2015 IL App (2d) 140987-U
No. 2-14-0987
Order filed May 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GARY SPOERRY Plaintiff-Appellant, v. THE BOARD OF THE LAKEMOOR POLICE COMMISSION FOR THE VILLAGE OF LAKEMOOR and THE VILLAGE BOARD OF LAKEMOOR, Defendants-Appellees.	)	Appeal from the Circuit Court of Lake County. No. 13-MR-1245 Honorable Diane E. Winter, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of plaintiff's amended complaint was affirmed where plaintiff forfeited his arguments either by failing to support them with citations to authority and the record or by failing to raise them below; even overlooking the forfeiture, plaintiff's arguments lacked merit.

¶ 2 Plaintiff, Gary Spoerry, appeals the dismissal, pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2012)), of his amended complaint against defendants, the Board of the Lakemoor Police Commission for the Village of Lakemoor (Police Commission) and the Village Board of Lakemoor (Village Board). We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff's amended complaint alleged the following facts. On April 6, 1994, plaintiff was hired as a patrolman for the Village's police department. On September 28, 2000, the Village Board voted in favor of promoting plaintiff to sergeant. Plaintiff served in that position until May 3, 2010, when the Village notified him that, due to changes in the economy and a reduction in work force, his rank was being reduced to patrolman. Just over two years later, on July 9, 2012, the Police Commission announced that it would conduct a "promotional examination" for the position of sergeant. Plaintiff applied for the position. On November 19, 2012, the Police Commission published a "final promotional eligibility list," listing plaintiff second with a score of 80.4%. Officer Rodney Erb, who scored 88.7%, received the promotion.

¶ 5 Plaintiff's amended complaint contained two counts. Count I alleged that plaintiff "was not properly notified and advised of his lawful opportunity for reappointment to his prior rank of sergeant in accordance to [*sic*] all relevant federal, state, [and] local laws and rules and regulations; in specific [*sic*], but not limited to 65 ILCS 5 [*sic*]." Plaintiff alleged that defendants' failure to notify him deprived him "of his lawful procedural opportunity to request reinstatement to his former rank of police sergeant," as well as "of his substantive due process rights to the position of police sergeant and all associated property interests that he is entitled to."

¶ 6 Count II, seeking declaratory relief, alleged that sections 10-1-38.1 and 10-2.1-18 of the Illinois Municipal Code (65 ILCS 5/10-1-38.1, 10-2.1-18 (West 2012)) required defendants "to properly notify Plaintiff and afford him an opportunity to request reinstatement to his previous rank of police sergeant." Plaintiff sought declarations that defendants failed to comply with the statutory provisions and that he was entitled to be reinstated to his former rank.

¶ 7 Both defendants filed motions to dismiss the amended complaint pursuant to section 2-619(a)(9) of the Code. They argued that they were not subject to section 10-1-38.1, because that section applies only if a municipality's electors have voted to adopt Article 10, Division 1, of the Municipal Code (hereinafter, "the Civil Service Act"[1]). Defendants attached an affidavit from the Village administrator, David Alarcon, in which he stated that he had reviewed the Village's records and that it had never adopted the Civil Service Act.

¶ 8 Defendants also argued that they were not subject to section 10-2.1-18, because Article 1, Division 2.1, of the Municipal Code (hereinafter, "the Police Commission Act"[2]), applies to a municipality only if its population exceeds 5,000. Defendants maintained that the Police Commission Act did not apply to the Village until April 26, 2011, when the Illinois Secretary of State certified for the first time that the Village's population had exceeded 5,000. Defendants further argued that once its population exceeded 5,000, it was required to create a police commission (see 65 ILCS 5/10-2.1-1 (West 2012)), which was then required to fill positions by competitive examination (see 65 ILCS 5/10-2.1-15 (West 2012)). Alarcon's affidavit indicated that, on August 25, 2011, the Village Board passed an ordinance creating the Police Commission. Defendants contended that the Police Commission thereafter properly promoted Officer Erb to the position of sergeant based on his higher score on the competitive examination.

