2014 IL App (1st) 130971-U

FIFTH DIVISION
February 28, 2014

No. 1-13-0971

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAY SHACHTER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 2012 CH 42601
	)	
COUNTY of COOK,	)	The Honorable
	)	Edmund Ponce de Leon,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Justice Palmer concurred in the judgment.
Presiding Justice Gordon specially concurred.

Held: Where defendant failed to give sufficient notice of its motion to dismiss under local court rules, defendant's motion was not properly before the court.

¶ 1 The plaintiff, Jay F. Shachter, filed suit against defendant, County of Cook, seeking relief in the form of a declaratory judgment and an injunction, alleging that the defendant refused a tender of payment in cash for redemption of plaintiff's unpaid real estate taxes that were sold at a

tax sale, and that this refusal amounted to a discharge of his real estate tax debt. Plaintiff also alleges that defendant should be permanently enjoined from seizing or authorizing the seizure of the subject property. A combined motion to dismiss brought by the defendant pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2010); 735 ILCS 5/2-619 (West 2010)) was noticed and filed on January 18, 2013. The motion was to be heard on January 24, 2013, at which time the trial court gave plaintiff until February 14, 2013 to respond to defendants' motion. However, on February 13, 2013, at a hearing set for plaintiff's motion to vacate the order of January 24, and rule to show cause, before plaintiff had filed any response, in an order captioned "for status," the trial court granted defendants' motion and dismissed plaintiff's suit in its entirety. Plaintiff asks that we reverse the judgment of the trial court. For the following reasons, we reverse and remand.

¶ 2 BACKGROUND

¶ 3 The following facts are gleaned from the record and submissions of the parties. It is undisputed that plaintiff owed unpaid real estate taxes on his home in 2008. On June 19, 2012, plaintiff requested an estimate of redemption from the Cook County Clerk. The estimate of redemption indicates that the 2008 real estate taxes on the subject property had been sold to Phoenix Bond and Indemnity on September 16, 2010 and that $13,241.97 was owed to redeem the unpaid taxes. On June 22, 2012, plaintiff tendered $13,300 in cash to defendant for unpaid real estate taxes on 6424 North Whipple Street, Chicago. An agent for defendant refused to accept the tender, and plaintiff claimed that his debt was discharged through his offer of tender, even though they refused his tender.

¶ 4 On November 28, 2012, plaintiff filed a complaint in the chancery division of the Circuit Court of Cook County, requesting relief in the form of a declaratory judgment discharging plaintiff of the real estate tax debt owed and also requesting an injunction enjoining defendant from seizing, authorizing the seizure of, or otherwise interfering with plaintiff's title to, or enjoyment of, the subject property.

¶ 5 On December 20, 2012, defendant filed an appearance and a motion to transfer the case to the county division, which hears cases dealing with the sale of real estate taxes and proceedings in tax deeds. On January 3, 2013, the date the motion to transfer was to be heard, plaintiff filed a motion for substitution of judge as a matter of right. 735 ILCS 5/2-1001(a)(2) (West 2012). Plaintiff's motion was granted and the case was transferred for reassignment to another judge. The case was reassigned and on January 7, 2013, defendants filed the same motion to transfer to the county division and for an extension of time to answer or otherwise plead. On January 15, 2013, the motion to transfer was granted and the motion for extension of time or to otherwise plead was entered and continued.

¶ 6 On January 17, 2013, plaintiff filed a notice of office closing, stating that from January 27, 2013 through February 7, 2013 he would be out of town, would not have access to mail, and would be unable to attend court.

¶ 7 On January 18, 2013, defendant filed a combined 2-615 and 2-619 motion to dismiss, to be heard on January 24, 2013. In support of the motion to dismiss, the county claimed (1) that plaintiff's claim was factually and legally insufficient; (2) that the circuit court did not have subject matter jurisdiction over the action; (3) that Cook County was not a proper party; and (4)

that the complaint did not name a necessary party.

¶ 8 On January 24, 2013, the court continued the motion and gave plaintiff 21 days to respond, *i.e.* until February 14, 2013, to file his response and set the motion for status on February 28, 2013.

