2013 IL App (1st) 121594-U

SIXTH DIVISION
July 26, 2013

No. 1-12-1594

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 JUDICIAL DISTRICT

THE CHICAGO INSTITUTE OF PSYCHOANALYSIS, Plaintiff-Appellant, v. ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, an administrative agency within the State of Illinois; MAUREEN T. O'DONNELL, in her role as DIRECTOR OF THE ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY; ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY BOARD OF REVIEW; and J. HUNT BONAN, in his role as CHAIRMAN, ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY BOARD OF REVIEW; and JANET SHLAES, an individual, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 12 L 50299 Honorable Margaret A. Brennan, Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justice Hall concurred in the judgment.
Justice Gordon specially concurred.

O R D E R

¶ 1 *Held*: Circuit court erred in dismissing administrative review action for lack of jurisdiction. Presumption that Board of Review decision was sent to plaintiff-employer on date of issuance, more than 35 days before plaintiff's complaint, was

> refuted by affidavit of non-receipt by plaintiff's counsel and not sufficiently corroborated by timely receipt by defendant-claimant's counsel.

¶ 2 Plaintiff Chicago Institute of Psychoanalysis appeals from an order of the circuit court dismissing for lack of subject matter jurisdiction its administrative review action challenging a decision of the Board of Review (Board) of the Department of Employment Security (Department). The Board found defendant Janet Shlaes eligible to receive unemployment benefits under the Unemployment Insurance Act (Act), 820 ILCS 405/100 *et seq*. (West 2010), affirming the decision of a Department referee that she left her employment with plaintiff for good cause attributable to plaintiff. On appeal, plaintiff contends that the dismissal was erroneous and the circuit court had jurisdiction, while the Department, its Director, the Board, and its Chairman (collectively, the State Defendants) respond that the dismissal was proper because plaintiff did not timely commence its review action as required by the Administrative Review Law (Law), 735 ILCS 5/3-101 *et seq.* (West 2010).

¶ 3 On March 6, 2012, plaintiff filed in the circuit court its complaint for administrative review. In relevant part, plaintiff alleged that the Board made its decision on or about January 4 but plaintiff did not receive it until February 21. Attached to the complaint was a copy of the Board decision stating a "Date Mailed" of January 4, 2012, that copies of the decision were to be sent to plaintiff and its attorney and to defendant Shlaes and her attorney, and that the decision was "Mailed on 01/04/2012 at Chicago." The address for plaintiff's counsel on the Board decision is the same as on the complaint.

¶ 4 Plaintiff also filed a motion for leave to file a complaint in administrative review, alleging that the Board had "until March 2012" to decide plaintiff's November 2011 appeal from the Department referee's decision. In the motion, plaintiff alleged that, when its counsel telephoned the Board on February 16 to inquire when the Board would issue its decision, a Board employee told counsel that the Board had made its decision in January and that a duplicate copy would be

mailed. Plaintiff further alleged that its counsel obtained a copy of the Board decision "for the first time" on February 21. Plaintiff acknowledged that it had 35 days from the Board's January 4 decision to commence administrative review but argued that, because it did not receive the Board decision or notice thereof until after the filing deadline had passed, the 35-day period should commence when it received notice on February 16 and thus its complaint is timely. Attached to the motion was an affidavit from plaintiff's counsel averring to the allegations in the motion, including that he received the Board decision on February 21 by going to the Board offices and did not receive a copy of the decision by mail until March 1.

¶ 5 The court denied plaintiff's motion for leave to file on March 22, 2012.

¶ 6 The State Defendants appeared in April 2012 and filed a motion to dismiss the complaint for lack of subject matter jurisdiction, alleging that the Board decision was mailed to "plaintiff-claimant" (actually, defendant) Shlaes on January 4 and received by Shlaes's counsel two days later, and that the Board's "decisions are mailed to all parties simultaneously," so that the March 6th filing of the complaint was untimely under the Law. Nowhere in the motion did the State Defendants allege that the Board decision was mailed to plaintiff on January 4, nor did the motion refer to plaintiff except in the caption. Attached to the motion was a copy of the Board decision, an affidavit from a Department employee to the effect that the Department had Shlaes's correct address on file, and an affidavit from Shlaes's counsel averring that she received the Board decision by mail on January 6 and notified Shlaes that same day by telephone.

