2016 IL App (4th) 150028-U

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March 17, 2016
Carla Bender
4th District Appellate
Court, IL

NOS. 4-15-0028, 4-15-0029, 4-15-0030, 4-15-0255 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JOHN KRAFT,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Douglas County
ARCOLA TOWNSHIP,	)	Nos. 13MR53
Defendant-Appellee.	)	14MR16
	)	14MR17
	)	14MR20
	)	
	)	Honorable
	)	Richard L. Broch,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court found the trial court did not err in refusing to admit plaintiff's exhibits and in granting defendant's motions for a directed finding.

¶ 2 In November 2013, plaintiff, John Kraft, filed a *pro se* complaint for declaratory and injunctive relief (case No. 13-MR-53) against defendant, Arcola Township (Arcola), alleging it failed to produce records in response to his request under the Freedom of Information Act (FOIA or Act) (5 ILCS 140/1 to 11.5 (West 2012)). In December 2014, the trial court entered a finding in favor of Arcola.

¶ 3 In May and June 2014, Kraft filed *pro se* complaints for declaratory and injunctive relief (case Nos. 14-MR-16, 14-MR-17, and 14-MR-20) against Arcola, alleging it failed to respond to his FOIA requests. In August 2014, Kraft filed a *pro se* motion for summary

judgment in case No. 14-MR-16. In December 2014, the trial court denied the motion for summary judgment and the motions for declaratory judgment.

¶ 4 In these consolidated appeals, Kraft argues the trial court erred in refusing to admit certain exhibits into evidence and in granting Arcola's motions for a directed finding. We affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Case No. 13-MR-53

¶ 7 In November 2013, Kraft filed a *pro se* complaint for declaratory and injunctive relief under the Act, alleging he, a resident of Edgar County, served two FOIA requests on Arcola, a public body, on April 23, 2013, seeking copies of public records. Kraft alleged he received a partial denial of both FOIA requests on April 30, 2013. Kraft responded to Arcola, stating the documents were not complete or were improperly redacted and the fee imposed was improper. He asked again for the requested records. Kraft alleged Arcola responded through its attorney, Mark Petty, and Kraft replied with a clarification of what was missing and improperly redacted. Kraft stated Petty responded, effectively denying the FOIA request and demanding payment of an improper invoice.

¶ 8 Kraft attached to his complaint various exhibits. E-mails showed Kraft's FOIA requests, including lists of Arcola trustees, their compensation packages, bank and credit-card statements, cellular-telephone bills, and other matters. Kraft alleged he was being denied his legal right to inspect certain public records by Arcola's failure to produce the records.

¶ 9 In May and June 2014, Kraft filed similar complaints alleging FOIA violations by Arcola. In June 2014, Arcola filed a motion to consolidate case Nos. 14-MR-16, 14-MR-17, and 14-MR-20. Kraft, through his attorney, objected to the motion to consolidate, stating Kraft had

not retained counsel in the three 2014 cases and consolidation would unduly delay the 2013 case. In August 2014, the trial court allowed the motion to consolidate.

¶ 10 In September 2014, Arcola filed an answer to the complaint for declaratory judgment. Arcola also filed an affirmative defense, alleging Kraft never paid the expenses for complying with his FOIA request and thus he failed to comply with the Act.

¶ 11 In December 2014, the trial court conducted a hearing on the complaint for declaratory judgment. Kraft appeared with counsel Yasmeen Baig. William Coombe testified he was the Arcola clerk. Baig sought to ask Coombe about exhibit No. 1, a letter dated April 30, 2013. Coombe stated it "has been altered a little bit, but it appears to be like the one I sent." He stated handwriting on the document was not his. Petty objected, stating the letter was a copy and not what Coombe produced. The trial court sustained the objection, stating as follows:

> "Ms. Baig, what we need to know is, is there an original, where is it, is it available to be brought into court[?] And if not, why, and then if Mr. Coombe indicates that this is in fact, except for the scratching on it with the numerals, a true and accurate representation of the original."

Baig asked to put on another witness to establish the foundation.

¶ 12 John Kraft testified he made a FOIA request on April 23, 2013. He stated exhibit No. 1 is a copy of the letter he received. He did not know what he did with the original and stated, "[i]t could be on my desk now or it might be in my book." Kraft stated the copy included notations that he wrote.