¶ 9 Plaintiff responded that Alarcon had only been administrator since November 2009 and that his "lack of personal knowledge and work experience at the Village *** inhibit[ed] him

[1] The parties refer to Article 10, Division 1, which is entitled "Civil Service in Cities," as the "Civil Service Act," and we follow their usage.

[2] The parties refer to Article 10, Division 2.1, which is entitled "Board of Fire and Police Commissioners," as the "Police Commission Act," and we follow their usage.

from knowing the Defendant Village's true legislative history." According to plaintiff, former Village president Virginia Povidas was more knowledgeable on this subject. Plaintiff attached her affidavit, in which she stated that during her tenure as trustee from 1992 to 2005 and president from 2005 to 2009, the Village followed the Civil Service Act. Plaintiff contended that Povidas's affidavit created a genuine issue of material fact as to whether the Village followed the Civil Service Act prior to the date on which the Police Commission Act became effective.

¶ 10 Defendants replied that "following" the Civil Service Act was not the same as adopting it. Defendants proffered the affidavit of Village clerk Bonnie Sikora, who indicated that she had reviewed the Village's minutes, ordinances, and resolutions since its founding in 1952 and had located no records reflecting that the Village had adopted the Civil Service Act.

¶ 11 On June 9, 2014, the court granted defendants' motions and dismissed plaintiff's complaint. The court granted plaintiff leave to file a second amended complaint, "provided [that] plaintiff can allege an adoption of the Illinois Civil Service Act by referendum."

¶ 12 On July 29, 2014, plaintiff filed a document entitled "Plaintiff's Response to this Court's Leave to Examine and Ascertain Whether or Not Defendant Village Adopted Relevant Civil Service Act Provisions Under 65 ILCS 5/10-1-43." In the document, plaintiff's counsel indicated that he had contacted the McHenry County clerk, employees of the clerk's office, and an employee of the Circuit Court of McHenry County.[3] No one located any record reflecting an election being held to adopt the Civil Service Act. Plaintiff's counsel further indicated that his research had uncovered the Village's 1986 Municipal Code, which indicated that the Village's police department was "subject to the order and direction" of the Village president. According to plaintiff, this showed that the Village "was following" the Civil Service Act.

[3] The Village of Lakemoor is located in McHenry and Lake Counties.

¶ 13 The court treated plaintiff's document as a motion to reconsider and entered a briefing schedule. Defendants responded that plaintiff's motion confirmed that the Village had not adopted the Civil Service Act. Additionally, defendants argued, the fact that the police department was subject to the order and direction of the Village president did not establish that the Civil Service Act applied in the Village. Defendants pointed out that, contrary to plaintiff's assertion, his amended complaint indicated that he was promoted to sergeant in September 2000 by vote of the Village Board. According to defendants, had the Village followed the Civil Service Act, it would have been required to appoint civil service commissioners, who would have then filled vacancies "on the basis of ascertained merit and seniority in service and examination" (65 ILCS 5/10-1-13 (West 2012)).

¶ 14 In his reply in support of his motion to reconsider, plaintiff argued, for the first time, that defendants should be equitably estopped from arguing that they did not adopt the Civil Service Act. Plaintiff contended that he and others had relied upon the "outward and accepted certainty" that the Village was operating under the terms of the Civil Service Act.

¶ 15 On September 3, 2014, the court denied plaintiff's motion to reconsider and dismissed the case with prejudice. Plaintiff timely appealed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, plaintiff argues that the trial court erred in dismissing his amended complaint. Specifically, he argues (1) that he was denied proper discovery, (2) that defendants should be equitably estopped from claiming that the Village never adopted the Civil Service Act, (3) that defendants violated his procedural and substantive due process rights, and (4) that defendants "may have" violated their own rules and regulations. Defendants contend that plaintiff has forfeited each of his arguments. We agree.

