2016 IL App (1st) 151583-U

SIXTH DIVISION
May 6, 2016

No. 1-15-1583

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAVID G. DUGGAN, Plaintiff-Appellant, v. 3114 NORTH SOUTHPORT, LLC, and the ZONING BOARD OF APPEALS OF THE CITY OF CHICAGO, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 14 CH 19972 Honorable Sophia Hall, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court did not err in dismissing plaintiff's complaint for administrative review because plaintiff failed to file it within the statutory 35-day period. Affirmed.

¶ 2 Following an administrative hearing, defendant Zoning Board of Appeals of the City of Chicago (the Board) granted a zoning variance in favor of defendant 3114 North Southport, LLC (Southport). Plaintiff David G. Duggan filed a complaint for administrative review challenging the Board's decision. The trial court granted defendants' motions to dismiss, finding, among other things, that plaintiff failed to file his complaint within the statutory 35-day time period for

filing complaints for administrative review. Duggan now appeals, contending that the trial court erred in finding that (1) his complaint for administrative review was untimely; (2) his complaint failed to state a claim; and (3) he lacked standing to challenge the Board's decision. Duggan further contends that the trial court abused its discretion in denying his motion to amend his complaint. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant Southport, the owner of real estate located at 3114 North Southport Avenue in Chicago, applied for a zoning variance with the Board. On May 16, 2014, the Board held an administrative hearing on Southport's application. Plaintiff Duggan and others testified at the hearing in opposition to Southport's application. Duggan signed his name and provided his address on the "sign-in sheet," along with two other objectors, James Hirshorn and Jon Waldman. On July 1, 2014, the Board issued a written decision approving Southport's application for a variance.

¶ 5 On December 15, 2014, Duggan filed his complaint for administrative review of the Board's decision, arguing that the decision was against the manifest weight of the evidence or was otherwise contrary to law. Southport and the Board each filed motions to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2014)). Both parties argued that dismissal was required because Duggan did not file his complaint within 35 days of the issuance of the Board's decision. The Board also argued that Duggan lacked standing and his complaint failed to state a cause of action because Duggan failed to allege that he was adversely affected by the Board's decision.

¶ 6 Attached to the Board's motion were two affidavits. Victor Resa stated in his affidavit that he was responsible for mailing copies of the Board's decisions, and that, following the

issuance of the Board's decision on July 1, 2014, Resa placed a copy of the decision in an envelope addressed to Duggan and others who had signed in at the hearing, and placed the envelopes (including Duggan's) in a box for pick-up by the "Central Mail staff" on July 2, 2014. Jeffrey Wilson stated in his affidavit that he was responsible for supervising the collection, processing and delivery of mail to various departments of the City of Chicago and also to the United States Post Office. Wilson further stated that, in the ordinary course of business, an envelope that was placed in the Board's pick-up box on July 2, 2014, would have been collected either on that same day (if it was placed in the box before 1 p.m.) or on July 3, 2014 (if it was placed in the box after 1 p.m.) and then delivered to the post office the following business day, either July 3, 2014, or July 7, 2014.

¶ 7 Duggan responded separately to the motions to dismiss. In his response to Southport's motion, Duggan attached his affidavit in which he denied having received the Board's decision prior to November 8, 2014. Duggan explained that, around October 30, 2014, he noticed on a website that a building permit had been issued for 3114 N. Southport, and he then contacted Resa early the next week. Duggan stated that he received a copy of the decision on November 8, 2014, and the envelope containing the decision was postmarked November 7, 2014. Duggan concluded that he timely filed his action on December 15, 2014, because it was filed within both the 35-day time period of section 3-103 of the Administrative Review Law (the Act) (735 ILCS 5/3-103 (West 2014)) and Illinois Supreme Court Rule 12(c) (Ill. S. Ct. R. 12(c) (eff. Sept. 19, 2014)), "which allows four days after mailing for service to be effective."

¶ 8 Duggan also included affidavits from two other individuals: Richard Lapins (whose affidavit was attached to Duggan's response to the Board's motion) and Rick Ahuja, M.D. (whose affidavit was included with the response to Southport's motion). Both affiants stated in

pertinent part that they attended the meeting before the Board, signed in as objectors, testified in opposition to the proposed variance, but never received a copy of the decision.

¶ 9 The Board replied to Duggan's response, and attached another affidavit from Resa. In this affidavit, Resa stated that, after receiving a call from Duggan, he sent "another copy" of the decision using the same procedures he explained in his prior affidavit. Resa added that he wrote the phrase "2nd mailing" on the upper left corner of the envelope, which was attached as an exhibit to his affidavit and was postmarked November 7, 2014.

¶ 10 On April 29, 2015, the trial court granted Southport's and the Board's motions to dismiss, finding that Duggan had failed to file his complaint "within the 35-day limitations period." In addition, the trial court further found that Duggan failed to state a claim and lacked standing. Duggan filed a motion for leave to file an amended complaint on May 7, 2015, but the trial court dismissed that motion on May 15, 2015. This appeal followed.

