2016 IL App (2d) 150414-U
Nos. 2-15-0414 & 2-15-0784 cons.
Order filed April 21, 2016
Modified upon denial of rehearing June 2, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE VILLAGE OF DEERFIELD, Petitioner-Appellee (Kenneth Neiman, Intervenor-Appellant).	))))))))	Appeal from the Circuit Court of Lake County. No. 15-MR-95 Honorable George Bridges, Judge, Presiding.

THE VILLAGE OF DEERFIELD and DETECTIVE BERNAS, Petitioners-Appellees (Kenneth Neiman, Intervenor-Appellant).	))))))))	Appeal from the Circuit Court of Lake County. No. 15-MR-1170 Honorable Victoria A. Rossetti, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted petitioners' petitions to disclose the expunged files in two unsuccessful prosecutions of intervenor, as petitioners showed "good cause" in that they needed the files to defend against intervenor's resulting lawsuits: petitioners did not need to comply with section 2-1401 or show that the

files were not available by other means, and intervenor did not otherwise preserve or show any reversible error.

¶ 2 The Village of Deerfield (Village) filed separate petitions for the disclosure of expunged files in two unsuccessful prosecutions of Kenneth Neiman (intervenor), who had filed federal lawsuits against the Village, based on the criminal cases. Intervenor, proceeding *pro se*, moved to dismiss the petitions. The trial court denied his motions and granted both petitions. Intervenor appeals *pro se*. We affirm.

¶ 3 Case No. 15-MR-95

¶ 4 In case No. 15-MR-95, the Village's petition, filed January 21, 2015, alleged as follows. On August 12, 2012, Village police arrested intervenor for two ordinance violations: criminal damage to property and disorderly conduct. On September 23, 2013, after a bench trial, defendant was acquitted of both charges. Later, he had his criminal file expunged (see 20 ILCS 2630/5.2 (West 2012)). On September 23, 2014, intervenor filed a federal action against the Village. To defend against the suit, the Village needed copies of intervenor's "unredacted criminal files from his August 25, 2012 arrest" and the transcript of the September 23, 2013, trial. The Village served a copy of the petition on intervenor's attorney.

¶ 5 On February 4, 2015, the trial court entered an order setting the cause for a February 25, 2015, hearing on intervenor's "motion to intervene and motion to dismiss" and also stating, "No private court reporter shall be ordered for the February 25, 2015 hearing." (We note that intervenor's motions were file-stamped February 25, 2015, and that the record does not show that intervenor entered an appearance as of February 4, 2015. The discrepancy does not seem to be crucial, however, and the parties do not appear concerned by it.)

¶ 6 On February 25, 2015, intervenor moved to intervene (see 735 ILCS 5/2-408 (West 2014)) and to dismiss the petition (see 735 ILCS 5/2-619.1 (West 2014)). His motion to dismiss

alleged as follows. The Village sought access to expunged records without pleading the required "good cause shown" (see 20 ILCS 2630/5.2(d)(9)(A)(ii) (West 2014)) and had also violated his right to privacy by using his name (he had filed the federal suits under a pseudonym). Also, the Village had erroneously used a new case number instead of the number from the expunged case. Further, as the Village had prosecuted the now-expunged cases, it should now possess all the documents filed in those cases. The two trial sessions, held on January 22, 2013, and September 23, 2013, had been transcribed by a private stenographer, and the transcripts had been filed in the trial court. The Village could have obtained the transcripts directly from the stenographer.

¶ 7 Intervenor's motion argued that, on several grounds, the petition should be dismissed. First, the federal court had "pendent jurisdiction" over the petition. Second, the two ordinance-violation cases had been tried together but never consolidated, yet the Village had failed to pay separate filing fees, and the petition should be dismissed for failure to segregate its claims (see 735 ILCS 5/2-603(b) (West 2014)). Third, because the expungement order had been entered on August 8, 2014, and there had been no direct appeal, the Village could attack it only by a petition under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)); however, the petition failed to plead a meritorious defense and due diligence, elements needed to state a claim under section 2-1401. Intervenor's motion attached copies of the cover pages of trial transcripts dated January 22, 2013, April 2, 2013, August 6, 2013, and September 23, 2013.

