2018 IL App (2d) 180129-U
No. 2-18-0129
Order filed April 16, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PETE ALMEIDA, Plaintiff-Appellee, v. BOARD OF TRUSTEES OF THE ELGIN POLICE PENSION BOARD, JAMES ROSCHER, President, ROBERT L. CHRIST, Vice President, DANIEL GLASBY, Secretary, ROBERT O'CONNOR, Assistant Secretary, DEBRA NAWROCKI, Trustee, and THOMAS QUIGLEY, Clerk, Defendants-Appellants.	)	Appeal from the Circuit Court of Kane County. No. 18-MR-00013 Honorable John A. Noverini, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Hudson and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting the plaintiff's motion for a preliminary injunction.

¶ 2 The defendant, the Board of Trustees of the Elgin Police Pension Board (Board), paid the plaintiff, Pete Almeida, over $57,000 for a disability pension that he was not eligible to receive. The Board subsequently informed the plaintiff that it was going to reduce his retirement pension based on that overpayment. The plaintiff filed a complaint and a motion for a preliminary injunction to prevent the Board from altering the amount of his retirement pension. On January

22, 2018, the circuit court of Kane County preliminarily enjoined the Board from altering the retirement annuity it had set for the plaintiff. The Board appeals from that order. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 The plaintiff became a member of the Elgin police department in July 1990. On May 15, 2009, the plaintiff filed an application with the Elgin Police Pension Fund, seeking a line-of-duty disability pension under section 3-114.1 of the Illinois Pension Code (Pension Code) (40 ILCS 5/3-114.1 (West 2008)), or, in the alternative, a non-duty disability pension pursuant to section 3-114.2 of the Pension Code (40 ILCS 5/3-114.2 (West 2008)). The application indicated that the nature of the injury or disability was post-traumatic stress dating back to May 26, 2006, the date he was called to a fatal car crash involving a four-year old girl. On June 1, 2009, the plaintiff was terminated from his employment with the Elgin police department. The Board held hearings on the plaintiff's application over two days and received numerous exhibits into evidence.

¶ 5 On April 22, 2010, the Board denied the plaintiff's request for either a duty or a non-duty pension. On November 4, 2010, the trial court affirmed the Board's decision. On appeal, the plaintiff argued that the Board's decision denying his application for a non-duty disability pension was against the manifest weight of the evidence. We agreed and ordered the Board to award the plaintiff a non-duty disability pension. *Almeida v. Board of Trustees of the Elgin Police Pension Board*, 2011 IL App (2d) 110179-U.

¶ 6 In accordance with the provisions of the Pension Code (40 ILCS 5/1-101 *et seq*. (West 2012)), the plaintiff subsequently submitted to annual medical exams certifying his continued disability. 40 ILCS 5/3-115 (West 2012). Based on these exams, on June 26, 2014, the Board found that the plaintiff had "recovered from his disability" and terminated his disability pension. Despite terminating his pension, the Board continued to pay the plaintiff a disability pension.

¶ 7 On December 30, 2014, the plaintiff filed a complaint for administrative review of the Board's decision (735 ILCS 5/3-103 (West 2014)) with the circuit court of Kane County, and the court subsequently reversed the Board's decision, finding that it was against the manifest weight of the evidence. On January 29, 2015, the Board filed a notice of appeal. It did not file a motion to stay operation of the trial court's judgment. Instead, on February 13, 2015, the Board filed a motion for leave for additional time to file a motion to stay. The trial court denied the Board's motion as untimely.

¶ 8 On October 16, 2015, this court reversed the trial court's decision, holding that "the Board's finding that the plaintiff was no longer disabled and its corresponding termination of his disability pension was not against the manifest weight of the evidence." *Almeida v. Board of Trustees of the Elgin Police Pension Board*, 2015 IL App (2d) 150109-U, ¶ 25.

¶ 9 On November 17, 2017, the Board sent the plaintiff a letter informing him that it had overpaid disability pension payments to him in the amount of $57,625.74 from June 27, 2014, through September 30, 2015. On December 18, 2017, the Board informed the plaintiff that, as a result of the overpayment, it would reduce the amount of his retirement benefits.

¶ 10 On January 3, 2018, the plaintiff filed a complaint against the Board, sounding in breach of contract. On January 5, 2018, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction to prohibit the Board from decreasing the retirement annuity it had set for him by deducting the amounts it had paid for his non-duty disability. On January 12, 2018, the trial court entered a temporary restraining order.