¶ 9 On February 8, 2013, plaintiff filed a motion to vacate the order of January 24, 2013, and requested a rule to show cause against William Blyth, opposing counsel, for criminal contempt for failing to inform the court that defendant's motion to dismiss was noticed in violation of Cook County Circuit Court Rule 2.1(c)(I). Plaintiff scheduled his motion to be heard on February 13, 2013. The motion claimed that defendant's motion to dismiss was not properly before the court because defendant filed and mailed its notice of motion on January 18, for a hearing on January 24 and due to a court holiday and weekend there was only three court days prior to the case noticed and that the local rules require not less than five court days notice. Cook County Circuit Court Rule 2.1(c)(i) (Cook Co. Cir. Ct. R. 2.1(c)(i) (August 21, 2000)) Notice of Hearing of Motions, states in pertinent part:

> "(c) Manner and time of service of notice.
>
> (i) Notice shall be given in the manner and to the persons described in Supreme Court Rule 11. If notice of hearing is given by personal service, the notice shall be delivered before 4 pm of the second court day preceding the hearing of the motion. If notice is given by mail, the notice shall be deposited in a United States post Office or Post Office Box on or before the fifth court day preceding the hearing of the motion. "

¶ 10 Plaintiff further contended that defendant violated Illinois Supreme Court Rule 101(d)

(Ill. S. Ct. R. 101(d) (eff. May 30, 2008)) which states in pertinent part:

> " (d) Summons Requiring Appearance Within 30 Days After Service. In all other cases the summons shall require defendant to file his answer or otherwise file his appearance within 30 days after service, exclusive of the day of service * * *."

¶ 11 Plaintiff also maintained that defendant violated Illinois Supreme Court Rule 181(a) (Ill. S. Ct. R. 181(a) (eff. Jan. 4, 2013)), requiring defendant to answer or otherwise plead within a certain time frame, which states in pertinent part:

> "a) When Summons Requires Appearance Within 30 Days After Service. When the summons requires appearance within 30 days after service, exclusive of the day of service, the 30-day period shall be computed from the day the copy of summons is left with the person designated by law and not from the day a copy is mailed, in case mailing is also required. The defendant may makes his or her appearance by filing a motion within the 30-day period, in which instance an answer or another appropriate motion shell be filed within the timed the court directs in the order disposing of the motion."

Plaintiff argued that defendant's motion to dismiss was not properly before the court because it had been untimely filed under Illinois Supreme Court Rule 101(d) and Illinois Supreme Court Rule 181. Further, plaintiff alleged that the attorney for the defendant should show cause why he should not be held in criminal contempt of court when he failed to inform the court of these violations.

¶ 12 On February 13, 2013, the date set for the hearing on plaintiff's motion to vacate and rule to show cause, the day before plaintiff's response to defendant's motion to dismiss was due, and

to which he had not yet responded, the court granted defendant's motion to dismiss which dismissed the case in its entirety. It is from the orders of January 24, 2013, and February 13, 2013, that plaintiff appeals.

¶ 13 ANALYSIS

¶ 14 Plaintiff argues he was denied procedural due process where the trial court, in an order titled "for status," granted defendants' motion to dismiss on the date set for a hearing on plaintiff's motion to vacate and rule to show cause, one day before plaintiff's response to that motion was due. Plaintiff further argues that defendant's motion to dismiss was not properly before the trial court, and thus the two orders that dealt with the motion, the order of January 24, 2013 and the order of February 13, 2013 were both improperly entered because the required notice to plaintiff was inadequate under Cook County Circuit Court Rule 2.1(c)(i). We agree.

¶ 15 We begin by considering plaintiff's arguments regarding Cook County Circuit Court Rule 2.1(c)(i). As noted above, that rule states:

> "Notice shall be given in the manner and to the persons described in Supreme Court Rule 11. If notice of hearing is given by personal service, the notice shall be delivered before 4 p.m. of the second court day preceding the hearing of the motion. If notice is given by mail, the notice shall be deposited in a United States post Office or Post Office Box on or before the fifth court day preceding the hearing of the motion." Cook Co. Cir. Ct. R. 2.1(c)(i) (August 21, 2000).

