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2018 IL App (3d) 170728-U

Order filed August 29, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

WILLIAM BUCK,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois,
)	
v.)	Appeal No. 3-17-0728
)	Circuit No. 17-MR-923
)	
DR. GLENN SCHEIVE,)	Honorable
)	Arkadiusz Z. Smigielski,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred by dismissing plaintiff's amended complaint with prejudice, in plaintiff's absence, because defendant mistakenly sent notice of the hearing date to plaintiff at an incorrect address.

¶ 2 William Buck (plaintiff) filed a *pro se*, four-count amended complaint against Dr. Glenn Scheive (defendant) arising from a dental extraction defendant performed for plaintiff, who at the time was incarcerated. Defendant filed a combined motion to dismiss plaintiff's amended complaint and sent notice of the hearing date to plaintiff at an incorrect address. On the date of

the hearing, plaintiff did not appear and had not filed a response. The trial court dismissed plaintiff's amended complaint with prejudice. Plaintiff appeals the trial court's dismissal with prejudice.

¶ 3

FACTS

¶ 4

On March 27, 2017, plaintiff filed a single-count complaint against defendant pursuant to section 2-622 of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-622 (West 2016). On June 20, 2017, defendant filed his first combined motion to dismiss plaintiff's complaint (first motion to dismiss) pursuant to section 2-619.1, which stated plaintiff is "currently an inmate at Pontiac Correctional Facility." 735 ILCS 5/2-619.1 (West 2016). The court scheduled a hearing on defendant's first motion to dismiss plaintiff's complaint for July 14, 2017. On that date, plaintiff did not appear and had not filed a response to the first motion to dismiss. The trial court granted defendant's first motion to dismiss without prejudice.¹

¶ 5

Approximately 10 days after the trial court granted the motion to dismiss, the circuit clerk received and filed plaintiff's late response to defendant's first motion to dismiss bearing the date of July 12, 2017. Plaintiff's late response explained that plaintiff was responding late "due to him being transferred from Menard C.C. to Pontiac C.C. [on 6/16/17], where he is now confined."

¶ 6

On August 7, 2017, the Will County Circuit Clerk received a letter from plaintiff dated July 27, 2017. In this letter, plaintiff advised the clerk as follows: "I haven't gotten any of the docket entries or orders from your office. *** I am confined in Pontiac CC, P.O. Box 99, Pontiac, Ill. 61764." The circuit clerk filed this letter, dated July 27, 2017, in the record in Will County case No. 17-MR-923 on August 7, 2017.

¹The court dismissed plaintiff's complaint pursuant to section 2-619.1 due to plaintiff's failure to comply with the health professional's report requirement, and failing to plead a cause of action for medical malpractice. 735 ILCS 5/2-619.1 (West 2016).

¶ 7 A few days later, plaintiff filed a four-count amended complaint on August 16, 2017, with plaintiff's certificate of service listing his address at Pontiac Correctional Center. Also on this date, August 16, 2017, the Will County circuit clerk received a letter from plaintiff dated August 13, 2017, that stated: "I am writing cause I am pro se and I haven't been getting any docket sheets or orders. I am not in Menard anymore. I am in Pontiac." (Emphasis in original.) Plaintiff provided his current address at Pontiac Correctional Center in the letter dated August 13, 2017. The circuit clerk filed this letter in Will County case No. 17-MR-923.

¶ 8 Beginning on August 17, 2017, the clerk's office corresponded with plaintiff by mail at his Pontiac address. On September 11, 2017, the clerk's office sent minute entries to plaintiff in a letter addressed to plaintiff's current Pontiac address. The circuit clerk also carbon copied defendant as a recipient pertaining to the correspondence dated September 11, 2017.

¶ 9 On September 18, 2017, defendant filed a motion to dismiss plaintiff's amended complaint with prejudice (second motion to dismiss) pursuant to section 2-619.1.² 735 ILCS 5/2-619.1 (West 2016). Defendant attached the first motion to dismiss, dated June 20, 2017, as exhibit A to the second motion to dismiss filed by defendant on September 18, 2017. In exhibit A, defendant stated plaintiff's current address was at Pontiac Correctional Center. However, defendant sent a notice of the hearing, scheduled for October 13, 2017, and pertaining to the second motion to dismiss, to plaintiff's former, but incorrect address. Specifically, defendant sent the notice of hearing to plaintiff's former address at Menard Correctional Center, as indicated by the language "TO: William Buck #R21689, P.O. Box 1000, Menard, IL 62259."

¶ 10 Similarly, on October 6, 2017, defendant filed a motion to dismiss plaintiff's amended complaint (third motion to dismiss) pursuant to section 2-619.1 and sent plaintiff a notice of

²Once again, plaintiff failed to attach a health professional's report to his amended four-count complaint as required by section 2-622(a)(1) of the Code. 735 ILCS 5/2-622(a)(1) (West 2016).

hearing on the third motion to dismiss also scheduled for a hearing on October 13, 2017, to plaintiff's former address at Menard, as indicated by the language "TO: William Buck #R21689, P.O. Box 1000, Menard, IL 62259 (*Via Certified Mail 7016 3010 0000 0946 2425*)."

