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2012 IL App (3d) 120032-U

Order filed December 31, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

TODD RANDICH, ARTHUR JACOBS, MICHAEL LOPINA, and JOHN O'CONNOR,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiffs-Appellants,	)	
v.	)	Appeal No. 3-12-0032 Circuit No. 10-MR-498
LOCKPORT TOWNSHIP FIREFIGHTERS' PENSION BOARD, Its Members Individually, and ROBERT R. CRONHOLM,	)	Honorable Barbara Petrungaro, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt and Justice Holdridge concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court should not have dismissed pension fund participants' complaint against the pension board for failing to file administrative review action where the pension board did not conduct a formal hearing before finding that the former fire chief had not reentered active service. Plaintiffs' complaint was sufficient to survive motion to dismiss filed by the pension board and the former fire chief.

¶ 2 Plaintiffs, Todd Randich, Arthur Jacobs, Michael Lopina and John O'Connor, are firefighters with the Lockport Township Fire Protection District (District), who participate in the Lockport Township Firefighters Pension Fund (Fund). The Fund is administered by defendants, the Lockport Township Firefighters Pension Board (Board). Defendant Robert Cronholm is the former District Fire Chief. Without conducting an adversarial hearing, the Board ruled that Cronholm's new position as Administrator did not constitute a reentry into active service. Plaintiffs filed a declaratory judgment action, alleging that the Board breached its fiduciary duties by ruling that Cronholm did not reenter active service. Defendants filed motions to dismiss, which the trial court granted. We reverse and remand.

¶ 3 On October 31, 2009, District Fire Chief Robert Cronholm retired as Fire Chief. Pension payments were approved effective November 1, 2009. On November 1, 2009, the District hired Cronholm as Chief Administrator. The District did not hire a replacement fire chief.

¶ 4 On November 4, 2009, the District attempted to enroll Cronholm in the Illinois Municipal Retirement Fund (IMRF). The IMRF rejected Cronholm's enrollment, finding that he was performing "fire protection duties" covered by the Firefighters' Pension Fund. On November 30, 2009, the Illinois Department of Insurance (DOI) advised the Board that the job descriptions for Fire Chief and Chief Administrator were substantially the same so that Cronholm's employment as Chief Administrator constituted reentry into service within the meaning of the Pension Code.

¶ 5 A Board hearing was scheduled for January 27, 2010. Prior to that meeting, the agenda was posted on the doors of the fire houses and the administration building. Under item "VII. A. "New Business," the agenda stated: "Hearing on Cronholm Status."

¶ 6 On January 27, 2010, the District changed Cronholm's job title to Administrator and changed

his duties. On the same date, a Board hearing was held. The stated purpose of the hearing was "to determine whether or not Retired Chief Robert Cronholm *** has reentered active service." The Board's attorney noted that Cronholm was sent notice of the hearing and was advised of his right to be represented by counsel. Cronholm was present at the hearing without counsel. Prior to the hearing, the District filed a motion to intervene. The Board voted to allow the District to intervene. The Board's attorney then entered several documents into evidence: (1) the Notice of Hearing, (2) the District's petition to intervene, (3) a letter from the District's attorney to the Board's attorney requesting that the hearing be rescheduled to a later date, (4) a job description for Fire Chief, (5) a job description for Administrator, and (6) an organizational chart created by the District's attorney.

¶ 7 The District's attorney advised the Board that it was planning to submit a new proposed job description for Cronholm's position of Administrator to the DOI. The Board's attorney recommended that the hearing be continued until the Board received a response from the DOI. The Board's attorney explained that he anticipated that the following would happen when the hearing was reconvened:

> "Upon receipt of that opinion, I will put together copies of everything, including the opinion letter, and I will distribute the copies to the Members of the Board. Obviously, the Chief will have an opportunity to review it. Then we will set it for a final hearing.
>
> The purpose of that final hearing will be to determine: Is there a reentry into service or is there not? At that point in time, you will have all the information in front of you. [Counsel for the District] will be here. He can make any points that he wishes to make. Chief Cronholm can make any points.

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And at that point in time, you'll have a court reporter here. That's the time that we'll ask questions. *** [Y]ou can deliberate and you can render a final decision."

The Board voted to continue the hearing to a later date.

¶ 8 In a letter dated March 12, 2010, the DOI advised the Board that Cronholm's duties as Administrator would not constitute reentry into active service. On March 18, 2010, the District appointed a new fire chief.