¶ 16 This case involves interpretation of both a local court rule and our supreme court rules. The best indication of legislative intent is the statutory language given its plain and ordinary

meaning. *People ex rel. Madigan v. Kinzer*, 232 Ill. 2d 179, 184 (2009), (citing *Holly v. Montes*, 231 Ill. 2d 153, 159 (2008). We may not depart from a statute's plain language by reading into it exceptions, limitations, or conditions the legislature did not express. *Kinzer*, 232 Ill.2d.at 184-85, (citing *People v. Lewis*, 223 Ill. 2d 393, 402 (2006). Courts should not attempt to read a statute other than in the manner it was written. *Kinzer,* 232 Ill. 2d at 185 (citing *Rosewood Care Center, Inc. v. Caterpillar, Inc*. 226 Ill. 2d 559, 567 (2007).

¶ 17 Plaintiff argues that defendant filed and mailed its notice of motion and motion to dismiss on January 18, 2013 and when defendant noticed the motion for January 24, 2013, it was in violation of Cook County Circuit Court Rule 2.1(c)(i). Cook Co. Cir. Ct. R. 2.1(c)(i) (eff. August 21, 2000). Plaintiff maintains that the proof of service shows that defendant mailed the document to plaintiff on January 18, 2013. Plaintiff further states that a court holiday and a weekend came between the time defendant mailed the notice and the hearing. Therefore, January 24 was only three court days prior to the date noticed, less than the five days required by local rule, and thus defendant's motion to dismiss was never properly before the court. Consequently, plaintiff argues that the two orders entered dealing with the motion, the order of January 24, 2013 and the order of February 13, 2013, were improper.

¶ 18 Plaintiff relies on *Premier Electrical Construction Co. v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 834 (1995), for the proposition that local rules have the force of statute and are binding on the trial court as well as the parties. It is well settled law in Illinois that the circuit courts do not have the discretion to ignore their own rules. *Id.* Plaintiff further contends that a motion noticed in violation of local rule may not be heard by the court, nor may

the court act on it in any way.

¶ 19 Defendant responds that the trial court is required to follow rules of notice only when they are not in conflict with a statute or supreme court rule. In this case, defendant contends that Cook County Circuit Court Rule 2.1 (c)(i) conflicts with Supreme Court Rule 12(c). Ill. S. Ct. R. 12(c) (eff. Jan. 4, 2013)). Supreme Court Rule 21(a) (Ill. S. Ct. Rule 21(a) (eff. Dec. 1, 2008)) authorizes circuit courts to adopt local rules governing civil cases provided they do not conflict with or modify supreme court rules or statutes. *People v. Atou*, 372 Ill. App. 3d 78, 82 (2007). Defendant argues that under Illinois Supreme Court Rule 12(c), service by mail is complete four days after mailing. Ill. S. Ct. R. 12(c) (eff. Jan. 4, 2013). The four-day period is calculated by excluding the day on which the notice is mailed and including the following four days after the notice is mailed. *Royal Insurance Company of America v. Insignia Financial Group, Inc*, 323 Ill. App. 3d 58, 63 (2001) (citing *Acosta v. Sharlin*, 295 Ill. App. 3d 102, 105 (1998)). Thus, defendant contends that because there is a conflict, the supreme court rule applies and therefore the trial court's decision should be upheld.

¶ 20 Plaintiff replies that the two rules govern different things. He correctly points out that Illinois Supreme Court Rule 12(c) says nothing about motions, but merely governs when service of documents is considered complete. Ill. S. Ct. R. 12(c) (eff. Jan. 4, 2013). For notice of a motion to be valid, it is not enough for service of the motion be complete prior to the presentation of the motion. Rather, the opposing party must be given the amount of advance notice mandated by local rules. Cook County Circuit Court Rule 2.1(c)(i) governs notice of a motion and provides how many days before presentation of a motion is necessary for notice.

Illinois Supreme Court Rule 12(c) (Ill. S. Ct. R. 12(c) (eff. Jan. 4, 2013) governs service of all documents, and provides when service of documents is complete. Thus, the rules govern different things and are not in conflict. Rule 12(c) (Ill. S. Ct. R. 12(c) (eff. Jan. 4, 2013)) does not govern when a motion can be presented. That issue is governed by Cook County Circuit Court Rule 2.1(c)(i) which required the motion to be presented no earlier than Monday, January 28, 2013, and there is nothing in the supreme court rules that contradicts that. Cook Co. Cir. Ct. R. 2. 1(c)(1) (eff. August 21, 2000). Here, defendant's notice of motion to dismiss was filed in violation of local court rule and therefore was not properly before the trial court.