(Emphasis in original.) 735 ILCS 5/2-619.1 (West 2016). There is no receipt documenting service on plaintiff by certified mail contained in the record on appeal.

¶ 11 On October 12, 2017, plaintiff filed a response to defendant's second motion to dismiss filed on September 18, 2017, but not a response to defendant's third motion to dismiss filed on October 6, 2017. On October 13, 2017, plaintiff did not appear for the motion hearing regarding defendant's second and third motions to dismiss. The trial court granted defendant's third motion to dismiss plaintiff's amended complaint with prejudice after "due notice having been given." After the court's ruling on October 13, 2017, the circuit clerk sent a docket entry notifying plaintiff of the trial court's dismissal of the amended complaint with prejudice. The circuit clerk addressed this correspondence to plaintiff at Pontiac Correctional Center.

¶ 12 Ten days later, on October 23, 2017, plaintiff filed a late response to defendant's third motion to dismiss. Plaintiff also filed a motion for the late filing of his response because defendant's third motion to dismiss and notice of the hearing were "sent to a prison that the defendant's lawyer knew plaintiff is not at." Plaintiff stated, "[i]t is sent to Menard *** then by the time they (the lawyers) go and get a ruling[,] plaintiff cannot respond because it has to go back through Menard's mail then sent to Pontiac before plaintiff gets it[,] taking almost 3 to 4 weeks."

¶ 13 Plaintiff filed a notice of appeal on the dismissal of his amended complaint with prejudice on October 26, 2017, before the trial court ruled on plaintiff's request to file a late response to the third motion to dismiss.

ANALYSIS

¶ 14

¶ 15 On appeal, plaintiff requests this court to reverse the trial court’s order dismissing plaintiff’s amended complaint with prejudice. Plaintiff argues the trial court’s order was erroneous, in part, because defendant sent plaintiff notice of “the motion to a prison plaintiff was not in,” and, as a result, “no writs were issued” to secure plaintiff’s appearance in court on October 13, 2017. In addition, plaintiff argues the lack of timely notice prevented plaintiff from receiving adequate “time given for him to respond to defendants motions ***.” Plaintiff asserts the order dismissing his amended complaint with prejudice must be set aside because plaintiff did not have a meaningful opportunity to participate in the lawsuit.

¶ 16

A trial court’s decision to dismiss a complaint with prejudice is reviewed to determine whether the trial court’s decision constituted an abuse of discretion. *Razor Capital v. Antaal*, 2012 IL App (2d) 110904, ¶ 28. Where the trial court does not consider the “unique and particular circumstances” of the case before dismissing a complaint with prejudice, an abuse of discretion exists. *Id.*

¶ 17

It is well established that both notice and an opportunity to respond to a dispositive motion represent basic principles of our judicial system. *Peterson v. Randhava*, 313 Ill. App. 3d 1, 12 (2000). Absence of notice alone is not determinative of whether an *ex parte* order is voidable; rather, the question is whether there was any harm or prejudice to the nonmoving party, such as plaintiff in this case. *Savage v. Mui Pho*, 312 Ill. App. 3d 553, 557 (2000). Prejudice exists when the failure to give notice prevents the nonmoving party from appearing and denies the party an opportunity to be heard or to respond. *Id.*

¶ 18

Here, it is clear from the contents of the very first motion to dismiss filed on June 20, 2017, that defendant knew plaintiff was residing at Pontiac Correctional Center, not Menard

Correctional Center, as early as June 20, 2017. In the body of the first motion to dismiss, defendant acknowledged plaintiff was “currently an inmate at Pontiac Correctional Facility.” The trial court granted the first motion to dismiss *without* prejudice.

¶ 19 On July 25, 2017, plaintiff’s certificate of service, attached to plaintiff’s late response to the first motion to dismiss, listed plaintiff’s current address at Pontiac Correctional Center. The body of plaintiff’s late response to the first motion to dismiss also began with a notification of his changed address. Every certificate of service prepared and filed by plaintiff after July 25, 2017, listed his current address at Pontiac Correctional Center.

¶ 20 Shortly thereafter, plaintiff sent the circuit clerk two separate letters, filed August 7, 2017, and August 16, 2017, respectively. Both letters explained plaintiff was no longer housed at Menard Correctional Center and currently resided at Pontiac Correctional Center. After August 16, 2017, the circuit clerk directed all correspondence to plaintiff at Pontiac Correctional Center. In fact, the circuit clerk sent correspondence to plaintiff at Pontiac Correctional Center on September 11, 2017, and also carbon copied defendant on this correspondence.

¶ 21 Unlike the circuit clerk, defendant sent *all* notices from June 20, 2017, until October 6, 2017, to plaintiff at Menard Correctional Center, in spite of defendant’s pleadings that made reference to plaintiff’s address at Pontiac Correctional Center beginning on June 20, 2017. Specifically, the record reveals that the defendant sent plaintiff two separate notices of the hearing scheduled for October 13, 2017, filed by defendant on September 18, 2017, and October 6, 2017. Both notices of the October 13, 2017, hearing date that defendant mailed to plaintiff incorrectly identified P.O. Box 1000 in Menard as plaintiff’s receiving address.

¶ 22 We note that the person preparing the order dismissing the matter with prejudice in defendant’s absence for the court’s signature on October 13, 2017, included language that “due

