-extensive with that of the principal (Bathon). The plaintiffs also asserted that *Hicks* was distinguishable where the type of policy discussed therein, a blanket fidelity policy, was written to run for the benefit of the named insureds only, while a public official bond is a faithful performance bond. After hearing the parties' arguments, the court noted that "whether it's correctly or incorrectly decided," *Hicks* was applicable in the instant case and the court was bound by the opinion. The court thereafter granted RLI's motion.

¶ 7 The trial court's August 25, 2014, order dismissed with prejudice the only claim asserted against the defendant and found that there was no just reason to delay the appeal or enforcement of the order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26,

2010). The plaintiffs appeal, asserting that they are the proper claimants and the trial court improperly dismissed the defendant on the pleadings.

¶ 8 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on the defects apparent on its face. 735 ILCS 5/2-615 (West 2014); *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006). As such, an order granting or denying a section 2-615 motion is reviewed *de novo*. *Marshall*, 222 Ill. 2d at 429. In reviewing the sufficiency of a complaint, Illinois courts construe the allegations in the complaint in the light most favorable to the plaintiffs, and accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Marshall*, 222 Ill. 2d at 429.

¶ 9 We begin by noting that the issue before us is not whether RLI will ultimately be liable under the bond, but whether the plaintiffs may pursue RLI directly under the bond, which was a "dual-position" bond relating to Bathon's positions as both treasurer and collector. Therefore, two statutes address the identity of the obligee and the form that the bond should take.

¶ 10 The statute relating to the form of the treasurer's bond states:

> "Each County treasurer, before he or she enters upon the duties of his or her office, shall also execute a bond (or, if the county is self-insured, the county through its self-insurance program may provide bonding) in such penalty and with such security as the county board shall deem sufficient, which bond in every county now having or which may hereafter have a population of 500,000 or more shall be in a penal sum of not less than $1,500,000. Such bond shall be in substance in the following form to-wit:

We, (A.B.), principal, and (C.D. and E.F.), sureties, all of the county of ... and State of Illinois, are obligated to *the People of the State of Illinois* in the penal sum of $..., for the payment of which, we obligate ourselves, each of us, our heirs, executors and administrators, successors and assigns.

The condition of the above bond is such, that if the above obligated (A.B.) shall perform all the duties which are or may be required by law to be performed by him or her, as treasurer of the county of ... in the time and manner prescribed or to be prescribed by law, and when he or she is succeeded in office, shall surrender and deliver over to his or her successor in office, all books, papers, moneys and other things belonging to the county, and appertaining to his or her office, except as hereinafter provided, then the above bond to be void; otherwise to remain in full force." (Emphasis added.) 55 ILCS 5/3-10003 (West 2014).

The statute relating to the form of the collector's bond states:

"Each county collector as soon as elected and qualified and before entering upon the duties of office as collector, in addition to the bond as treasurer, shall furnish a bond in such penalty and with such security as the county board considers sufficient. In counties with 3,000,000 or more inhabitants, the bond shall be in a penal sum of not less than $1,500,000. The signatures to the bond, signed by a mark, shall be witnessed, but in no other case shall witness be required. The bond shall be substantially in the following form:

Know All Men by These Presents, that we, A.B. collector, and C.D. and E.F. securities, all of the county of ... and State of Illinois, are held and firmly

bound unto *the People of the State of Illinois*, in the penal sum of ... dollars, for the payment of which, well and truly to be made, we bind ourselves, each of us, our heirs, executors and administrators, successors and assigns, firmly by these presents.

Signed and sealed on (insert date).

The condition of the foregoing bond is such that if the above bound A.B. performs all the duties required to be performed as collector of the taxes in the county of ..., in the State of Illinois, in the time and manner prescribed by law, and when succeeded in office, shall surrender and deliver to his or her successor in office, all books, papers and moneys appertaining to the office, except as hereinafter provided, then the foregoing bond to be void; otherwise to remain in full force.

It is expressly understood and intended that the obligation of the above named sureties shall not extend to any loss sustained by the insolvency, failure or closing of any bank or trust company organized and operating either under the laws of the State of Illinois, or the United States wherein the collector has placed the funds in his or her custody or control, or any part thereof." (Emphasis added.) 35 ILCS 200/19-40 (West 2014).

¶ 11 As presented above, the facts before us indicate that while the named obligee on the instrument itself is "Madison County Government," the statute requires that the obligation run to "the People of the State of Illinois." As successfully argued before the

trial court, the defendants also contend on appeal that *Hicks* informs our decision on these facts.