¶ 7 On May 1, 2012, the court granted the motion to dismiss. This appeal timely followed.

¶ 8 Before addressing the merits of this appeal, we note that the record on appeal does not include a transcript or appropriate substitute (*see* Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) for the motion hearings of March 22 or May 1, 2012. As appellant, plaintiff is obligated to provide us a sufficiently complete record of the proceedings to support its claim of error, so that we must

presume in the absence of such a record that the court's orders conformed to the law and had a sufficient factual basis. *In re Marriage of Gulla and Kanaval*, 234 Ill. 2d 414, 422 (2009). Conversely, our review is not precluded by the absence of transcripts where the record contains that which is necessary to dispose of the issues raised under the applicable standard of review. *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 655 (2007). Here, plaintiff contends in its brief, and the State Defendants do not contest, that the court's dismissal order was issued without a briefing schedule or evidentiary hearing.

¶ 9 On appeal, plaintiff contends that the dismissal of its administrative review action was erroneous as the State Defendants failed to prove service of the Board decision on plaintiff more than 35 days before plaintiff filed its complaint, while the State Defendants respond that the dismissal was proper because plaintiff did not timely commence its action.

¶ 10 The Act provides that administrative review of Board decisions is available "only under and in accordance with" the Law, and that "[t]he party aggrieved by the decision of the Board of Review *** may secure judicial review thereof in the circuit court." 820 ILCS 405/1100 (West 2010). The Law provides that, "[u]nless review is sought of an administrative decision 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 2010).

¶ 11 An "action 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 2010). Service may be either by personal delivery or the mailing of a copy of the decision in a sealed postage-paid envelope addressed to the party affected by the decision at his last known address. 735 ILCS 5/3-103 (West 2010); 56 Ill. Admin. Code § 2720.5(a) (eff. Jan. 30, 1992). "The date on the

document shall be rebuttable evidence that it was mailed on that date; a postmark placed on the envelope by the United States Postal Service shall be conclusive evidence of the date of mailing." 56 Ill. Admin. Code § 2720.10(d) (eff. Oct. 24, 1994). Service of a document by mail is not invalid merely because a party denies receiving it. *City of Bloomington v. Illinois Labor Relations Board*, 2011 IL App (4th) 100778, ¶ 15.

¶ 12 An administrative agency such as the Department bears the burden of establishing that a complaint under the Law was filed more than 35 days after the notice of its decision was served; however, it need not prove a mailing date beyond a reasonable doubt but rather must show that it is more probable than not that the mailing occurred on a specific date. *Carroll v. Department of Employment Security*, 389 Ill. App. 3d 404, 411 (2009). Mailing of the notice of decision may be proved by evidence of agency custom plus some corroborating circumstances relevant to show the custom was followed in the particular instance. *Id.* Such corroborating evidence includes, but is not limited to, affidavits from agency employees responsible for mailing decisions showing that they had personal knowledge of the decision at issue. *Id.* The circuit court examines the affidavits concerning the mailing but must take testimonial evidence if a material and genuinely-disputed question of fact remains. *Id*., at 411-12. We will reverse the circuit court's decision whether the Board satisfied its burden to prove mailing only if that determination is contrary to the manifest weight of the evidence. *Id.*, at 412.

¶ 13 The provisions of the Civil Practice Act, 735 ILCS 5/2-101 *et seq*. (West 2010), apply in cases under the Law except as otherwise provided. 735 ILCS 5/1-108(a) (West 2010). Section 2-619 of the Civil Practice Act provides that a defendant "may, within the time for pleading, file a motion for dismissal of the action" upon various enumerated grounds, including that "the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction," and that "the action was not

commenced within the time limited by law." 735 ILCS 5/2-619(a)(1), (5) (West 2010). A section 2-619 motion to dismiss admits as true all well-pleaded facts and reasonable inferences therefrom, and a court ruling upon such a motion must interpret all pleadings and supporting documents in favor of the non-moving party. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Our review of a dismissal pursuant to section 2-619 is *de novo*. *Id.*