¶ 11 ANALYSIS

¶ 12 On appeal, Duggan contends that the trial court erred in dismissing his complaint for administrative review. Duggan argues that his complaint was not untimely, and that he properly stated a claim and established his standing to challenge the Board's decision. In addition, Duggan claims that the trial court abused its discretion in denying his motion to amend his complaint. We turn first to his claim that his complaint was timely.

¶ 13 The Board's motion to dismiss was brought under section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). Under section 2-619, a court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. As a result, a motion to dismiss pursuant to section 2-619 should not be granted unless it is clearly apparent that no set of facts can be proved

that would entitle the plaintiff to recovery. *Id.* We review *de novo* the trial court's decision on section 2-619 motions to dismiss. *Id.*

¶ 14 Section 2-619 of the Code permits dismissal if the cause action was not "commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2014). Additionally, subsection (a)(9) permits dismissal where "the claim asserted *** is barred by other affirmative matter avoiding the legal effect of or defeating the claim" (735 ILCS 5/2-619(a)(9) (West 2014)), where "affirmative matter" includes "any defense other than a negation of the essential allegations of the plaintiff's cause of action" (*Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). If, however, the affirmative matter is not apparent on the face of the complaint, the motion must be supported by affidavit. *Id.* at 116. If the affidavits adequately support the asserted defense, the defendant satisfies the initial burden of going forward on the motion, and the burden then shifts to the plaintiff. *Id.* The plaintiff must establish that the defense either is unfounded or requires the resolution of an essential element of material fact, and the plaintiff may establish this by affidavits or other proof. *Id.* "A counteraffidavit is necessary, however, to refute evidentiary facts properly asserted by affidavit supporting the motion [or] else the facts are deemed admitted." *Id.*

¶ 15 Section 11-13-4 of the Illinois Municipal Code empowers the Board to grant or deny applications for zoning variances. 65 ILCS 5/11-13-4 (West 2014). Section 11-13-13 states that the Board's decisions are subject to judicial review pursuant to the Act. 65 ILCS 5/11-13-13 (West 2014) (citing 735 ILCS 5/3-101 *et seq.* (West 2014)). In addition, a decision of the Board is defined as an "administrative decision" under section 3-101 of the Act. *Id.* (citing 735 ILCS 5/3-101 (West 2014)).

¶ 16 This appeal centers on the timeliness requirements of the Act, necessitating that we interpret the Act, a question of law warranting *de novo* review. *Nudell v. Forest Preserve District of Cook County*, 207 Ill. 2d 409, 415 (2003). Section 3-102 of the Act states that, unless review of an administrative decision is sought "within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision." 735 ILCS 5/3-102 (West 2014).

¶ 17 Section 3-103 of the Act provides in relevant part that actions to review a final administrative decision "shall be commenced by the filing of a complaint *** within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision." 735 ILCS 5/3-103 (West 2014). "The method of service of the decision shall be provided in the Act governing the procedure before the administrative agency, but if no method is provided, a decision shall be deemed to have been served *** when a copy of the decision is *deposited in the United States mail*." (Emphasis added.) *Id.* Here, there is no dispute that procedural laws governing the Board do not provide for a method of service; as such, service is accomplished when the decision of the Board that is being appealed is placed in the United States mail. See *Nudell*, 207 Ill. 2d at 424.

¶ 18 In this case, Duggan argues that the Board failed to serve its decision in July primarily based upon his allegation that he never received it, and therefore, he is excused from the Act's 35-day limitations period. First of all, it is well established that a party to a lawsuit has an independent obligation to follow the case. *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 943 (1999); see also *Verni v. Imperial Manor of Oak Park Condominium, Inc.*, 99 Ill. App. 3d 1062, 1067 (1981). The record in this case reveals that Duggan did nothing until Thursday, October 30, 2014, and then waited until the following week to contact Resa. Nonetheless, even

assuming, *arguendo*, that Duggan's implication that the Board never mailed the decision in July but instead back-dated the decision to July and then mailed it in November is correct, that contention of error necessarily fails.

¶ 19 Duggan concedes that he received the Board's decision on November 8, 2014. Resa and Wilson stated in their affidavits that the decision was placed in the United States mail on November 7, 2014, which satisfied the Board's burden to establish evidence in support of its 2-619 motion. At that point, the burden shifted to Duggan to provide a counteraffidavit establishing that his December 15 filing was timely. See *Kedzie*, 156 Ill. 2d at 116. Duggan's affidavit, however, only addressed the date of receipt and provided nothing to refute the date of mailing, so he failed to meet his burden to refute the Board's evidence. See *Rodriguez v. Sheriff's Merit Comm'n of Kane County*, 218 Ill. 2d 342, 346 n.1 (2006) (holding that the plaintiff's amended counteraffidavit denying receipt of the agency's decision did not contain facts establishing the plaintiff's knowledge "with respect to the commission's mailing practices"). Therefore, the 35-day limitations period began on November 7 and ended on Friday, December 12, 2014, at the latest. Duggan's complaint, which was filed on Monday, December 15, 2014, was untimely, and the trial court correctly dismissed it.