¶ 18 Plaintiff first argues that he was denied proper discovery. As defendants point out, plaintiff does not cite a single authority in support of this argument. Rather, he asserts that he "strongly disagrees with the circuit court's decision to dismissing [*sic*] the case without proper discovery to uncover the full truth." Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires the argument section of an appellant's brief to "contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." The failure to develop a legal argument supported by citations to authority results in forfeiture of the argument. *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶¶ 12-13. "The appellate court is not a depository into which a party may dump the burden of research." (Internal quotation marks omitted.) *Hall*, 2012 IL App (2d) 111151, ¶ 13.

¶ 19 Additionally, the record contains no indication that plaintiff requested discovery. The Supreme Court Rules permit liberal pretrial discovery, and a plaintiff may file a motion to request discovery even before the defendant appears. Ill. S. Ct. R. 201 (eff. May 29, 2014); *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 949 (1995). Furthermore, Illinois Supreme Court Rule 191(b) (eff. Jan. 4, 2013) permits a plaintiff to request a continuance to obtain affidavits or documents necessary to respond to a motion to dismiss pursuant to section 2-619 of the Code. However, plaintiff never made such a request. It is well-established that arguments not raised before the trial court are forfeited and cannot be raised for the first time on appeal. *K & K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 25.

¶ 20 Plaintiff next argues that defendants should be equitably estopped from claiming that the Village never adopted the Civil Service Act. Plaintiff forfeited this argument by raising it for the first time in his reply brief in support of his motion to reconsider the trial court's dismissal order. Arguments raised for the first time in a motion to reconsider in the trial court are forfeited on

appeal. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36. The purpose of a motion to reconsider is not to raise issues that could have been addressed earlier but, rather, to bring to the court's attention newly discovered evidence that was not available at the time of the original hearing, changes in existing law, or errors in the court's application of the law. *Evanston Insurance Co.*, 2014 IL 114271, ¶ 36. Here, plaintiff raised the issue of equitable estoppel for the first time in his reply brief in support of his motion to reconsider, which was too late. See *Evanston Insurance Co.*, 2014 IL 114271, ¶ 36 (holding that the plaintiff forfeited an argument that could have been raised in response to the defendants' motion to dismiss but which was not raised until its motion to reconsider the dismissal order).

¶ 21 Plaintiff's next argument is that defendants violated his procedural and substantive due process rights. This section of plaintiff's brief is divided into four subsections. The first three subsections appear to relate to procedural due process, but plaintiff does not cite a single authority in these sections. Therefore, plaintiff has forfeited the arguments that he raises in these three subsections. *Hall*, 2012 IL App (2d) 111151, ¶¶ 12-13.

¶ 22 The fourth subsection relates to substantive due process. Plaintiff does cite authority in this subsection, but he raises an argument that he did not raise below. He argues that, when he was demoted from sergeant to patrolman, his wage decreased from $30.47 to $28.47 per hour. He contends he had a "property interest" in his higher wage and that it was "wrongfully taken from him." Nothing in the record indicates the amount of plaintiff's wages. Furthermore, plaintiff did not raise this argument below. Therefore, it is forfeited. *K & K Iron Works, Inc.*, 2014 IL App (1st) 133688, ¶ 25.

¶ 23 Plaintiff's final argument is that defendants "may have" violated their own rules and regulations. According to plaintiff, the Police Commission's rules and regulations require new

employees to complete an 18-month probationary period. Plaintiff asserts that Officer Erb had been a full-time employee for only 6 months prior to his promotion to sergeant. Plaintiff argues that "[i]f Officer Erb had met his probationary status, the Village of Lakemoor needs to prove so." Again, these facts are not in the record, and this is not an argument that plaintiff raised below; therefore, it is forfeited. *K & K Iron Works, Inc.*, 2014 IL App (1st) 133688, ¶ 25.