¶ 14 Here, the burden was upon the State Defendants to show that plaintiff was served with the Board decision more than 35 days before its March 6, 2012, complaint. However, the State Defendants did not make the most basic allegation in the motion to dismiss that plaintiff had been sent the Board's decision. Indeed, the dismissal motion referred to defendant Shlaes as the plaintiff and made no reference to the actual plaintiff. Instead, the State Defendants in their dismissal motion alleged, and with supporting documents showed, that Shlaes had been timely sent the Board's decision. The State Defendants correctly note the rebuttable presumption arising from the Board decision itself that it was served upon all parties on January 4, 2012, as stated therein. The State Defendants' dismissal-motion allegation that Board decisions are generally sent to all parties simultaneously is in effect a mere restatement of the presumption of mailing.

¶ 15 To refute that presumption, plaintiff's counsel averred that he did not learn of or receive a copy of the Board decision until mid-February. In support of the presumption, the State Defendants presented the affidavit of Shlaes's counsel to the effect that she received the Board decision shortly after January 4. We note that the Board decision bore a correct address for plaintiff's counsel, thus diminishing the possibility that the Board sent it to what it believed to be plaintiff's counsel but in fact sent it elsewhere. However, that does not affect the possibility that the decision was somehow not sent to plaintiff's counsel but was sent to Shlaes's counsel, a possibility not addressed by the latter's receipt of the decision. The State Defendants were required to corroborate the rebuttable presumption that plaintiff or its counsel was served with

the decision in January, and we find that they failed to do so. The evidence from plaintiff's counsel merely highlights that failure.

¶ 16 We conclude that the motion to dismiss was improperly granted. This case must be remanded to the circuit court for further administrative review proceedings under the Law.

¶ 17 Reversed and remanded.

¶ 18 Justice Gordon, specially concurring:

¶ 19 I concur but I must write separately to clarify the standard of review.

¶ 20 The facts are already stated in the majority's order, so I repeat here only the few facts needed for my analysis below. In the case at bar, defendant IDES moved to dismiss for lack of subject matter jurisdiction the complaint of "plaintiff-claimant, Janet Shlaes," on the ground that it had not been filed within 35 days after the Board's decision had been mailed.

¶ 21 There is one big problem: Janet Shlaes was not the plaintiff, and she had not filed the complaint. Shlaes was a codefendant. The only plaintiff was the Chicago Institute, Janet Shlaes' employer.

¶ 22 In support of its motion to dismiss the nonexistent complaint of a non-existent plaintiff, defendant IDES submitted affidavits that showed receipt of the Board's decision by Shlaes – not a receipt by the actual plaintiff, Chicago Institute. Defendant IDES submitted: (1) an affidavit stating that it had the correct address of co-defendant Shlaes on file; and (2) an affidavit from Shlaes' attorney stating that she had timely received the Board's decision.

¶ 23 By contrast, plaintiff submitted an affidavit from its counsel stating that he had not received the Board's decision until February 21 when he went to the Board's office, and that he did not receive a copy of the decision by mail until March 1.

¶ 24 The trial court then issued a written order stating: "[t]his matter coming to be heard on Defendant's motion to dismiss for lack of subject matter jurisdiction, *** [t]his motion is granted." To the extent that what the trial court granted was defendant's motion, the trial court granted a motion to dismiss the nonexistent complaint of a nonexistent plaintiff.

¶ 25 No evidentiary hearing was held, so the only evidence before the trial court consisted of documentary evidence, namely, (1) the affidavits described above, and (2) a copy of the Board's

decision, which was attached to plaintiff's complaint and which asserted a "Date Mailed" of January 4.

¶ 26 The first issue we need to resolve is the correct standard of review. The majority provides two different and conflicting standards of review. The majority states in paragraph 12 that our standard of review is whether the trial court's decision is "contrary to the manifest weight of the evidence," and in paragraph 13 that our standard of review is *de novo*.

¶ 27 The standard of review is important. If we must determine whether the trial court's decision is "contrary to the manifest weight of the evidence," then we would have to be certain what the trial court's decision was, *i.e.*, did the trial court dismiss the nonexistent complaint of a nonexistent plaintiff, or did it intend to dismiss the complaint of a party who was neither named in the dismissal motion nor discussed in the motion's supporting affidavits.

