

NOTICE
Decision filed 05/20/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150196-U

NO. 5-15-0196

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).

EXCALIBUR ENERGY COMPANY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Franklin County.
)	
v.)	No. 09-MR-32
)	
MARILYN ROCHMAN,)	Honorable
)	Eric J. Dirnbeck,
Defendant-Appellee.)	Judge, Presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

- ¶ 1 *Held:* We vacate the circuit court's dismissal "with prejudice" of the plaintiff's action because the circuit court violated this court's previous mandate on remand. This court's previous mandate and order contemplated the refiling of the plaintiff's action in a section 2-1401 petition, thereby joining Franklin County as a necessary party, and therefore, implicitly directed the circuit court to dismiss "without prejudice" the plaintiff's complaint.
- ¶ 2 The plaintiff, Excalibur Energy Company, appeals from the circuit court's order dismissing "with prejudice" its second-amended complaint against the defendant, Marilyn Rochman. On appeal, Excalibur Energy argues that the circuit court violated this court's previous mandate on remand. We vacate and remand.

¶ 3

BACKGROUND

¶ 4 As detailed in the previous appeal of this case (*Excalibur Energy Co. v. Rochman*, 2014 IL App (5th) 130524), Excalibur Energy filed a second-amended "[c]omplaint [i]n [e]jectment" against Rochman, alleging that a tax deed, issued to Rochman's predecessor in title, Franklin County, as trustee, was void for lack of notice to Excalibur Energy's predecessor in title, the Joseph B. Gould Trust. In its complaint, Excalibur Energy requested the circuit court to quiet title to the premises, order Rochman's ejectment, and determine the amount owed for Rochman's wrongful possession.

¶ 5 In its subsequently filed motion for summary judgment, Excalibur Energy requested the circuit court to find that the tax deed issued to Franklin County was void. The circuit court granted Excalibur Energy's motion for summary judgment, concluding that Franklin County, as trustee and tax purchaser, did not make a diligent inquiry and effort to serve the property owner with notice required by the Property Tax Code (35 ILCS 200/22-10 through 22-30 (West 2008)). The circuit court held that because Excalibur Energy and its predecessors had received no notice of the tax deed proceedings, the court in those proceedings had lacked jurisdiction, and the tax deed was void. The circuit court thereby set aside the tax deed. See *Excalibur Energy Co.*, 2014 IL App (5th) 130524, ¶ 12.

¶ 6 Rochman appealed. On appeal, this court held that although case law supported the circuit court's order finding that the tax deed was void, Excalibur Energy's complaint in ejectment was not a valid attack on the tax deed. This court determined that a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West

2008)) was the proper route to set aside the tax deed and that such a petition must be filed in the same proceeding in which the tax deed was issued, thereby including Franklin County as a necessary party. We therefore reversed the circuit court's order granting Excalibur Energy's motion for summary judgment, and we remanded the action to the circuit court with directions to dismiss Excalibur Energy's complaint in ejectment. See *Excalibur Energy Co.*, 2014 IL App (5th) 130524, ¶¶ 23, 27.

¶ 7 On January 13, 2015, this court filed its mandate with the circuit court of Franklin County, along with our opinion. The mandate from the judgment stated:

"It is the decision of this Court that the judgment on appeal be REVERSED AND REMANDED WITH DIRECTIONS to the Circuit Court of Franklin County for such other proceedings as required by the order of this Court, a copy of which is attached hereto."

¶ 8 Rochman filed a motion to enforce the mandate, and the circuit court entered the mandate as follows: it vacated the order granting summary judgment in favor of Excalibur Energy, and it granted Rochman's motion to dismiss "with prejudice." Excalibur Energy thereafter filed a motion to vacate the circuit court's dismissal "with prejudice," arguing that the mandate required dismissal "without prejudice." After the circuit court denied Excalibur Energy's motion to vacate the dismissal, Excalibur Energy filed notice of appeal.

¶ 9

ANALYSIS

¶ 10 This court has jurisdiction to determine whether the circuit court's order was in accord with our previous mandate. *PSL Realty Co. v. Granite Investment Co.*, 86 Ill. 2d

291, 308 (1981). "The appellate court's mandate is the transmittal of the judgment of the reviewing court to the [trial] court." *Coldwell Banker Havens, Inc. v. Renfro*, 288 Ill. App. 3d 442, 446 (1997); see also Ill. S. Ct. R. 369 (eff. July 1, 1982). "[U]pon transmittal to the trial court, [the mandate] vests the trial court with authority only to take action that conforms with the mandate." *In re Marriage of Ludwinski*, 329 Ill. App. 3d 1149, 1152 (2002). "A trial court has no authority to act beyond the scope of the mandate and must follow the specific directions of the appellate court's mandate to the letter to insure that its order or decree is in accord with the decision of the appellate court." *In re Marriage of Ludwinski*, 329 Ill. App. 3d at 1152. "In construing the language, matters which are implied may be considered embraced by the mandate." *PSL Realty Co.*, 86 Ill. 2d at 308-09.