¶ 8 The trial court continued the cause to March 5, 2015, and again to April 22, 2015. On April 22, 2015, the court held a hearing and entered a judgment providing as follows. Intervenor was allowed to intervene. His motion to dismiss was denied. Following oral argument, "[f]or good cause shown," the expunged files in the two cases would be made available for copying by the circuit court clerk, who would make copies available to the parties. The cases "shall remain[]

expunged pursuant to court order." On the same day, intervenor filed a notice of appeal (appeal No. 2-15-0414).

¶ 9 Case No. 15-MR-1170

¶ 10 On July 14, 2015, the Village and "Detective Bernas" (no first name given) (petitioners) petitioned for "leave to access expunged criminal case files 2013 CF 2779." Petitioners alleged as follows. On September 30, 2013, Village police officers arrested intervenor for theft. On November 20, 2013, he was indicted. Later, however, the Lake County State's Attorney dropped the charges, and intervenor had the file expunged. On May 14, 2015, intervenor filed a federal lawsuit in the Northern District of Illinois against petitioners and several other parties, based on the arrest and the criminal proceedings. The federal case was now in the discovery phase. In order to defend the suit, petitioners sought to obtain copies of the "unredacted criminal files," including, but not limited to, pleadings, notes, grand jury testimony, and court orders.

¶ 11 On July 23, 2015, intervenor moved to intervene; to dismiss the petition (see 735 ILCS 5/2-619.1 (West 2014)); and for a substitution of judge (then Judge George Bridges) as a matter of right. The motion to dismiss alleged the following facts. On May 15, 2014, the State's Attorney dismissed the charge. On August 4, 2015, intervenor obtained a final judgment expunging the entire case file. On May 13, 2015, he filed a federal suit against petitioners and others, based on the criminal proceeding. The defendants in the federal suit had filed an answer and their affirmative defenses, and discovery would be governed by the federal procedural rules.

¶ 12 Intervenor's motion argued first that the petition should be dismissed for want of personal jurisdiction, as the Village and Bernas had mailed the petition to intervenor but had failed to serve a summons on him (see 735 ILCS 5/2-203 (West 2014)). Next, the motion argued that the petition had failed to plead any need for the trial court to order the disclosure of the file, as there

was "pendent federal jurisdiction" that would require intervenor to disclose those documents per federal procedural rules and that would enable petitioners to obtain the documents by subpoenaing the State's Attorney's office. This meant that the petition was legally insufficient because it had not pleaded that petitioners "lack[ed] an adequate remedy at law."

¶ 13 Intervenor's motion also contended that the petition was defective because it had not been filed under the same number as the criminal case; that the petition was legally insufficient under section 2-1401 (for the same reasons as the first petition); and that, in the original case, the petitioners could have received all of the documents in issue before the expungement judgment became final. Finally, the petitioners did not plead and could not prove good cause, because they could have obtained the documents in the federal case by requesting them from "the stenographer or other source."

¶ 14 On July 29, 2015, the court, Judge Victoria A. Rossetti now presiding, held a hearing on the petition and intervenor's motions. Intervenor stated that he had brought a "private court reporter," but the judge responded that there was an official court reporter who would transcribe the proceedings. Petitioners' attorney argued that, in order to defend the federal suit, petitioners needed the expunged file in the criminal case. Petitioners had requested the documents from the State's Attorney's office, but that office had told them that, "because the file was expunged, [it was] treated as though it never existed." Petitioners could not defend the case without the criminal case file, but they had had "no idea" that intervenor would file a federal lawsuit based on the criminal case, so they had not objected to his petition to expunge the file.

¶ 15 Intervenor argued that he should be allowed to intervene. On the merits, he contended that petitioners' failure to anticipate his federal suit was not good cause to obtain the documents now. He also repeated the other arguments that he had made in his motion to dismiss.