¶ 11 On January 22, 2018, following a hearing, the trial court granted the plaintiff's motion for a preliminary injunction. The trial court found that (1) the plaintiff had established a clear right in his police pension; (2) the Board had no authority to alter or diminish the plaintiff's pension rights under section 3-144.2 of the Pension Code (40 ILCS 5/3-144.2 (West 2016)) and *Rossler*

v. Morton Grove Police Pension Board, 178 Ill. App. 3d 769 (1989); (3) the plaintiff had no adequate remedy at law because he would lose the value of his pension if the Board changed it; (4) the plaintiff would suffer irreparable harm; and (5) the plaintiff would likely prevail on the merits of his action.[1] On February 21, 2018, the Board appealed from the trial court's order.

¶ 12 ANALYSIS

¶ 13 On appeal, the Board argues that the trial court abused its discretion when it found that the plaintiff had established the required elements for a preliminary injunction.

¶ 14 At the outset, we note that the plaintiff filed a motion to dismiss the Board's appeal. The plaintiff claims that the Board's appellate brief does not contain an appropriate appendix as required by Illinois Supreme Court Rule 342 (eff. July 1, 2017). We have reviewed the Board's appellate brief and determine that it does comply with the applicable supreme court rules. We therefore deny the plaintiff's motion to dismiss the appeal.

¶ 15 Turning to the merits of the Board's appeal, we observe that a preliminary injunction is an "extraordinary" remedy that "should be granted only in situations of extreme emergency or where serious harm would result if the preliminary injunction was not issued." *Clinton Landfill, Inc. v. Mahomet Valley Water Authority*, 406 Ill. App. 3d 374, 378 (2010). The purpose of preliminary injunctive relief is not to determine controverted rights or decide the merits of the

[1] The Board argues that the trial court made no finding as to whether the plaintiff would likely prevail on the merits of his action. However, in its order, the trial court specifically incorporated its January 12, 2018, order granting the plaintiff's motion for a temporary restraining order. In that order, the trial court found that the plaintiff would likely prevail on the merits of his action. Thus, the trial court's order of January 22, 2018, reflects a finding that the plaintiff would likely prevail on the merits of his action.

case, but to prevent a threatened wrong or continuing injury and preserve the status quo with the least injury to the parties concerned. *In re Marriage of Jawad*, 326 Ill. App. 3d 141, 154 (2001). In order to obtain preliminary injunctive relief, the plaintiff must establish: (1) a clearly ascertained right in need of protection; (2) irreparable injury in the absence of an injunction; (3) no adequate remedy at law; and (4) a likelihood of success on the merits of the case. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006). Failure to prove any one of the four elements requires denial of a motion for a preliminary injunction. *Yellow Cab Co., Inc. v. Production Workers Union of Chicago & Vicinity, Local 707*, 92 Ill. App. 3d 355, 356 (1980). If the first four criteria are met, then the court must consider the balancing of the hardships and the public interests involved. *Mohanty*, 225 Ill. 2d at 62. To obtain a preliminary injunction, the movant must raise a "fair question" that each of the elements is satisfied. *Clinton Landfill*, 406 Ill. App. 3d at 378.

¶ 16 In reviewing a preliminary injunction on appeal, we examine only whether the party seeking the injunction has demonstrated a *prima facie* case that there is a fair question concerning the existence of the claimed rights. *People ex. rel Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 177 (2002). The decision to grant or deny a preliminary injunction rests within the sound discretion of the trial court and on review the decision will not be disturbed absent an abuse of discretion. *Id.* However, where a court does not make any factual findings and instead rules on a question of law, the appellate court's review is *de novo*. *Clinton Landfill*, 406 Ill. App. 3d at 378. Issues on which a *de novo* standard applies include the constitutionality of a statute (*World Painting Co., LLC v. Costigan*, 2012 IL App. (4th) 110869, ¶ 12) and the construction of a contract (*Grassner v. Raynor Manufacturing Co.*, 409 Ill. App. 3d 995, 1006 (2011)).

¶ 17 We believe that the trial court abused its discretion in granting the plaintiff injunctive relief because three of the criteria necessary for such relief are missing. First, there is no

irreparable harm to the plaintiff that necessitated injunctive relief. "Irreparable harm" represents a type of emergency situation that poses serious harm if relief is not immediately provided. *Clinton Landfill*, 406 Ill. App. 3d at 380. The record reveals that the plaintiff is currently 52 years old and that he will not be eligible to receive his retirement pension until he is 60. See 40 ILCS 3/111(b) (West 2016). Thus, at issue here is the pension that the plaintiff is scheduled to receive in *eight years*. As such, there is no need to resolve this issue immediately.

¶ 18 Second, as to an adequate remedy at law, for purposes of an injunction, an inadequate remedy can be the threat of irreparable harm or other harm that cannot be adequately corrected by the payment of monetary damages. *Petrzilka v. Gorscak*, 199 Ill. App. 3d 120, 124 (1990). The essence of the dispute between the plaintiff and the Board is a monetary one—whether the Board can recover money from the plaintiff's retirement pension that it claims it wrongly paid him. Thus, the plaintiff does have an adequate remedy at law.