¶ 9 A Board hearing was scheduled for April 15, 2010. Prior to the hearing, the agenda was posted at fire houses and the administration building. Under item "VIII. Pensioners Status," the agenda listed: "A. Discussion on Cronholm Status." There is no transcript from the April 15, 2010 hearing, but the minutes from that hearing reflect that the Board was advised of the DOI's March 12, 2010, letter. On the recommendation of the Board's attorney, a motion was made "to accept the findings that the L.T. F.P.D. hiring Robert Cronholm as Administrator does not constitute re-entry into active service as stated in the Department of Insurance letter of March 23, 2010." The motion was seconded, and the Board voted to approve the motion. The Board's attorney also recommended that a motion be made to take no action for either repayment or recalculation of Cronholm's pension benefits from his date of retirement to March 18, 2010, the date a new fire chief was hired. The motion was made, seconded and approved. Some of the plaintiffs, as well as Cronholm, attended the April 15, 2010, board hearing.

¶ 10 On May 19, 2010, plaintiffs filed their original complaint, seeking declaratory judgment and administrative review. That complaint named only the Pension Board and Fund as defendants. It

did not name the individual Board members, the District or Cronholm. Defendants filed a motion to dismiss the complaint, and plaintiffs voluntarily dismissed their administrative review count.

¶ 11 The Board met again on July 22, 2010. Prior to the hearing, an agenda was posted on the fire houses and at the administration building. Under item "VIII. Pensioners Status," the agenda stated: "Discussion on Cronholm Status." The minutes from that hearing state: "Nothing at this time on Cronholm Status." The minutes from the April 15, 2010, hearing were read and approved. Some of the plaintiffs were present at that hearing.

¶ 12 In January 2011, IMRF conducted an evidentiary hearing on Cronholm's eligibility to participate in IMRF. IMRF found Cronholm ineligible because his duties as Administrator "broadly encompass 'fire protection duties.' "

¶ 13 In July 2011, plaintiffs filed their third amended complaint, seeking only declaratory judgment against defendants, the Board, its individual members and Cronholm. The complaint sought declarations that (1) the Board members breached their fiduciary duties by making pension payments to Cronholm when he had reentered active service, failing to reconvene a hearing to determine the issue of reentry and failing to administer the pension fund in accordance with the Pension Code; (2) Cronholm was unjustly enriched by receiving pension funds to which he was not entitled; (3) the Fund be made whole by ordering Cronholm and/or the Board members to repay the improperly paid pension benefits, plus interest; and (4) plaintiffs were entitled to receive reasonable attorney fees and costs for their action.

¶ 14 Defendants filed motions to dismiss, arguing, in part, that plaintiffs failed to timely and properly bring an administrative review claim. The trial court entered an order granting defendants' motion, holding that plaintiffs were required to seek administrative review of the Board's final

decision made on April 15, 2010. The court found plaintiffs failed to do so. Additionally, plaintiffs' original complaint failed to include all necessary parties, namely Cronholm and the District, within the statutory time frame. Therefore, the court held that dismissal was appropriate.

¶ 15 I

¶ 16 Plaintiffs first argue that the trial court erred in finding that the Board issued a final administrative decision on whether Cronholm reentered active service.

¶ 17 The Administrative Review Law, which governs the Pension Board, defines the term "administrative decision" as "any decision, order or determination of any administrative agency rendered in a particular case, which affects the legal rights, duties or privileges of parties and which terminates the proceedings before the administrative agency." 735 ILCS 5/3-101 (West 2010). A final agency determination contemplates some sort of adversarial process involving the parties affected, a hearing on the controverted facts, and an ultimate disposition rendered by an impartial fact finder. *O'Rourke v. Access Health, Inc.*, 282 Ill.. App. 3d 394, 401 (1996); *Board of Trustees of the Addison Fire Protection District No. 1 Pension Fund v. Stamp*, 241 Ill. App. 3d 873, 881 (1993); *Jagielnik v. Board of Trustees of the Police Pension Fund of the Village of Mundelein*, 211 Ill. App. 3d 26, 32 (1991); *Sturm v. Block*, 72 Ill. App. 3d 306, 311 (1979).

¶ 18 It is such a decision, usually containing findings of fact by the agency, along with the record before the agency, that is before the circuit court when it sits in judicial review of administrative actions. *Sturm*, 72 Ill. App. 3d at 311. A decision that contains no findings of facts "is simply insufficient to permit an intelligent review of that decision." *Violette v. Department of Healthcare & Family Services*, 388 Ill. App. 3d 1108, 1112 (2009). Where a decision cuts and pastes the findings of another administrative body and contains no independent review of the evidence or

testimony from the parties, there are no factual findings that can be reviewed by a court. See *id*.