¶ 16 Petitioners replied that they had not been aware of the expunged case's file number, because the number no longer existed and the circuit court clerk's office had been unable to supply it. Intervenor had filed the federal case in his own name, and it was now entering discovery. Petitioners and the other federal defendants had subpoenaed the State's Attorney's office, but "they said that criminal file did not exist." Finally, even if intervenor was going to turn over "what he supposedly ha[d] in his possession," it was petitioners' attorney's duty to make sure that they had what they needed to defend the federal suit.

¶ 17 The trial court stated as follows. Section 5.2 (e)(6) of the expungement statute (20 ILCS 2630/5.2(e-6) (West 2014)) allows a court to order access to expunged records when good cause is shown. Petitioners had met this requirement by showing that they needed the documents in order to defend themselves in a lawsuit that involved the facts of the criminal case. The court entered a judgment granting intervenor's motions for a change of judge and to intervene; denying his motion to dismiss; and allowing petitioners access to the file in case No. 13-CF-2779 and requiring them to send intervenor free copies of the documents. Intervenor filed a timely notice of appeal (appeal No. 2-15-0784). We consolidated the appeals.

¶ 18 The Appeal

¶ 19 On appeal, intervenor raises various claims of error. We address them in the approximate order of presentation. We note that intervenor's *pro se* brief is somewhat disjointed and at times appears to hint at arguments without developing them or citing any pertinent legal authority in support. We consider these potential issues forfeited. See Ill. S. Ct. R. 341(h)(7); *Holmstrom v. Kunis*, 221 Ill. App. 3d 317, 325 (1991).

¶ 20 Intervenor argues first that both petitions were legally insufficient because they failed to meet the requirements for petitions under section 2-1401 of the Code of Civil Procedure (735

ILCS 5/2-1401 (West 2014)). To support the assumption on which this argument is based, intervenor cites "20 ILCS 2630/5.2(a)(12)." No such provision exists, however. Apparently, intervenor means subsection (d)(12) (20 ILCS 2630/5.2(d)(12) (West 2014)). This provision, however, applies only to the filing of "a motion to vacate, modify, or reconsider the order granting or denying the petition to expunge or seal" or, if more than 60 days have passed since the order was served, "a petition to vacate, modify, or reconsider." *Id.* In the latter specified eventuality, the petition must conform to subsection (c) of section 2-1401. *Id.*

¶ 21 The flaw in intervenor's argument, as petitioners point out, is that the two petitions here did *not* seek to vacate, modify, or reconsider the orders of expungement. They sought only to obtain access to the files under subsection (d)(9)(A)(ii) of the expungement statute. That section provides, "Upon entry of an order to expunge records ***[,] the records of the circuit court clerk shall be impounded until further order of the court upon good cause shown." 20 ILCS 2630/5.2(d)(9)(A)(ii) (West 2014). This language says nothing about section 2-1401. Intervenor's first argument is based upon a legal confusion and thus lacks merit.

¶ 22 Intervenor argues second that petitioners failed to show "good cause" for disclosing the records in either underlying prosecution. However, his argument is based in part on the same erroneous assumption as is his first argument: that petitioners were required to seek relief under section 2-1401 of the Code of Civil Procedure. Thus, intervenor incorrectly contends that petitioners needed to satisfy subsection (b) of section 2-1401 by providing an affidavit or substitute. See 735 ILCS 5/2-1401(b) (West 2014). As section 2-1401 has nothing to do with this appeal, the argument fails.

¶ 23 Intervenor's second argument also overlaps with his third argument, which is that petitioners failed to prove that they lacked an "adequate remedy at law." By this, intervenor

appears to mean that petitioners did not establish that their petitions under the expungement statute were the *only* way that they could obtain the records that they sought. Accordingly, intervenor theorizes that petitioners could have obtained the records (1) by moving for disclosure in the federal suits, using the federal rules (see Fed. R. Civ. Proc. 26 (eff. Dec. 1, 2010)); (2) by requesting that the stenographer(s) in the original trials reconstruct the transcripts; or (3) by subpoenaing the stenographers or intervenor's former trial counsel.