¶ 19 Finally, as to the plaintiff's likelihood of success on the merits of his claim, we find such success to be unlikely. Section 3-144.2 of the Pension Code provides

> "(a) If the Fund commits a mistake by setting any benefit at an incorrect amount, it shall adjust the benefit to the correct level as soon as may be practicable after the mistake is discovered. The term "mistake" includes a clerical or administrative error executed by the Fund or participant as it relates to a benefit under this Article; however, in no case shall "mistake" include any benefit as it relates to the reasonable calculation of the benefit or aspects of the benefit based on salary, service credit, calculation or determination of a disability, date of retirement, or other factors significant to the calculation of the benefit that were reasonably understood or agreed to by the Fund at the time of retirement.

(b) If the benefit was mistakenly set too low, the Fund shall make a lump sum payment to the recipient of an amount equal to the difference between the benefits that should have been paid and those actually paid, plus interest at the rate prescribed by the Public Pension Division of the Department of Insurance from the date the unpaid amounts accrued to the date of payment.

(c) If the benefit was mistakenly set too high, the Fund may recover the amount overpaid from the recipient thereof, either directly or by deducting such amount from the remaining benefits payable to the recipient as is indicated by the recipient. If the overpayment is recovered by deductions from the remaining benefits payable to the recipient, the monthly deduction shall not exceed 10% of the corrected monthly benefit unless otherwise indicated by the recipient.

However, if (i) the amount of the benefit was mistakenly set too high, and (ii) the error was undiscovered for 3 years or longer, and (iii) the error was not the result of fraud committed by the affected participant or beneficiary, then upon discovery of the mistake the benefit shall be adjusted to the correct level, but the recipient of the benefit need not repay to the Fund the excess amounts received in error." 40 ILCS 5/3-144.2 (West 2016).

¶ 20 Section 3-144.2(c) of the Code clearly allows a Board to recover amounts that it overpaid to a recipient by deducting such amount from the remaining benefits payable to him. That is exactly what the Board is seeking to do in this case. The plaintiff insists that the Board did not overpay him because it just kept paying him the amount he had previously received. Such an argument is unpersuasive. The record reveals that the Board paid the plaintiff over $57,000 in disability pension benefits at a time that it owed him none. That constitutes an overpayment.

¶ 21 In so ruling, we find the trial court's reliance on *Rossler v. Morton Grove Police Pension Board*, 178 Ill. App. 3d 769 (1989), to be misplaced. In *Rossler*, the plaintiff retired after the Morton Grove Police Pension Board informed him that he had accumulated sufficient time toward a 20-year pension. Two-and-half years after the plaintiff retired, the Pension Board informed him that it had made an error in calculating his service time and therefore intended to recalculate his pension. The plaintiff thereafter sought to enjoin the Pension Board from adjusting his pension. *Rossler*, 178 Ill. App. 3d at 771-72. On appeal, the reviewing court determined that, under the current version of the Pension Code, the Pension Board's attempt to adjust its decision was untimely because it could only adjust the amount if there was an overpayment due to "fraud, misrepresentation, or error." *Id.* at 174. The reviewing court found that "error" meant an error of arithmetic. *Id.*

¶ 22 Here, the Pension Board has not made a decision regarding the pension the plaintiff will receive for his almost 19 years of service. Further, even if the Board had, the current version of the Pension Code does not limit the Board to adjusting a pension only if there has been fraud, misrepresentation, or error. See 40 ILCS 5/3-144.2 (West 2016). Moreover, the *Rossler* court's determination that error meant only arithmetic error has been specifically repudiated. See *Kosakowski v. Bd. of Trustees of City of Calumet City Police Pension Fund*, 389 Ill. App. 3d 381, 385 (2009) (*Rossler* court should not have engrafted a limitation upon the term "error" in section 3-144.2 because a reviewing court is not at liberty to read into the statute a limitation that the legislature did not express). As such, under the current version of the Pension Code, there was nothing inappropriate about the Board seeking to recover the overpayment made to the plaintiff.

¶ 23 Finally, we note that our discussion herein is offered solely for the purposes of explaining our determination to reverse the preliminary injunction. The discussion should not be taken as a

resolution on the ultimate merits of the case. Rather, that determination is to be made by the trial court on the basis of the evidence presented at trial. See *Lake in the Hills Aviation Group, Inc. v. Village of Lake in the Hills*, 298 Ill. App. 3d 175, 186 (1998).

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed, and the cause is remanded.

¶ 26 Reversed and remanded.