2011 IL App (3d) 110159-U

Order filed December 19, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

A.D., 2011

DEMARKUS BAILEY,	)	Appeal from the Circuit Court
	)	of the12th Judicial Circuit
Plaintiff-Appellant,	)	Will County, Illinois
	)	
vs.	)	Appeal No. 3-11-0159
	)	Circuit No. 09-MR-1204
	)	
KEITH ANGLIN, Warden	)	Honorable
Danville Correctional Center.	)	Edward A. Burmila, Jr.
	)	Judge, Presiding.
Defendant-Appellee.	)	

JUSTICE WRIGHT delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by denying plaintiff's motion for default judgment and then properly granted defendant's motion to dismiss plaintiff's complaint for *habeas corpus* relief.

¶ 2 On November 23, 2009, plaintiff filed a petition for writ of *habeas corpus* relief naming the Warden of Danville Correctional Center, as defendant. On January 21, 2011, the trial court denied plaintiff's motion for default judgment and granted defendant's motion to dismiss plaintiff's *habeas corpus* complaint. We affirm.

¶ 3 FACTS

¶ 4 On November 23, 2009, plaintiff filed a petition for writ of *habeas corpus* against defendant. On April 12, 2010, plaintiff filed a motion for default judgment. Several days later, on April 23, 2010, the clerk of the court received a returned proof of service of a summons showing the Vermilion County sheriff previously served the original complaint on defendant on December 29, 2009.

¶ 5 On July 22, 2010, defendant filed a motion to dismiss the complaint alleging the complaint did not support the contention that plaintiff was entitled to immediate release; failed to set forth a claim in *habeas corpus*; and was barred by *res judicata*.

¶ 6 On August 9, 2010, plaintiff filed a revised motion for default judgment alleging defendant was served with the complaint in this case on December 29, 2009, and failed to file a timely answer or appearance within 30 days of service. Similarly, plaintiff alleged that defendant's motion to dismiss filed on July 22, 2010, was also not timely.

¶ 7 On August 25, 2010, defendant responded to plaintiff's revised motion for default judgment by claiming a default judgment was not appropriate because defendant exercised due diligence. Defendant's response alleged the assistant attorney general in this case received an irregular document which appeared to be a summons in January 2010. Consequently, the assistant attorney general contacted the Will County circuit clerk's office on both January 12, 2010, and January 28, 2010, and learned that a summons had been issued but had not been returned to the court with a proof of service. As a result, the assistant attorney general believed that plaintiff had not properly served defendant with the summons issued by the court. After learning on July 13, 2010, that this case was set for hearing, the assistant attorney general called

the clerk's office again and learned that a proof of service, showing service on defendant, which occurred on December 29, 2009, was received by the circuit clerk's office on April 23, 2010. The assistant attorney general then prepared a motion to dismiss and presented it to the court at the time of the scheduled hearing on July 22, 2010.

¶ 8 On August 26, 2010, the court conducted a hearing on plaintiff's revised motion for default judgment. When denying the motion, the court found that the Attorney General's office filed pleadings on behalf of defendant prior to the hearing on plaintiff's revised motion for default judgment.

¶ 9 On November 29, 2010, plaintiff filed a motion for leave to file another *habeas corpus* petition, and renewed his revised motion for default judgment claiming defendant's motion to dismiss was not timely and should be denied. On December 10, 2010, defendant filed a response to plaintiff's renewed, revised motion for default judgment claiming that plaintiff's renewed motion repeated the same arguments previously rejected by the court.

¶ 10 On December 22, 2010, plaintiff filed a second *habeas corpus* complaint. Plaintiff claimed that his sentence was subject to "P.A. 89-404" and that this public act was found unconstitutional on January 22, 1999. Therefore, according to plaintiff, he was required to serve only 50% of his 20-year sentence and should be immediately released.

¶ 11 On January 21, 2011, the court entered a written order denying plaintiff's renewed revised motion for default judgment and dismissed plaintiff's *habeas corpus* complaint. On February 22, 2011, plaintiff filed a notice of appeal.