¶ 24 Intervenor's sole citation of legal authority in support of his argument is to *Hart v. Oliver*, 296 Ill. 209 (1921). But this opinion merely stands for the long-standing principle that, ordinarily, injunctive relief is unavailable at common law if the plaintiff has an adequate remedy in the form of money damages. *Id.* at 213. That traditional rule has no relevance to whether the expungement statute enables parties to gain access to expunged records if they show good cause. Moreover, we cannot accept intervenor's remarkable assumption that a party defending against lawsuits that are based on prior criminal proceedings should have to rely on unofficial notes compiled by private individuals, instead of the official court records. The expungement statute surely makes no such assumption, and we shall not read it in.

¶ 25 Intervenor next argues that both trial judges erred by refusing to consolidate these actions with the previous expunged actions. Insofar as intervenor's argument is comprehensible at all, it appears to be based on his assumption that petitioners were legally required to file their petitions in accordance with section 2-1401 of the Code of Civil Procedure, an assumption that, as we have explained, is incorrect. There was no need for petitioners to file their actions under the numbers of cases that had in essence been wiped off of the books, and there was no requirement for the trial court to treat the petitions as something other than original actions. The petitions were not an attempt to vacate or modify the judgments in the criminal cases.

¶ 26 Intervenor argues next that petitioners violated a local court rule by refusing to redact previously impounded or sealed information, specifically (it appears) intervenor's name. Intervenor did not raise this argument at the trial court level, so we consider it no further. See *In re Estate of Murphy*, 56 Ill. App. 3d 1037, 1039 (1978). We do note that, insofar as intervenor contends that his anonymity is being compromised, there is no such anonymity in the federal suit from which case No. 15-MR-1170 has arisen. See Neiman v. Village of Deerfield, No. 15-CVv-4300, 2015 WL 9315543 (N.D. Ill. Dec. 12, 2015) (memorandum opinion and order) (identifying intervenor by name).

¶ 27 Intervenor argues next that Judge Bridges erred by refusing to allow a private stenographer to transcribe the hearings in case No. 15-MR-95. Intervenor's sole citation of authority is to Illinois Supreme Court Rule 46(a) (eff. Dec. 13, 2005), which, however, states only that the record of court proceedings "*may* be taken by stenographic means." (Emphasis added.) The use of "may" means that the decision whether to have a stenographer transcribe the proceedings was within the judge's sound discretion. See *People v. Fulkerson*, 326 Ill. App. 3d 1124, 1126 (2002). Intervenor has shown neither an abuse of the trial court's discretion nor prejudice from the denial of his request. As intervenor himself notes, the lack of a transcript does not hinder our review where the issues on appeal are solely ones of law and do not involve evidentiary matters. *Korogluyan v. Chicago Title & Trust Co.*, 213 Ill. App. 3d 622, 628 (1991). Moreover, there was a full transcript of the hearing before Judge Rossetti in the accompanying case, which raised predominantly the same issues of law.

¶ 28 Finally, intervenor argues that, at that hearing, Judge Rossetti erred by citing subsection (e-6) of the expungement statute (20 ILCS 2630/5.2(e-6) (West 2014)) as the source of the court's authority to grant petitioners relief for good cause shown. Intervenor fails to explain why

this momentary lapse prejudiced him. Of course, it is the trial court's judgment, not its reasoning, that we review. *Hope v. Hope*, 398 Ill. App. 3d 216, 220 (2010). The judgment was sound, as the court had an ample basis to grant petitioners relief, in both cases, under subsection (d)(9)(A)(ii) of the statute (20 ILCS 2630/5.2(d)(9)(A)(ii) (West 2014)).

¶ 29 The judgments of the circuit court of Lake County are affirmed.

¶ 30 Affirmed.