¶ 19 When an administrative agency fails or refuses to hold a required hearing, there is no final administrative decision that can be reviewed by a court. *Harris v. Regional Board of School Trustees of Union County*, 82 Ill. App. 3d 710, 713 (1980). In such a case, no complaint for administrative review can be filed; rather, a suit must be brought to compel the Board to hold a hearing. *Id*.

¶ 20 Here, there was no adversarial hearing on whether Cronholm had reentered active service. Although a hearing was convened in January, the Board did not hear from the parties but, instead, continued the hearing to a later date. At that later date, the formal procedures existing when the hearing was originally convened were absent. There is no evidence of notice to the parties, no court reporter was present, and the parties did not present arguments. Instead, the Board simply received the DOI's advisory letter and voted to approve its findings. This was not a "final administrative decision" that could be meaningfully reviewed. See *Violette*, 388 Ill. App. 3d at 1112.

¶ 21 Defendants contend that a formal hearing is not a necessary prerequisite to a "final administrative decision." In support of this contention, they cite to several cases that hold that a final and binding decision by an administrative agency requires only that the agency has taken some definitive action with regard to an application before it and that the applicant has been informed of the action. See *Fields v. Schaumburg Firefighters' Pension Board*, 383 Ill. App. 3d 209, 220 (2008); *Sola v. Roselle Police Pension Board*, 342 Ill. App. 3d 227, 232 (2003); *Key Outdoor, Inc v. Department of Transportation*, 322 Ill. App. 3d 316, 324 (2001). We find those cases distinguishable because in none of those cases was a formal hearing commenced and then never completed.

¶ 22 Where, as here, a formal hearing is begun and then postponed to a later date at which time a court reporter is to be present and the parties are to introduce evidence and testimony, no final administrative decision is made until such a hearing is held. Here, the Board was given a letter from the DOI, and the Board voted to approve the findings of the DOI. The Board's attorney explained that once the District received the DOI's letter, the January 27th hearing would be reconvened, and there would be testimony and arguments presented, a court reporter would be present and the Board would then deliberate. The Board failed to hold that hearing, instead accepting the DOI report and simply approving the minutes of the April 15, 2010, meeting. That action was not a final administrative decision.

¶ 23 The Board's own actions support our finding that the Board's decision on April 15, 2010, was not a final administrative decision. The agenda for the Board hearing following the April 15th hearing listed "Discussion on Cronholm Status" as an agenda item. The minutes from that meeting state: "Nothing at this time on Cronholm Status." If the Board had intended for the April 15, 2010, decision to be a final determination, then there would be no reason to discuss Cronholm's status at the next meeting. If Cronholm's status had been resolved, the minutes would presumably reflect the Board's action.

¶ 24 Since the Board never made a final administrative decision regarding Cronholm's status, defendants did not err in failing to bring an administrative review action because no such action could be brought. See *Harris*, 82 Ill. App. 3d at 713. Thus, the trial court erred in dismissing plaintiffs' complaint for failing to bring an action for administrative review.

¶ 25 II

¶ 26 Defendants alternatively argue that plaintiffs' complaint should be dismissed because (1) no

"ongoing controversy" exists to support their declaratory judgment action, (2) plaintiffs lack standing to sue, (3) plaintiffs failed to properly plead a breach of fiduciary duty, and (4) defendants are immune from liability.

¶ 27 A cause of action should be dismissed only when it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to relief. *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). In reviewing the sufficiency of a complaint, we accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id.* We also construe the allegations in the light most favorable to the plaintiff. *Id.* We review *de novo* a trial court's order granting a motion to dismiss. *Id.*

¶ 28 A. Declaratory Judgment

¶ 29 To state a cause of action for declaratory judgment, the plaintiff must assert that (1) he has a tangible legal interest with regard to the claim, (2) the defendants' conduct is opposed to that interest, and (3) there is an ongoing controversy between the parties that is likely to be prevented or be resolved if the court decides the case. *Knox v. Godinez*, 2012 IL App (4th) 110325, ¶ 18.

¶ 30 Defendants argue that there is no "ongoing controversy" in this case since Cronholm now has the title of Administrator and is no longer performing fire-related duties. However, in their complaint, plaintiffs allege that Cronholm is still performing fire-related duties, as the IMRF found following its evidentiary hearing in January 2011. Therefore, according to plaintiffs, Cronholm is receiving pension benefits to which he is not entitled, and an ongoing controversy exists.

¶ 31 Since we must take as true the allegations contained in plaintiffs' complaint, plaintiffs have alleged all of the requisite elements of a cause of action for declaratory relief.