¶ 21 Even more importantly, plaintiff was deprived of due process when the court granted defendant's motion to dismiss at a hearing without giving plaintiff proper notice. Plaintiff correctly points out that the order of January 24, 2013, explicitly gave plaintiff 21 days from that date, *i.e.*, February 14, 2013, to file a written response to defendant's motion to dismiss. The order also set a status date of February 28, 2013. However, on February 13, 2013, at a hearing on plaintiff's motion to vacate and rule to show cause, on a day when the motion to dismiss was not before the court, before plaintiff had filed any response to defendant's motion to dismiss, and one day before the last day granted to plaintiff in which to file a response, the trial court, in an order captioned "for status," granted defendant's motion and dismissed the case with prejudice.

¶ 22 A procedural due process claim presents a legal question subject to *de novo* review. *People ex rel Birkett v. Konetski*, 233 Ill. 2d 185, 201 (2009). The fundamental requirements of due process are notice of the proceeding and an opportunity to present any objections. *People v. Konetski*, 233 Ill. 2d 185, 201 (2009) (citing *Tri-G, Inc. v. Burke*, *Bosselman & Weaver*, 222 Ill.

2d 218, 244-245 (2006)). Due process is a flexible concept, and " 'not all situations calling for procedural safeguards call for the same kind of procedure.' " *Konetski*, 233 Ill. 2d at 201 (quoting *Lyon v. Department of Children & Family Services*, 209 Ill. 2d 264, 272 (2004) (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972))).

¶ 23 We find *People v. Bounds*, 182 Ill. 2d 1 (1998), particularly instructive. In *Bounds,* defendant's conviction for murder had been affirmed on direct appeal. *Id*. at 2. Postconviction counsel filed a four-count petition for postconviction relief. The trial court granted leave to file an amended petition by a certain date. *Id*. at 4. Counsel had requested time to file the amended petition in order to enable him to obtain the trial record which had been lost. In the interim, the State filed a motion to dismiss and defense counsel had issued subpoenas. At a subsequent hearing, the State announced that it had located the trial record and turned it over. The matter was then continued for status on a later date. At that later date, counsel appeared with a new discovery motion as well as a motion for an additional continuance. *Id.* at 4-5. These motions were not ruled upon, instead, the trial court granted the State's motion to dismiss the postconviction petition without hearing argument. *Id*. at 5. Defendant contended that he was entitled to rely on the court's order granting him the right to file an amended petition and on the court's statement that the March 28, court date was for status. Defendant maintained that he had no notice that the court would rule on the State's motion to dismiss on the status date and the trial court's decision to do so was fundamentally unfair. Our supreme court agreed and held that the trial court violated the defendant's right to procedural due process of law when it converted a status call to a hearing on the merits without notice to the parties. *Id.* Thus, the court reversed the

circuit court's dismissal of defendant's petition. *Id.*

¶ 24 In this case, as previously discussed, the trial court set a briefing schedule on January 24, 2013. When plaintiff returned from an out-of-town trip and received the order, he filed a motion to vacate and requested an order of criminal contempt claiming defendant violated local Cook County Circuit Court Rule 2.1(c)(i). Cook Co. Cir. Ct. R. 2.1(c)(i) (eff. August 21, 2000). On February 13, 2013, the day plaintiff's motion was set to be presented to the court, which was also the day before plaintiff's response to the dismissal motion was due, the court granted the dismissal motion and dismissed the case with prejudice. In the case at bar, as in *Bounds*, there was no notice that defendant's motion to dismiss would be ruled upon. We find that this lack of notice violated plaintiff's right to procedural due process.

