2014 IL App (1st) 131842-U

SECOND DIVISION
August 12, 2014

No. 1-13-1842

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ROBERT MCKAY, Plaintiff-Appellant, v. COOK COUNTY d/b/a Provident Hospital, and SIDNEY THOMAS, Chief Operating Officer for Provident Hospital, Cook County, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County No. 12 L 3014 Honorable Thomas R. Mulroy, Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justice Pierce and Justice Liu concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court properly dismissed plaintiff's second amended complaint as barred by *res judicata* where plaintiff sought an administrative hearing concerning his layoff from employment, administrative review of the administrative decision before the circuit court, a related *Shakman* complaint, and a related complaint in federal court before filing the instant complaint seeking review of the actions by the agency in disciplining and laying off plaintiff.

¶ 2 Plaintiff Robert McKay filed a verified complaint against defendant Cook County d/b/a Provident Hospital (Provident) and Provident chief operating officer Sidney Thomas on March 19, 2002. On November 6, 2012, plaintiff filed a second amended verified complaint against

defendants sounding in breach of contract implied in law and a "statutory violation" of a Cook County ordinance. Pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2012)), defendants moved to dismiss the second amended complaint under both sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 619 (West 2012)). On March 22, 2013, following briefing and oral argument, the trial court dismissed the second amended complaint without further explanation.

¶ 3 On appeal, plaintiff asserts that the trial court erred in dismissing the second amended complaint because he had filed a retaliatory discharge claim and Provident's actions suspending and laying plaintiff off of work were merely a "smokescreen" to hide his unlawful discharge. Plaintiff argues that dismissal was improper because his claim should have been ruled an exception to the doctrine of *res judicata*. Plaintiff also alleges that he claimed a statutory violation by defendants and that claim falls outside the purview of the Administrative Review Law and he could not bring his claim in the prior action; therefore, he concludes, there was no final adjudication on the merits and *res judicata* could not apply. For the following reasons, we affirm the judgment of the trial court.

¶ 4 I. BACKGROUND

¶ 5 The following facts are of record. Plaintiff was employed by Provident in 1993 as a fire marshal in the safety department and was promoted to the position of safety director in 1999. In February 2007, there was an issue in Provident's pneumatic tubing system with a potentially infectious material spill that required decontamination and shutting the system down until it was completely dry. However, prior to the completion of the drying process, Provident management ordered plaintiff to return the tubing system into operation. As a result, fumes from the cleaning agent were released into the building sending two employees to the emergency room with

reactions to the fumes. Plaintiff prepared an incident report that reflected poorly upon plaintiff's manager, Barbara Patterson.

¶ 6 On March 8, 2007, Patterson charged plaintiff with insubordination and he was placed on suspension without pay pending a hearing. On April 3, 2007, plaintiff received a letter dated March 27, 2007, from Kim Gilmore, bureau chief of human resources for Provident, informing him that due to budgetary constraints, Provident was reducing staff and plaintiff had been laid off. On April 12, 2007, plaintiff filed a hearing request with the Employee Appeals Board of Cook County, Illinois (EAB), contesting his March 8, 2007, suspension without pay. Plaintiff alleged that he was laid off despite the fact that the only other employee with the same job classification had less seniority than plaintiff. He alleged that this violated section 7.03 of the personnel rules, but Thomas ordered the layoff despite the rule.

¶ 7 On October 29, 2007, the EAB issued its decision. The EAB denied plaintiff's appeal finding that plaintiff was laid off and Provident did not take disciplinary action against plaintiff. The EAB specifically noted that it appeared the layoff was in violation of section 7.03, but any issues related to the layoff were beyond the scope of its jurisdiction that granted it review of a discharge, demotion, or suspension. Therefore the EAB rendered no opinion on the propriety of plaintiff's layoff.

¶ 8 Plaintiff sought review of the EAB decision in the Circuit Court of Cook County on December 3, 2007. Plaintiff asserted that the EAB erred in finding that the separation was not a termination. Plaintiff argued that the defendants' decision violated Provident's policies and procedures. On October 1, 2008, the circuit court denied plaintiff's complaint and affirmed the EAB's finding.