¶ 12 The *Hicks* plaintiffs were private grain producers who sued employees of the Illinois Department of Agriculture in the Jackson County circuit court for their losses to the Murphysboro Grain Elevator, to whom they had sold grain on credit before it went bankrupt. *Hicks*, 97 Ill. App. 3d at 828-29. The plaintiffs alleged that the state officials failed to perform the duties required of them by the Illinois Grain Dealers Act (the Act), such as allowing the Murphysboro Grain Elevator to operate without obtaining a license and without procuring a surety bond as mandated by the Act. *Id*. at 829. The plaintiffs joined Aetna as a defendant because it had issued a blanket fidelity insurance policy (a "3D" or "Dishonest, Disappearance and Destruction" policy) to cover losses resulting from the dishonesty of the employees insured (*i.e.*, Illinois State employees) and from the disappearance or destruction of property of the insured. *Id*. The plaintiffs claimed that Aetna was acting as "the surety on the blanket public official bond" and was liable as surety for the failure of the defendants to faithfully perform the duties of their offices; Aetna filed a motion to dismiss the complaint, contending "under several different lines of argument, that these plaintiffs could not maintain a suit directly." *Id*.

¶ 13 The *Hicks* court examined case law and secondary treatises, concluding that while public officials' bonds are generally available to protect the interests of private persons who may be aggrieved by their breach, a third party's right to bring action must be in the express language of the bond or the statute requiring the bond. *Id*. at 831. Citing *Midland Loan v. National Surety Corp.*, 309 U.S. 165 (1940), this court noted that a

unanimous Supreme Court has held that a third party's right to sue on the instrument for loss covered by an official bond running only to the statutory obligee depends on the intent of the legislative body, which may be evidenced by express statutory language or by implication. *Id.* at 832. The instrument in *Hicks* did not name the plaintiffs as an obligee, nor did it give indication that their parties could maintain a direct action against Aetna; moreover, the statute requiring the procurement of bonds stated that the obligee should be identified as "the People of the State of Illinois." Finding no support in the law, the language of the contract, or consent from the State of Illinois, the court found no legal authority supporting the plaintiffs' suit against Aetna and subsequently affirmed the complaint's dismissal. *Id*.

¶ 14 We find that the crux of the holding in *Hicks*–that a third party may not bring an action on an official bond in the absence of specific authority–is directly applicable to the facts before us. Thus, under Illinois law, the only proper plaintiff under the public official bond issued by RLI is the named obligee, *i.e.*, Madison County, or a claimant specifically authorized by the statute. *Hicks*, 97 Ill. App. 3d at 831.

¶ 15 Reading the instrument and the language of the statute together, we find that in this instance, "the People of the State of Illinois" refers to the body politic and not the individual citizens of the county. We find support for this holding is evidenced both by the language in the instrument naming not the people but "Madison County Government" as the obligee, and in the absence of statutory authority regarding third-party interests. As in *Hicks*, the statute's reference to "the People of the State of Illinois" does not directly create an individual right of action, and we do not find any implied intention within the

language of the statute that would persuade us that it was intended to provide a third-party right of action to individual citizens.

¶ 16 The plaintiffs attempt to both contest the validity of the *Hicks* decision, or in the alternative, distinguish it from the facts before us. In response to this argument, we note initially that the plaintiffs' assertions regarding *Hicks*'s relevance due to the type of instrument at issue is a *non sequitur*. Our court specifically stated therein that for the purposes of the decision, we assumed that the instrument issued by Aetna was a surety bond; thus, the holding in *Hicks* is directly relevant to this cause, where a surety bond is most certainly the instrument in question.

¶ 17 In regards to distinguishing this case from the facts in *Hicks*, the plaintiffs cite several cases holding that a public official bond is given to protect the interests of any person injured by the official acts of the public servant. However, we find them distinguishable from the facts before us. While some of these opinions indeed recognized an individual right of action involving a public official's bond, all of the cases cited by the plaintiffs consist of opinions that are devoid of certain facts that are critical to our analysis, whether it be the language of the bond instrument, the naming of specific obligee on the instrument, or if a statutory requirement designated the proper claimants under the bond. See *People ex rel. Bothman v. Brown*, 194 Ill. App. 246 (1915); *Governor v. Dodd*, 81 Ill. 162 (1876); *People ex rel. Munson v. Bartels*, 138 Ill. 322

(1891); *City of Cairo ex rel. Robinson v. Sheehan*, 173 Ill. App. 464 (1912).[2]

¶ 18 By the terms of the instrument, RLI ensured that Bathon is liable for the penal sum of $1 million where he failed to faithfully perform the duties of his office. The plaintiffs, however, may not properly seek their recompense for Bathon's wrongdoings through a direct action against the surety. We therefore find that RLI's motion to dismiss count VII of the plaintiffs' consolidated complaint was properly granted by the circuit court.

¶ 19 Affirmed.

[2]The plaintiffs also cite *Apperson v. Hartford Accident & Indemnity Co*., 322 Ill. App. 485 (1944). While the court noted that among the "exceptions to the general rule concerning the nonliability of obligors to unnamed and undesignated obligees not a party to the bond" were bonds of public officers, this statement was made in *dicta* and elaborated no further as to what circumstances would give rise to these exceptions. *Id*. at 496.