¶ 12 ANALYSIS

¶ 13 On appeal, plaintiff claims that the trial court erred by granting defendant's motion to dismiss and denying his complaint for *habeas corpus* relief because the truth-in-sentencing legislation "was not the law" at the time plaintiff committed his offense. Therefore, defendant claims the Illinois Department of Corrections was violating plaintiff's due process rights by applying the truth-in-sentencing legislation to his 20-year sentence. Plaintiff also claims that defendant's motion to dismiss was time barred. Defendant responds that the trial court properly denied plaintiff's motion for default judgment and then dismissed plaintiff's complaint.

¶ 14 Plaintiff's Motions for Default Judgment

¶ 15 A trial court's determination as to whether to grant or deny a motion for default judgment rests within the sound discretion of the trial court. The court's determination will not be disturbed absent an abuse of the court's discretion or a denial of substantial justice. *Dupree v. Hardy*, 2011 IL App (4th) 100351, ¶ 51 (citing *Jackson v. Bailey*, 384 Ill. App. 3d 546, 548 (2008)). A trial court abuses its discretion " 'when it acts arbitrarily without the employment of conscientious judgment or if its decision exceeds the bounds of reason and ignores principles of law such that substantial prejudice has resulted.' " *Dupree v. Hardy*, 2011 IL App (4th) 100351, ¶ 51 (quoting *Mann v. Upjohn Co.*, 324 Ill. App. 3d 367, 377 (2001) (citing *Marren Builders, Inc. v. Lampert*, 307 Ill. App. 3d 937, 941 (1999)).

¶ 16 Although a judgment of default may be entered for failure to file an appearance, "a default judgment is a drastic measure, not to be encouraged and to be employed with great caution, only as a last resort." *Biscan v. Village of Melrose Park Board of Fire & Police Commissioners*, 277 Ill. App. 3d 844, 848 (1996) (citing *Lachenmyer v. Didrickson*, 263 Ill. App. 3d 382 (1994)). This principle is especially applicable in a quasi-criminal proceeding

where the procedural rules are governed by civil practice, but where the outcome has ramifications in criminal law. *Raimondo v. Pavkovic*, 107 Ill. App. 3d 226, 230 (1982). The overriding consideration when deciding whether to enter a default order is whether substantial justice is being done. *Biscan v. Village of Melrose Park Board of Fire & Police Commissioners*, 277 Ill. App. 3d at 848 (citing *Northern Trust Co. v. American National Bank & Trust Co. of Chicago*, 265 Ill. App. 3d 406 (1994)).

¶ 17 We note that defendant's motion for default judgment was filed on April 12, 2010, before the court received proof of service. Without a proof of service, the default judgment could not have been properly allowed by the court until sometime after April 23, 2010.

¶ 18 We also note defendant filed a revised motion for default judgment on August 9, 2010. Defendant filed a timely response to the revised request for default judgment on August 25, 2010.

¶ 19 Plaintiff does not dispute the facts contained in defendant's August 25, 2010, response to plaintiff's revised motion for default judgment concerning the explanation for a delayed answer or appearance to plaintiff's original complaint. Further, the record supports this explanation and verifies that a proof of service was not returned by the Vermillion County Sheriff's office to the clerk of the court until April 23, 2010. Since the explanation for the delayed response is supported by this record, we conclude that the trial court did not abuse its discretion by denying plaintiff's revised motion for default judgment and allowing defendant to proceed with his motion to dismiss. Moreover, since plaintiff did not allege any new facts or arguments in his renewed, revised motion for default judgment, filed on November 29, 2010, we also conclude

that the trial court did not abuse its discretion by again denying plaintiff's request for default judgment.

¶ 20 Defendant's Motion to Dismiss

¶ 21 Defendant brought his motion to dismiss based upon sections 2-615 and 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-615, 2-619 (2010). The trial court did not articulate the basis for the decision to dismiss plaintiff's complaint. However, we review a trial court's decision to grant a motion to dismiss based upon either section 2-615 or section 2-619 *de novo* . *Beacham v. Walker*, 231 Ill. 2d 51, 57-58 (2008); *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003). We begin by considering whether plaintiff's complaint and attached documents established that plaintiff would be entitled to relief.