¶ 32 B. Standing

¶ 33 Section 1-115 of the Illinois Pension Code provides that an action may be brought by a participant to (a) obtain relief under section 1-114 of the Pension Code (for breach of fiduciary duty), (b) enjoin any act or practice that violates the Pension Code, or (c) obtain other appropriate equitable relief to redress any such violation or to enforce any such provision. 40 ILCS 5/1-115 (West 2010).

¶ 34 Here, plaintiffs are participants in the Lockport Township Firefighters' Pension Fund from which Cronholm is receiving a pension. As participants, they have standing to bring their declaratory judgment action alleging breach of fiduciary duty and seeking equitable relief from defendants. See 40 ILCS 5/1-115 (West 2010).

¶ 35 C. Breach of Fiduciary Duty

¶ 36 To state a cause of action for breach of fiduciary duty, the plaintiff must allege (1) the existence of a fiduciary duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303, ¶ 21.

¶ 37 Section 1-101.2 of the Pension Code provides that "[a] person is a 'fiduciary' with respect to the pension fund or retirement system established under this Code to the extent that the person *** exercises any discretionary authority or discretionary control respecting management of the pension fund or retirement system, or exercises any authority or control respecting management or disposition of its assets." 40 ILCS 5/1-101.2 (West 2010). Section 1-114 of the Pension Code provides:

> "Any person who is a fiduciary with respect to a retirement system or pension fund established under this Code who breaches any duty imposed upon fiduciaries by this Code *** shall be personally liable to make good to such retirement system or pension fund any losses to it resulting from each such breach, and to restore to such

> retirement system or pension fund any profits of such fiduciary which have been made through use of assets of the retirement system or pension fund by the fiduciary, and shall be subject to such equitable or remedial relief as the court may deem appropriate." 40 ILCS 5/1-114 (West 2010).

Section 4-117 of the Pension Code provides: "If a firefighter receiving pension payments reenters active service, pension payments shall be suspended while he or she is in service." 40 ILCS 5/4-117 (West 2010).

¶ 38 Here, plaintiffs allege that defendants are fiduciaries pursuant to section 1-114 of the Pension Code and that they breached their fiduciary duties by not suspending Cronholm's pension payments, in violation of section 4-117 of the Pension Code. They further allege that Cronholm was "unjustly enriched" and request that the pension fund "be made whole" by ordering that the funds paid to Cronholm be returned to the fund. Those allegations properly state a cause of action for breach of fiduciary duty. See *Tucker*, 2012 IL App (1st) 103303, at ¶ 21.

¶ 39 D. Immunity

¶ 40 Finally, defendants argue that the trial court properly granted their motion to dismiss because they are entitled to immunity under the Tort Immunity Act and/or the common law public immunity doctrine.

¶ 41 The Tort Immunity Act does not apply to breach of fiduciary duty claims because they are not torts. See *Kinzer on Behalf of City of Chicago v. City of Chicago*, 128 Ill. 2d 437, 445 (1989). Since plaintiffs are alleging breach of fiduciary duty against defendants, they are not entitled to immunity under the Tort Immunity Act. See *id*.

¶ 42 Notwithstanding the Tort Immunity Act, there is a common law public official immunity

doctrine. *Kinzer*, 128 Ill. 2d at 445. The common law public official immunity doctrine provides that "a public officer is immune from individual liability for the performance of discretionary duties in good faith." *Id*., quoting *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 502 (1976).

¶ 43 Here, any finding of immunity in favor of defendants would directly contradict section 1-114 of the Pension Code, which states that "[a]ny person who is a fiduciary with respect to a retirement system or pension fund *** who breaches any duty imposed upon fiduciaries by this Code *** shall be personally liable to make good to such retirement system or pension fund any losses to it resulting from each such breach, and to restore to such retirement system or pension fund any profits of such fiduciary which have been made through use of assets of the retirement system or pension fund by the fiduciary, and shall be subject to such equitable or remedial relief as the court may deem appropriate." 40 ILCS 5/1-114 (West 2010). If pension board members were immune from suit, as defendants contend, section 1-114 would be meaningless.

¶ 44 Furthermore, plaintiffs' complaint alleges that defendants did not act in good faith because they "knew or should have known" that Cronholm's pension payments should be suspended. Because we must accept, as true, the allegations of plaintiff's complaint, plaintiffs have adequately alleged that defendants did not act in good faith and, therefore, are not entitled to immunity.

¶ 45 For the foregoing reasons, the trial court erred in dismissing plaintiffs' complaint. We remand this case to the trial court to compel the Board to hold a hearing and issue a final administrative decision regarding whether Cronholm reentered active service. See *Harris*, 82 Ill. App. 3d at 713.

¶ 46 The order of the circuit court of Will County is reversed, and the cause is remanded.

¶ 47 Reversed and remanded.