¶ 9 A July 31, 2009, memorandum opinion from Judge Der-Yeghiayan of the United States District Court for the Northern District of Illinois is also of record. In that opinion, the court granted defendant Cook County's motion to dismiss plaintiff's action under 42 U.S.C. § 1983 for procedural due process violations as well as claims under the Illinois Whistleblower Act (740 ILCS 174/1 *et seq.* (West 2008)). The court opined that plaintiff's claims were barred by the doctrine of *res judicata*, because plaintiff had the opportunity to raise the issues in his action before the circuit court challenging the decision of the EAB.

¶ 10 On December 18, 2009, plaintiff filed a *Shakman* claim with The Office of the Cook County Post-SRO Complaint Administrator alleging unlawful political discrimination from when he was suspended without due process and then laid off under pretextual conditions. Although plaintiff had violated the limitations period for filing, the complaint administrator completed an investigation of plaintiff's claims and on June 22, 1011, issued a final claim report outlining his investigation and findings. Ultimately, no evidence was found that plaintiff was laid off and not reinstated due to political considerations.

¶ 11 On March 19, 2012, plaintiff filed the underlying complaint in this appeal. As noted above, plaintiff's second amended complaint contained counts for breach of contract implied in law and an alleged "statutory violation" of Cook County ordinances and the personnel rules. Defendants moved to dismiss pursuant to section 2-619.1 of the Code based on both section 2-615 and 2-619. Defendants argued that plaintiff failed to state a contract claim because he failed to follow the terms of the allowable remedies under the personnel rules for which he argued defendants breached. Defendants also asserted that plaintiff failed to state any cause of action for a statutory violation because he failed to identify any statutory provision that was violated. Finally, defendants argued that dismissal was proper pursuant to section 2-619(4) under the

doctrine of *res judicata* because plaintiff appealed his determination with the EAB, sought review in the circuit court, filed a *Shakman* complaint, and filed a federal suit.

¶ 12 On March 22, 2013, the circuit court dismissed the case with prejudice following briefing and argument. No memorandum order was entered and there is no transcript of any the proceedings before the court. Defendant appeals that order.

¶ 13 At some point prior to preparing his brief, plaintiff obtained a copy of a memorandum dated February 22, 2007, from Robert R. Simon, M.D., interim bureau chief of the bureau of health services to all bureau CMO's and CNO's. In the memorandum, Dr. Simon indicated that lay-off letters that had recently been sent from human services were rescinded. He indicated that the letters were sent as a result of computer error.

¶ 14 II. ANALYSIS

¶ 15 We begin by noting that " '[a] reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.' " (Internal quotation marks omitted.) *Gandy v. Kimbrough*, 406 Ill. App. 3d 867, 875 (2010) (quoting *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995)). Supreme Court Rules 341(h)(6) and (7) require a statement of the facts, with citation to the record, necessary for an understanding of the case and a clear statement of contentions with supporting citation of authorities and pages of the record relied on. Ill. S. Ct. Rs. 341(h)(6), (h)(7) (eff. July 1, 2008). These rules are not merely suggestions, but are necessary for the proper and efficient administration of the courts. *First National Bank of Marengo v. Loffelmacher*, 236 Ill. App. 3d 690, 691-92 (1992). While a *pro se* litigant, plaintiff is not entitled to leniency with respect to

compliance with the rules of procedure required of attorneys. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78.

¶ 16 We will not sift through the record or complete legal research to find support for this issue. The burden of a sufficient record falls on the appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Issues that are ill-defined and insufficiently presented do not satisfy the rule and are considered waived. *Express Valet, Inc. v. City of Chicago*, 373 Ill. App. 3d 838, 855 (2007). In fact, for these violations, this court may not only strike portions of the brief or consider arguments waived, but strike a brief in its entirety and dismiss the matter. *Marengo*, 236 Ill. App. 3d at 692. Where the record is not complete, any doubts which might arise from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Further, "the reviewing court must presume the circuit court had a sufficient factual basis for its holding and that its order conforms with the law." *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 157 (2005).

