

2016 IL App (1st) 150471-U  
No. 1-15-0471  
March 15, 2016

SECOND DIVISION

**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 DISTRICT

---

RESPIRONICS, INC., a Delaware Corporation in good standing,	)	Appeal from the Circuit Court Of Cook County.
	)	
Plaintiff-Appellee,	)	
	)	No. 12 L 050051
v.	)	
	)	The Honorable
BRIAN HAMER, in his official capacity as	)	Robert Lopez Cepero,
Director of the Illinois Department of Revenue;	)	Judge Presiding.
and DAN RUTHERFORD, in his capacity as	)	
Illinois State Treasurer,	)	
	)	
Defendants-Appellants.	)	

---

JUSTICE NEVILLE delivered the judgment of the court.  
Presiding Justice Pierce and Justice Simon concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The circuit court does not have authority to make a motion for summary judgment *sua sponte*.
- ¶ 2 Respironics, Inc. paid taxes under protest and filed a complaint in which it prayed for recovery of part of its tax payments. The circuit court entered a judgment in favor of Respironics. On appeal, the Department contends that the circuit court failed to follow

established procedures before summarily entering judgment. We find that the circuit court in effect made a motion for summary judgment *sua sponte*, and then granted its own motion without the support of any admissible evidence concerning issues of material fact. Accordingly, we reverse the circuit court's judgment and remand for proceedings in accord with court rules.

¶ 3

### BACKGROUND

¶ 4

On November 14, 2011, the Illinois Department of Revenue sent Respironics a notice of deficiency. According to the Department's calculations, Respironics should have paid \$298,547 in taxes for its 2005 tax year, instead of the \$139,844 it actually paid. With the late payment penalty and interest, the Department found that Respironics owed the State \$319,022.58 due to its failure to pay in full its taxes for 2005. The Department found similar deficiencies in Respironics's payments for 2006 and 2007. The notices of deficiency for those years informed Respironics that, according to the Department's calculations, Respironics owed the State \$419,540.58 for 2006 and \$273,901.86 for 2007.

¶ 5

Respironics paid under protest the amounts the Department claimed. On January 12, 2012, Respironics filed a complaint in which it alleged that the Department had overstated Respironics's tax because the Department improperly included in its tax computation the earnings of RI Assurance, Inc., a wholly owned affiliate of Respironics. In its answer, the Department alleged that Respironics erred when it excluded RI Assurance's earnings from Respironics's income as reported on its tax return.

¶ 6

At a status hearing on November 20, 2014, the circuit court entered an order directing the parties to "present to the Court summary points of the similarities and differences factually

between the present matter and *Wendy's International, Inc. v. Hamer*, 2013 IL App (4th) 110678" by November 26, 2014, less than a week after the date of the order. The record does not include any motion to which the order responds, and the order on its face makes no reference to any motion of the parties.

¶ 7 Respironics filed a six page "factual comparison" listing allegations concerning RI Assurance and comparing the allegations to the facts stated in *Wendy's*. For many of the allegations, Respironics added designations which appear to have the form of citations to a record or a collection of numbered documents. For example, Respironics wrote: "RI Finance, Inc. received 1,000 shares of RI Assurance for the initial purchase/contribution of \$250,000 cash. (TX 00330-332)." The record on appeal does not include any of the documents to which Respironics refers in its factual comparison. Nothing in the record indicates that the trial court had access to any documents referred to in the summary.

¶ 8 The Department filed one page in which it alleged that several factual differences made *Wendy's* inapplicable to the case against Respironics.

¶ 9 At the next status hearing, held December 2, 2014, the circuit court entered an order in which it said:

"The Court finding no genuine issue of material fact as to one or more of the major issues and the matter of *Wendy's International, Inc. v. Hamer*, 2013 IL App (4th) 110678 \*\*\* being controlling, judgment is entered in favor of Respironics, Inc."

¶ 10 The Department filed a motion for reconsideration, in which it pointed out that

"The Department was unable to create a record at the Circuit Court level.