¶ 22 Public Act 89-404, enacted in 1995, amended 10 different statutory provisions. *People v. Reedy*, 186 Ill.2d 1, 10 (1999). Section 40 amended the Unified Code of Corrections (730 ILCS 5/1-1-1 *et seq.* (West 1996)), and provided for "new truth-in-sentencing rules for calculating good-conduct credit and early release." *Id*. As plaintiff correctly alleges, our supreme court held this legislation unconstitutional on January 19, 1999, because it violated the single subject clause of the Illinois Constitution. *Id*.

¶ 23 Plaintiff acknowledges in his complaint that the legislature passed Public Act 90-592, effective June 19, 1998, but argues that it was no longer the law as of January 1, 1999. Our supreme court in *Reedy* noted that during the pendency of the case the legislature enacted Public Act 90-592 (Pub. Act 90-592, eff. June 19, 1998) and that the act "both deleted and recodified the entire truth-in-sentencing legislation originating from Public Act 89-404." *People v. Reedy*,

186 Ill. 2d at 17. Public Act 90-592 became effective June 19, 1998, and modified section 3-6-3(a)(2) of the Unified Code of Corrections. *People v. Reedy*, 186 Ill. 2d at 17. Thereafter, this court upheld the constitutionality of Public Act 90-592 in *People v. Norris*, 328 Ill. App. 3d 994, 998 (2002).

¶ 24 Although not addressed by the State, plaintiff also contends that the passage of P.A. 90-740 (eff. Jan. 1, 1999) resulted in P.A. 90-592 (eff. June 19, 1998) no longer being the law after January 1, 1999, when plaintiff committed his offense, and therefore, plaintiff was not subject to truth-in-sentencing. Contrary to plaintiff's arguments, the legislature did not reinstate the prior legislation, which was held unconstitutional by our supreme court in *Reedy*, by passing P.A. 90-740. This public act, P.A. 90-740, amended sections 3-6-3 and 5-4-1 of the Unified Code of Corrections (730 ILCS 5/3-6-3. 5/5-4-1 (West 1998). See P.A. 90-740 (eff. Jan. 1, 1999). Accordingly, the language contained in P.A. 90-592, along with the limited, but additional, amendatory language of P.A. 90-740, became the law on January 1, 1999, and was the law in effect at the time plaintiff committed this offense on January 18, 1999.

¶ 25 Since it is undisputed that the record shows that plaintiff committed the offense of aggravated criminal sexual assault and that offense is an offense subject to truth-in-sentencing (730 ILCS 5/3-6-3 (West 2000)), we conclude the Department of Corrections has correctly calculated plaintiff's sentence. This also leads us to the conclusion that plaintiff has not satisfied the terms of his sentence, is not entitled to immediate release, and cannot be granted the *habeas corpus* relief as requested. Therefore, the trial court properly dismissed plaintiff's complaint.

¶ 26 Finally, we address the State's request on appeal that this court find plaintiff's brief to be frivolous and appropriately sanction plaintiff for his abuse of the judicial process relying upon

Singer v. Brookman, 217 Ill. App. 3d 870 (1991). The *Singer* court found that sanctions were warranted in that case pursuant to Supreme Court Rule 375(b) (eff. Feb. 1, 1994), which allows a reviewing court to impose an appropriate sanction upon a party or his or her attorney if it is determined " 'that the appeal itself is frivolous, or that an appeal was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or the manner of prosecuting the appeal is for such purpose.' " *Singer v. Brookman*, 217 Ill. App. 3d 870, 880 (1991). Supreme Court Rule 375 is a rule relevant to civil appeals. Since this appeal is quasi-criminal in nature and filed by a *pro se* individual currently held in the Department of Corrections, we decline to consider Supreme Court Rule 375 sanctions in this case.

¶ 27 CONCLUSION

¶ 28 The judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.