¶ 25 Defendant argues that plaintiff's February 8 motion to vacate the order and find defendant in contempt was effectively his response to the motion to dismiss. Defendant relies on *Intercontinental Parts v. Caterpillar*, 260 Ill. App. 3d 1085, 1090 (1994), for the proposition that a party who has filed a motion seeking certain relief from the circuit court is obligated to obtain a ruling on that motion or a refusal to rule on the motion. Failure to obtain a ruling operates as a waiver of the alleged error. *Id.*

¶ 26 In *Intercontinental,* plaintiff moved to strike portions of affidavits submitted by defendant's in connection with a motion for summary judgment, contending that they did not comply with the requirements set forth in Illinois Supreme Court Rule 191(a). Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). Although the arguments for striking the challenged portions of the affidavits were presented at a hearing held June 12, 1991, plaintiff did not obtain a ruling on this

motion. *Intercontinental,* 260 Ill. App. 3d at 1040. Since plaintiff failed to obtain a ruling on its motion to strike, the court held that plaintiff waived the right to argue on appeal that the trial court should not have considered the affidavits submitted by defendants. *Id*. Similarly, defendant argues, because plaintiff failed to obtain a ruling on this motion or a refusal to rule from the trial court, the issue is waived on appeal.

¶ 27 *Intercontinental* is distinguishable from the present case in two key aspects. First, in *Intercontinental,* the issue dealt with the veracity of affidavits filed in support of summary judgment motions. Plaintiff had an opportunity to present and argue its motion at a hearing, although there was no ruling and thus the issue was waived. In the case at bar, when plaintiff received insufficient notice, he filed a motion to vacate the order of January 24, which set a briefing schedule on defendant's motion to dismiss, and thus, did not waive the notice requirement. Secondly, in the case at bar, there is no indication in the record that plaintiff ever had an opportunity to argue his motion to vacate or respond to defendant's motion to dismiss. Thus, the order of February 13, 2013, was entered in violation of plaintiff's right to argue in his defense and therefore violated his due process.

¶ 28 Having concluded that plaintiff did not receive sufficient notice and he did not waive notice, we need not address the other issues presented by the parties.

¶ 29 CONCLUSION

¶ 30 Therefore, for the foregoing reasons, we find that the trial court erred in dismissing plaintiff's case with prejudice. The orders of the circuit court dated January 24, 2013 and February 13, 2013 are vacated and this case is remanded to the circuit court for further

proceedings.

¶ 31 Vacated and remanded.

¶ 32 Presiding Justice Gordon, concurring:

¶ 33 I concur with the majority's holding that the trial court violated procedural due process, when the trial court stated in a written order that plaintiff had 21 days to respond to defendant's motion, but then it ruled on the motion before plaintiff's response was even due. *Supra* ¶¶ 14, 24. Thus, I concur with the majority that we must reverse the trial court's dismissal order.

¶ 34 However, I must write separately because the majority also bases its judgment, in part, on the fact that the original notice of the motion was defective, and I cannot concur with that holding. *Supra* ¶ 20. Any defect in the original notice was waived: (1) when plaintiff acknowledged actual receipt of the notice and stated that he would waive objection to the defective notice if defendant could obtain an extension of even one day for the hearing; and (2) the trial court then granted plaintiff's request for an extension, allowing plaintiff 21 days to file a written response.

¶ 35 A review of the appellate record reveals the following facts. As the majority observes, on January 18, 2013, defendant filed a motion to dismiss, and the accompanying notice of motion set the motion to be heard on January 24, 2013, at 10:30 a.m.

¶ 36 However, the majority's order overlooks the facts which plaintiff conceded in his motion to vacate the January 24 order, in which plaintiff, who was acting *pro se*, explained what happened after he received defendant's notice of motion.

¶ 37 First, plaintiff acknowledged actual receipt of the notice, stating: "On Wednesday

evening, January 23, 2013, Plaintiff received a Notice of Motion in the mail informing him that Defendant was going to present a Motion to Dismiss the following morning, at 10:30 a.m., Thursday, January 24." Plaintiff then tried to reach defendant's attorney by telephone without success to state that plaintiff had a conflict at that time.

¶ 38 Second, plaintiff acknowledged that he left a message for defendant's attorney stating that "he would waive objection to the defective notice if Defendant could get a hearing for Friday, January 25" instead. On the morning of January 24, plaintiff "telephoned the judge's chambers and told the judge's clerk that [he] would not be in court at 10:30 a.m. and explained, in detail, why."

¶ 39 In addition, the majority overlooks the fact that the trial court's written order confirms that plaintiff did, indeed, contact the court and that the court's order was issued in response to that contact. The court's written January 24 order confirms that "Plaintiff [had] notified the Court that he would not be present for the Motion to Dismiss set [for] today." As a result, "the Court gave Plaintiff a future date to appear." The order then set the following schedule: "Plaintiff has 21 days from today's date to file a written response to Defendant's Motion to Dismiss. Defendant has 7 days to Reply or 28 days from today's date. *** This cause is set for status on February 28, 2013, *** at 10:30 a.m."