¶ 11 "Where a reviewing court remands a case with instructions that are general, the trial court is required to examine the appellate court's opinion and exercise its discretion in determining what further proceedings would be consistent with the opinion on remand." *In re Marriage of Ludwinski*, 329 Ill. App. 3d at 1152-53; see also *People ex rel. Bernardi v. City of Highland Park*, 225 Ill. App. 3d 477, 482 (1992). Moreover, if the mandate directs the trial court to proceed in conformity with the opinion issued, then the content of the appellate opinion is significant and must be consulted in determining the appropriate course of action. *PSL Realty Co.*, 86 Ill. 2d at 308-09; *In re Marriage of Ludwinski*, 329 Ill. App. 3d at 1153; *People v. Abraham*, 324 Ill. App. 3d 26, 30 (2001).

¶ 12 In this case, the controlling question is whether the circuit court complied with the mandate issued on January 13, 2015. See *PSL Realty Co.*, 86 Ill. 2d at 308-09. The

mandate reversed the judgment of the circuit court, which had granted summary judgment in Excalibur Energy's favor, and remanded the cause with directions to the circuit court "for such other proceedings *** required by the order of this [c]ourt." This court's opinion was attached to the mandate and stated as follows:

"Accordingly, the plaintiff's complaint in ejectment should have been dismissed on Rochman's motion. [Citation to cases holding 2-1401 petition is appropriate action to set aside tax deed.] We therefore reverse the circuit court's order granting Excalibur Energy's motion for summary judgment, and we remand the action to the circuit court with directions to dismiss Excalibur Energy's complaint in ejectment." *Excalibur Energy Co.*, 2014 IL App (5th) 130524, ¶ 27.

¶ 13 Pursuant to the opinion, this court directed dismissal on the basis that Excalibur Energy had pled facts to support an action to set aside a tax deed and that such an action must be pled in a section 2-1401 petition to set aside the tax deed (735 ILCS 5/2-1401 (West 2008)) in the original action issuing the tax deed, thereby including Franklin County as a necessary party. *Excalibur Energy Co.*, 2014 IL App (5th) 130524, ¶ 26. Accordingly, this court directed the circuit court to dismiss Excalibur Energy's action in ejectment but reserved Excalibur Energy's right to maintain the action pursuant to a section 2-1401 petition to attack the tax deed. This court did not conclude that Excalibur Energy could plead no set of facts entitling it to relief pursuant to the claim alleged. Instead, this court noted that the case law supported Excalibur Energy's action and the circuit court's conclusion that a tax deed is void where the tax deed proceedings result in a total failure to provide notice. See *Excalibur Energy Co.*, 2014 IL App (5th) 130524,

¶ 23. Implicitly, this court directed the circuit court to dismiss "without prejudice" Excalibur Energy's complaint in ejectment and remanded the cause to the circuit court for further proceedings. See *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 36 (dismissal with prejudice not a just result where trial court acknowledged that plaintiff likely could state at least one cause of action; thus, case reversed and remanded for plaintiff to file an amended complaint); see also *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 300 (2010) (case remanded to trial court where improper pleading was grounds for dismissal without prejudice).

¶ 14 Accordingly, the previous mandate and opinion contemplated a dismissal "without prejudice" of the plaintiff's action. Thus, the circuit court violated the mandate of this court in dismissing "with prejudice" the plaintiff's claim. We therefore vacate the circuit court's dismissal "with prejudice" and remand the cause with directions to enter an order dismissing "without prejudice" the plaintiff's second-amended complaint. See generally *In re S.G.*, 277 Ill. App. 3d 803, 811 (1996) (case remanded with instructions to enter an order dismissing the case without prejudice).

¶ 15 CONCLUSION

¶ 16 For the reasons stated, we vacate the judgment of the circuit court of Franklin County, with directions to the circuit court to dismiss "without prejudice" the plaintiff's second-amended complaint in ejectment.

¶ 17 Vacated and remanded with directions.