¶ 20 Duggan argues that the limitations period starts 35 days from the date of his receipt, and is extended by the "four days for service by mail" of Supreme Court Rule 12(c) (Ill. S. Ct. R. 12(c) (eff. Sept. 19, 2014)). Our supreme court, however, has squarely rejected that argument. With certain exceptions not relevant here, Rule 12(c) and other "General Rules" that fall under Article I of our supreme court rules govern "all proceedings *in the trial court*." (Emphasis added.) Ill. S. Ct. R. 1 (eff. July 1, 1982); see also *Rodriguez*, 218 Ill. 2d at 355 (holding that supreme court "rules" — and in particular Rule 11 — become applicable "only when litigation

commences"). In this case, litigation had not begun and nothing was pending before the trial court when the Board mailed its decision to Duggan in November.

¶ 21 Nonetheless, Duggan argues in reply that he should be excused from strict compliance with the 35-day statutory time frame because there was "no such notice sufficient under due process." Duggan cites a Second District case, *Grimm v. Calica*, 2015 IL App (2d) 140820, *appeal allowed*, No. 120105 (Mar. 30, 2016), in support of his claim that the absence of this notice violated his due process rights.[1] Duggan's reliance upon *Grimm*, however, is misplaced.

¶ 22 In *Grimm*, the Department of Children and Family Services (DCFS) denied the plaintiff's request to expunge an "indicated" child-abuse finding following a hearing. *Id.* ¶¶ 3-4. DCFS issued its decision in the form of a business letter dated July 30, 2013, that informed the plaintiff that the decision was final and if the plaintiff disagreed with any part of it, she could seek judicial review under the Act " '*within 35 days of the date this decision was served on you*.' " (Emphasis in the original.) *Id.* The plaintiff, however, filed her complaint for administrative review on the 36th day, and DCFS moved to dismiss the complaint as untimely. *Id.* ¶¶ 5-6. The trial court, however, noted that the prior Monday had been a court holiday, so it denied the motion to dismiss " 'in the interests of justice' " because the plaintiff had missed the filing deadline "by less than 24 hours." *Id.* ¶ 9. The Second District affirmed, holding that the notice violated due process because the notice was "confusing *** as to the service date" of the decision. *Id.* ¶¶ 14-18.

¶ 23 *Grimm*, however, is unpersuasive for various reasons. At the outset, our supreme court has already held that "[t]he text of the Illinois Constitution does not recognize a right to appeal from administrative proceedings," and that "the right to appeal from an administrative decision is

[1] The Board has filed with this court a motion to file a surreply brief arguing that *Grimm* is distinguishable and that Duggan's claim regarding a lack of notice is forfeited with respect to the July mailing of the decision. Duggan has filed a response. We deny the Board's motion.

not essential to due process of law." *Carver v. Nall*, 186 Ill. 2d 554, 563 (1999), *overruled in part on other grounds by Nudell*, 207 Ill. 2d at 424. Additionally, the *Grimm* court relied upon two cases for the holding that a misleading notice violates due process: *Bell v. Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago*, 398 Ill. App. 3d 758, 763 (2010); and *Coleman v. Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago*, 392 Ill. App. 3d 380, 386 (2009). *Grimm*, 2015 IL App (2d) 140820, ¶ 12. While it is true that due process considerations will prevent the jurisdictional 35-day requirement from barring an administrative-review complaint if the agency failed to "fairly and adequately inform a plaintiff of its decision" (*Bell*, 398 Ill. App. 3d at 763; *Coleman*, 392 Ill. App. 3d at 386), neither *Bell* nor *Coleman* concerned the absence of a notice advising of the 35-day time frame. Rather, in each case the *content* of the decision was misleading in that the decisions stated that the plaintiffs' applications for benefits were "granted" but failed to inform each plaintiff that she would be receiving substantially less than she had sought or was entitled to. See *Bell*, 398 Ill. App. 3d at 765-66; *Coleman*, 392 Ill. App. 3d at 386. In fact, the *Bell* court reiterated the holding in *Carver* that, "because the right to appeal from an administrative decision is not constitutionally mandated and therefore is not an essential component of due process, *the failure to advise parties of their appeal rights within 35 days does not toll the statute of limitations*." (Emphasis added.) *Bell*, 398 Ill. App. 3d at 764 (citing *Carver*, 186 Ill. 2d at 562-63). *Grimm*'s holding is therefore unpersuasive, and we decline to apply it to these facts.

¶ 24 CONCLUSION

¶ 25 The trial court properly granted defendants' motions to dismiss because plaintiff failed to file his complaint for administrative review within the statutory 35-day time period. Because of

our holding that Duggan's complaint was untimely, we need not discuss his remaining contentions of error. Accordingly, we affirm the judgment of the trial court.

¶ 26 Affirmed.