¶ 17 Section 2-619 of the Code of Civil Procedure allows a party to move for summary disposition of issues of law or easily proved issues of fact. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-117 (1993). Such a motion admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matter appearing on the face of the complaint which defeat the plaintiff's claim. *Joseph v. Chicago Transit Authority*, 306 Ill. App. 3d 927, 930 (1999). This court, under a *de novo* standard of review, must determine whether a material issue of fact should have precluded dismissal or, absent a question of fact, whether the dismissal was proper as a matter of law. *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d 112, 116-117 (1993). This court may uphold a trial court's decision on any basis appearing in the record. *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 359-60 (1999).

¶ 18 Plaintiff advances three issues on appeal: (1) that his layoff was actually a retaliatory discharge and should have been allowed; (2) that his claim under count I should not have been dismissed as *res judicata* because defendants withheld the February 22, 2007, letter and the EAB had not considered that vital evidence; and (3) that his statutory violation claim under count II should not have been dismissed as it could not have been brought in earlier proceedings and was an exception to the doctrine of *res judicata*.

¶ 19 Under the doctrine of *res judicata*, a final judgment on the merits entered by a court with proper jurisdiction acts as an absolute bar to subsequent claims between the parties regarding the same claim, demand, or cause of action. *Mount Mansfield Insurance Group v. American International Group, Inc.*, 372 Ill. App. 3d 388, 392 (2007). The doctrine of *res judicata* is based on the public policy interests of judicial economy and finality of litigation. *Papers Unlimited v. Park*, 253 Ill. App. 3d 150, 153 (1993). The doctrine applies to not only claims actually made and decided in the first action, but also to matters that might have been raised and determined or that could have been offered to sustain or defeat a claim in the first cause of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008). The essential elements of the equitable doctrine of *res judicata* are: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of parties or their privies; and (3) an identity of causes of action. *Mount Mansfield*, 372 Ill. App. 3d at 392.

¶ 20 First, plaintiff's first argument on appeal fails because he never raised a claim of retaliatory discharge before the trial court. A claim that is not asserted in the complaint is considered abandoned and may not be raised for the first time on review. *Allstate Property and Casualty Ins. Co. v. Trujillo*, 2014 IL App (1st) 123419, ¶ 17. Plaintiff's second amended

complaint sounded in breach of contract implied in law and an alleged statutory violation. Accordingly, plaintiff's claim that his retaliatory discharge claim should survive is rejected.

¶ 21 Furthermore, the stated basis of support for plaintiff's first and second issue is defendants' failure to produce the February 22, 2007, letter to plaintiff, the EAB, or the circuit court. Plaintiff argues that this was prejudicial to him and the court and further evidence of defendants' continued retaliation against plaintiff. Plaintiff relies on this letter to claim that his breach of contract claim falls within an exception to the application of *res judicata*. Plaintiff maintains that because he could not have asserted these claims any time prior to his eventual discovery of the letter, *res judicata* cannot apply. Therefore, plaintiff contends that the record demonstrates that the EAB clearly did not consider all the evidence and none of the prior proceedings considered the propriety of his layoff.

¶ 22 Contrary to plaintiff's claims, the February 22, 2007, letter does not prove that he could not have brought his claims in the prior actions. Plaintiff was disciplined on March 8, 2007, and was issued a letter informing him that he had been laid off due to budgetary constraints on March 27, 2007. The February letter stating that prior lay-off notices were to be disregarded has no bearing on plaintiff's subsequent layoff and clearly did not rescind his layoff as he contends now on appeal.