¶ 28 By contrast, if we are reviewing the dismissal *de novo*, then we perform the same analysis that a trial court would perform: we review the documentary evidence and we reach our own conclusions. We owe no deference to whatever decision the trial court did, or did not, make. *A. M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2012 IL App (1st) 121183, ¶ 37; *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 579 (2011), *aff'd on other grounds sub. nom. Khan v. Deutsche Bank AG*, 2012 IL 112219.

¶ 29 The majority cites *Carroll v. Department of Employment Security*, 389 Ill. App. 3d 404, 411 (2009), for the proposition that: "We will reverse a circuit court's determination regarding whether the Board satisfied its burden to prove a mailing only if it is contrary to the manifest weight of the evidence." See *supra* ¶ 12 (paraphrasing this quote from *Carroll*). *Carroll*, in turn, cites for support *Kocourek v. Bowling*, 96 Ill. App. 3d 310, 314 (1981).

¶ 30 In *Kocourek*, there were not only affidavits, but also an evidentiary hearing. *Kocourek*, 96 Ill. App. 3d at 312-13. The trial court listened to direct examinations, and cross-examinations,

and redirect examinations; and resolved credibility disputes; and made a factual finding about the issue of mailing. *Kocourek*, 96 Ill. App. 3d at 312-13. It was this factual finding that the appellate court in *Kocourek* determined was entitled to the highly deferential standard of whether the decision was against the manifest weight of the evidence. *Kocourek*, 96 Ill. App. 3d at 314.

¶ 31 In *Carroll*, the appellate court stated that: "The circuit court examines the affidavits concerning the mailing, and if a material and genuinely disputed question of fact remains, then evidentiary testimony must be taken." *Carroll*, 389 Ill. App. 3d at 411-12. In *Carroll*, there was no dispute about material facts because only one side submitted an affidavit. *Carroll*, 389 Ill. App. 3d at 406-07, 412. As a result, the issue was simply the sufficiency of the allegations contained in the one affidavit. *Carroll*, 389 Ill. App. 3d at 412. Thus, no evidentiary hearing was needed.

¶ 32 In the case at bar, if the trial court had ruled for plaintiff, one could have understood why an evidentiary hearing was not needed. The parties' affidavits are not even conflicting, since plaintiff's affidavit showed that it had not received the decision on time, while defendant's affidavits concerned receipt by an entirely different party.

¶ 33 However, in the case at bar, the trial court ruled for defendant, and defendant's affidavits – all by themselves – raise a dispute about material facts, since they assert a mailing *to a different party*.

¶ 34 Since the trial court made its ruling on documentary evidence alone, and a reviewing court is in as good a position as the trial court to review documents, the trial court's ruling is not entitled to the deferential "against the manifest weight" standard. Our supreme court has held that, when a trial court did not hear "live testimony, the trial court was in no superior position than any reviewing court to make findings, and so a more deferential standard of review is not warranted." *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). Our supreme court

"reiterate[d] that where the evidence before the trial court consists of depositions, transcripts or evidence otherwise documentary in nature, a reviewing court is not bound by the trial court's findings and may review the record *de novo*." *Addison*, 232 Ill. 2d at 453. Since the evidence in the case at bar was purely "documentary in nature," the appropriate standard of review here is *de novo*, rather than against the manifest weight of the evidence.

¶ 35 Not only do we review these documents *de novo*, but we also must review them in the light most favorable to plaintiff. When ruling on a section 2-619 motion, a court is required to interpret all the supporting documents, such as the affidavits at issue here, in the light *most favorable* to the nonmovant. *Bjork v. O'Meara*, 2013 IL 114044.

¶ 36 Reviewing these documents *de novo* and interpreting them in the light most favorable to the nonmovant, as we are required to do in a section 2-619 case, I cannot find that defendant's affidavits concerning *an entirely different party* satisfied defendant's burden to prove a timely mailing. To the extent that the "Date Mailed" stamp on the decision creates a rebuttable presumption of a timely mailing (*supra* ¶ 11), that presumption was rebutted by the attorney's affidavit. Since we must interpret these documents in the light *most* favorable to plaintiff, the conclusion becomes inescapable that the presumption was rebutted.

¶ 37 For the above reasons, defendant failed to satisfy its burden of proving a timely mailing, and I concur.