\*\*\* The matter was set for status, at which time this Court heard oral argument.

\* \* \*

\*\*\* The Department did not have opportunity to formally raise the nuanced differences between the Wendy's International Inc. matter and the case at issue."

¶ 11 The circuit court denied the motion for reconsideration. The Department now appeals.

¶ 12 ANALYSIS

¶ 13 The Department contends that the circuit court lacked authority to enter judgment in favor of Respironics *sua sponte*. In support, the Department cites *Peterson v. Randhava*, 313 Ill. App. 3d 1 (2000). In *Peterson*, Randhava filed a motion for sanctions under Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. Feb. 1, 1994)). At the hearing on the motion, the circuit court decided *sua sponte* to treat the motion as a motion for summary judgment under section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 1998)). The circuit court entered a judgment in favor of Randhava and Peterson appealed.

¶ 14 The appellate court said :

"Section 2-1005 of the Code of Civil Procedure does not authorize the trial court to *sua sponte* summarily grant summary judgment, but allows the nonmoving party time to respond to the summary judgment motion. 735 ILCS 5/2-1005 (West 1998). Equally important are the basic principles of our system that a party receive notice and an opportunity to respond to a potentially dispositive motion. Such opportunity 'is deeply imbedded in our concept of fair play and justice.' *English v. Cowell*, 10 F. 3d 434, 437 (7th Cir. 1993). Here, the court

determined what type of motion the defendant should file and, without waiting for defendant to file it and without giving plaintiff an opportunity to respond to it, granted the motion and dismissed the case with prejudice. The problem with this approach is that it not only may waste judicial resources, through producing unnecessary appeals and remands that may have been avoided, but it deprives the plaintiff of an opportunity to conduct discovery on the relevant issues, present evidence and argue against dismissal." *Peterson*, 313 Ill. App. 3d at 11-12.

¶ 15 The appellate court reversed the judgment and remanded for proceedings in accord with court rules.

¶ 16 Although the circuit court here did not indicate what rules or statutes warranted the entry of final judgment in favor of Respirationics, we agree with the parties that the language of the order indicates that the court acted as though it was deciding a motion for summary judgment. Respirationics argues that it made an informal motion for summary judgment and the record supports the entry of judgment in its favor. The record includes no written or spoken motion for summary judgment. Thus, the record leads to the conclusion that the circuit court made a motion for summary judgment *sua sponte*, and then, without notice that it intended to proceed under section 2-1005, it entered judgment on its own motion.

¶ 17 Following *Peterson*, we hold that the statutes and rules did not authorize the circuit court to make a motion on its own to dispose of the case in this summary manner, without the notice required for dispositive motions (see *Peterson*, 313 Ill. App. 3d at 13-14), and without

giving the Department a full and fair opportunity to create a record in support of its decision to tax Respiroics on the income of RI Assurance.

¶ 18 Moreover, the record on appeal includes no evidence admissible at trial in support of the factual assertions on which Respiroics relies as justification for the circuit court's judgment. If a party had made a motion for summary judgment and the circuit court had granted it, we would review the judgment *de novo*. *In re Estate of Hoover*, 155 Ill. 2d 402, 411 (1993). We could then affirm if the "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014); *Murphy v. Urso*, 88 Ill. 2d 444, 464 (1981). The informal memoranda the court requested do not qualify as pleadings, depositions or affidavits. Respiroics's memorandum includes no evidence admissible in court, as it consists solely of allegations without attestation. In the Department's single page response to the court's request, we find no admission sufficient to warrant the circuit court's conclusion that Respiroics is entitled to judgment as a matter of law. Thus, even apart from the procedural impropriety, we must reverse the judgment so that the parties can present evidence and create a record that shows a party has presented sufficient evidence to justify the entry of judgment in its favor.

¶ 19 Accordingly, we must reverse the judgment and remand to the circuit court for the parties to present motions, possibly including a motion for summary judgment supported by a fully developed record, or for the court to hold a trial for disposition of the case.

¶ 20 Reversed and remanded.