¶ 24 We acknowledge that forfeiture is a limitation on the parties, not on reviewing courts, and that a court may overlook a party's forfeiture in order to maintain a sound and uniform body of precedent or where the interests of justice so require. *Roxana Community Unit School District No. 1 v. Environmental Protection Agency*, 2013 IL App (1st) 120825, ¶ 39. Even setting aside plaintiff's forfeiture, we conclude that the trial court properly dismissed his amended complaint.

¶ 25 A motion to dismiss under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint but asserts some "affirmative matter" as a defense. *Lawson v. Schmitt Boulder Hill, Inc.*, 398 Ill. App. 3d 127, 130 (2010). In ruling on a section 2-619(a)(9) motion to dismiss, all well-pleaded facts and the inferences arising from those facts must be taken as true. *Lawson*, 398 Ill. App. 3d at 130. "The question on appeal is 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Our review is *de novo*. *Sandholm*, 2012 IL 111443, ¶ 55.

¶ 26 Plaintiff's claims in his amended complaint depend on the applicability of either section 10-1-38.1 of the Civil Service Act or section 10-2.1-18 of the Police Commission Act.[4] Each of

[4] We express no opinion as to whether plaintiff's amended complaint stated a cause of action. We note that plaintiff did not allege that the Village had adopted either the Civil Service

these sections provides a procedure for an officer, whose rank has been reduced due to reductions of force, to apply for reinstatement once his or her prior position is reestablished. However, the affidavits submitted in support of and in opposition to defendants' motions to dismiss clearly demonstrated that the Village never adopted the Civil Service Act, and that the Police Commission Act did not become effective in the Village until April 26, 2011, when its population exceeded 5,000. On appeal, plaintiff does not dispute this. Instead, he argues that defendants should be equitably estopped from claiming that they had not adopted the Civil Service Act. This argument lacks merit.

¶ 27 The party claiming equitable estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other person intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof. *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313-14 (2001).

¶ 28 Even if the Village "followed" the Civil Service Act, plaintiff has not identified any misrepresentation or concealment by the Village on which he reasonably relied. While Povidas

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Act or the Police Commission Act at the time of his demotion. It was plaintiff's burden to plead and prove facts supporting his allegation that defendants had a duty to notify him of his right to reinstatement to the position of police sergeant. However, this crucial allegation was unsupported by any allegations of specific fact contained in or inferred from the complaint.

indicated in her affidavit that the Village followed the Civil Service Act, nothing in her affidavit suggests that the Village misrepresented this to plaintiff. When plaintiff's rank was reduced to patrolman, the Village did not tell him that he would have priority reinstatement to his prior position once it was reestablished. Furthermore, even assuming that plaintiff was aware at the time of his demotion that the Village "followed" the Civil Service Act, and even assuming that this somehow was a misrepresentation, plaintiff does not explain how he reasonably relied on that misrepresentation to his detriment. Specifically, he does not identify anything that he would have done differently had he known that the Village in fact did not "follow" the Civil Service Act. In his reply brief, he asserts in one sentence that the Village's representation that it followed the Civil Service Act "directly led to his detriment in regards to reinstatement." This vague, conclusory statement is insufficient.

¶ 29 Plaintiff's due process argument likewise lacks merit. According to plaintiff, after he was demoted to patrolman, he had a "protectable property interest" in returning to his prior rank of sergeant once the economy improved. It is unclear how plaintiff reaches this unsupported conclusion, given that at the time of his demotion the Village had not adopted the Civil Service Act and the Police Commission Act did not apply to the Village. Even if the Village "followed" the Civil Service Act, pursuant to the plain language of section 10-1-43 of that Act, a municipality is not bound by the Act until its electors vote to adopt it. 65 ILCS 5/10-1-43 (West 2012). We decline to hold that "following" the Civil Service Act without adopting it is sufficient to give rise to a protectable property interest in returning to the rank of sergeant following a reduction of force.

¶ 30 III. CONCLUSION

¶ 31 For the forgoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 32 Affirmed.