¶ 23 There is no dispute that there is an identity of parties in the two actions. Plaintiff admits that the record clearly shows that the EAB held a hearing and issued a decision and that there was judicial review affirming that decision. However, plaintiff claims that because he was not apprised of all of the facts, he could not bring his claims at the same time and thus they are not barred by *res judicata*. Because the February letter is not relevant to plaintiff's claim, plaintiff's second argument on appeal fails as it is premised on the claim that defendants' failure to produce

the February 22, 2007, denied him due process and misled the trial court into finding that *res judicata* applied.

¶ 24 Plaintiff also argues that *res judicata* should not be applied to his statutory violation claim. Plaintiff asserts that Illinois law does not allow for joinder of claims with complaints under the Administrative Review Law unless they are constitutional or federal questions. Plaintiff notes that each of the cases cited by defendants and the federal court in its discussion on the issue each involved constitutional or federal questions. See *Durgins v. City of St. Louis*, 272 F.3d 841 (7th Cir. 2001); *Stratton v. Wenona Community Unit Dist. No. 1*, 133 Ill. 2d 413 (1990); and *Garcia v. Village of Mt. Prospect*, 360 F.3d 630 (7th Cir. 2004). Plaintiff asserts that, contrary to these cases, in Illinois "there is no statute on point, there is no case law addressing, in general the propriety of joinder with administrative review actions." *Stykel v. City of Freeport*, 318 Ill. App. 3d 839, 843 (2001). Plaintiff adds that defendants' reliance on *Bagnola v. SmithKline Beecham Clinical Laboratories*, 333 Ill. App. 3d 711 (2002), is misplaced because there is no discussion in that case of the propriety of joinder of common law claims with actions for Administrative Review and, furthermore, the common law issue in *Bagnola* had been previously argued and fully addressed where plaintiff's statutory claim has not been addressed.

¶ 25 We disagree with plaintiff's readings of these cases and agree with the trial court that dismissal of plaintiff's statutory claim was proper as barred by *res judicata*. While plaintiff is correct that the *Bagnola* court did not engage in a full discussion of the joinder of common law claims with an action in administrative review, it presented a full discussion of the law and policy behind *res judicata*, examined the common law claim of spoliation of evidence, applied the test to determine if *res judicata* applied to the facts and claims presented, and concluded that

"plaintiff's spoliation action and his complaint for administrative review satisfy the same transaction test for *res judicata* purposes." *Id.* at 721.

¶ 26 A review of *Stykel* supports the *Bagnola* court's acceptance of the premise that joinder of claims with administrative review actions is proper and refutes plaintiff's argument. As quoted by plaintiff, the *Stykel* court did note that there was no authority directly addressing joinder with administrative review actions. The court noted that the Administrative Review Law was silent, as with many other statutory schemes, on the issue of joinder but that joinder of cases is generally covered by section 2-614(a) of the Code of Civil Procedure (735 ILCS 5/2-614(a) (West 1998)) which is to be liberally construed to promote the economy of actions and trial convenience. *Stykel*, 318 Ill. App. 3d at 843, citing *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 199 (1995). Furthermore, the court considered the issue and concluded that "the liberal pleading requirements and the goal of judicial economy suggest that the plaintiffs should be permitted to join with the administrative review counts any additional counts that are cognizable when the Review Law applies to the actions of an administrative agency." *Id.* at 844.

¶ 27 Plaintiff's statutory claim revolves around the same facts as his claim in administrative review. In fact, he relies partly on the findings of fact of the EAB to support his claim that defendants violated municipal ordinances. Plaintiff's claim was not under the jurisdiction of the administrative agency and the EAB did not render an opinion on the layoff or compliance with municipal ordinances. The claim was an independent cause of action against defendants unrelated to the agency's determination whether the action was a layoff or disciplinary action and was not preempted by the Administrative Review Law and joinder of the claims was proper. See *Ross v. City of* Freeport, 319 Ill. App. 3d 835, 840 (2001). Accordingly, plaintiff could have

brought the claim in the prior action and we affirm the judgment of the trial court dismissing plaintiff's second amended complaint as barred under the doctrine of *res judicata*.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the judgment of the circuit court.

¶ 30 Affirmed.