¶ 40 The Illinois Supreme Court has held that, under " 'the doctrine of invited error,' " a party " 'may not request to proceed in one manner and then later contend on appeal that the course of action was in error.' " *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) (quoting *People v. Carter*, 208 Ill. 2d 309, 319 (2003)). To permit a party to use, as a vehicle for reversal, the exact action

which it procured in the trial court " 'would offend all notions of fair play' " and encourage duplicity by litigants. *Harvey*, 211 Ill. 2d at 385 (quoting *People v. Villareal*, 198 Ill. 2d 209, 227 (2001)). Thus, when a party "procures, invites or acquiesces" in a trial court's ruling, even if the ruling is improper, he cannot contest the ruling on appeal. *People v. Bush*, 214 Ill. 2d 318, 332 (2005); *Harvey*, 211 Ill. 2d at 386, *People v. Coffey*, 205 Ill. 2d 52,114 (2001).

¶ 41 As a result, plaintiff cannot now on appeal contest a defect in defendant's original notice: (1) when plaintiff acknowledged actual receipt of the notice and stated that he would waive objection to the defective notice if defendant could obtain an extension of even one day for the hearing; and (2) the trial court then granted plaintiff's request for an extension, allowing plaintiff 21 days to file a written response.

¶ 42 However, I concur in the majority's judgment reversing the dismissal order because, on February 13, the day before plaintiff's written response was due, the same trial judge issued an order stating:

> "This matter coming on to be heard for status, parties being present and the Court being fully advised, it is hereby ordered that:
>
> (1) The motion to dismiss is granted.
>
> (2) The cause of action in its entirety is dismissed.
>
> (3) The court date of 2/28/13 is stricken.
>
> This is a final order."

The written order, quoted above, acknowledges that the matter was set only "for status" and not for a hearing on defendant's motion to dismiss, and it offers no reason why plaintiff was denied

his previously granted opportunity to file a response. In its brief to this court, defendant does not claim that a dismissal hearing was, in fact, held.

¶ 43 Defendant argues in response that plaintiff cannot argue for the first time on appeal that he was not allowed to respond. However, to the extent that defendant wanted to argue on appeal that plaintiff failed to object below, it was defendant's burden to supplement the record with the transcript in order to support this claim. Although it is the appellant's burden to provide us with a sufficient record to be able to grant the relief that the appellant requests on the claims that the appellant raises (*Chicago Province of the Society of Jesus v. Clark and Dickens, L.L.C.*, 383 Ill. App. 3d 435, 443 (2008)), it is the appellee's burden to supplement the record if anything is missing that is needed to support its own claims (*People v. Vernon*, 396 Ill. App. 3d 145, 151 (2009)). It is defendant, not plaintiff, who is claiming on appeal that plaintiff waived his response by failing to object below and thus it is defendant's burden to provide us with a complete record to substantiate this claim of waiver. Ill. S. Ct. R. 328 (eff. Feb. 1, 1994) (permitting an appellee to request the preparation of a supporting record on its claims, prior to the filing of the record on appeal); Ill. S. Ct. R. 329 (eff. Jan. 1, 2006) (permitting an appellee to supplement the record, even after it has been filed).

¶ 44 Defendant also argues that plaintiff's motion to vacate the trial court's January 24 order *was* plaintiff's response to defendant's motion to dismiss. However, even a cursory reading of plaintiff's motion to vacate shows that it did not address, at all, the substance of defendant's motion to dismiss. Plaintiff was seeking to vacate the January 24 order, in part, because that order had stayed the discovery which plaintiff sought. In the motion to vacate, plaintiff stated

that he learned, only when he received the January 24 order, that defendant's attorney "had taken advantage of the *ex parte* proceedings to secure a stay of discovery." Saying that the motion to vacate was a response to the dismissal motion is putting the cart before the horse.

¶ 45 Thus, I do not find defendant's arguments on this point persuasive, and I concur with the majority's holding that the trial court violated procedural due process, when the trial court's order stated that plaintiff had 21 days to respond to defendant's motion, but then the motion was decided before plaintiff's response was even due.