¶ 13 Deana Shields testified she is the office manager for Arcola. Baig asked Shields to identify exhibit No. 2, titled amended affidavit in support of a motion for involuntary

dismissal. She stated the bottom of the second page included her signature. When asked if documents attached to the affidavit were in response to Kraft's FOIA request, Shields stated she could not tell "whether this is actually what we sent." Petty objected, and the trial court sustained the objection, finding the document had not been authenticated.

¶ 14 Kraft was called to the stand again. He stated exhibit No. 1 was "not available to me today." He believed exhibit No. 1 was a true and accurate copy of the original response he received "but without seeing them side by side, page by page, I don't know."

¶ 15 After Kraft finished testifying, Baig asked that exhibit No. 1 be admitted into evidence. Petty objected. The trial court found none of the three witnesses were able to say with specificity that Kraft received the document in response to his FOIA request. Based on the lack of authentication, the court refused to admit exhibit No. 1.

¶ 16 Baig also asked that exhibit No. 2 be admitted into evidence. Petty objected. The trial court indicated judicial notice had been taken that the document had been filed. However, the court found a proper foundation had not been laid and refused to admit the exhibit into evidence.

¶ 17 Baig then submitted exhibit No. 3. After being sworn in by the trial court, Baig testified exhibit No. 3 was a December 5, 2014, letter from Petty, along with documents relating to a FOIA request by Kraft. Upon questioning, Baig stated the FOIA request did not pertain to the subject matter of the hearing. Petty objected, in part, because the letter involved a December 2, 2014, FOIA request from Kraft. Baig stated the documents were relevant "to show that more expansive responses and more expansive documentation" were available to Arcola to provide to Kraft. The court sustained the objection, finding exhibit No. 3 irrelevant to the issue before the court.

¶ 18 After Kraft rested, Arcola made an oral motion for a directed finding. The trial court found Kraft had not presented a *prima facie* case, stating "the evidence did not show that the documents as requested were not tendered, nor has it [been] shown that if they were tendered, they were tendered beyond the date in question." The court granted Arcola's motion. Kraft appealed (case No. 4-15-0255).

¶ 19 B. Case No. 14-MR-16

¶ 20 In May 2014, Kraft filed a *pro se* complaint for declaratory judgment and injunctive relief, alleging he served a FOIA request on Arcola on April 12, 2014, seeking copies of public records. Kraft alleged Arcola never responded to his request and he was denied his legal right to inspect public records by Arcola's failure to produce the records. Kraft attached to his complaint exhibit A, an e-mail showing he had requested copies of records pertaining to bids, quotes, and payments involving insurance and public funds used for scholarships.

¶ 21 In August 2014, Kraft filed a *pro se* motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2014)). Kraft again alleged Arcola had not provided the public records he requested. He asked the trial court, *inter alia*, to declare Arcola to be in violation of the Act and enjoin it from continuing to withhold access to nonexempt public records.

¶ 22 C. Case No. 14-MR-17

¶ 23 In May 2014, Kraft filed a *pro se* complaint for declaratory judgment and injunctive relief, alleging he served a FOIA request on Arcola on April 25, 2014, seeking copies of public records. Kraft alleged Arcola never responded to his request and he was being denied his legal right to inspect public records by Arcola's failure to produce the records. Kraft attached to his complaint exhibit A, an e-mail showing he had requested copies of credit-card statements,

copies of names of scholarship recipients for the previous 10 years, and the policy or criteria used to determine qualification or application procedures for the scholarship.

¶ 24 D. Case No. 14-MR-20

¶ 25 In June 2014, Kraft filed a *pro se* complaint for declaratory judgment and injunctive relief, alleging he served a FOIA request on Arcola on May 4, 2014, seeking copies of public records. Kraft alleged Arcola never responded to his request and he was being denied his legal right to inspect public records by Arcola's failure to produce the records. Kraft attached to his complaint exhibit A, an e-mail showing he had requested copies of checks written in December 2013 and January 2014. Exhibit B showed e-mail correspondence between Arcola and Kraft. On May 22, 2014, Kraft asked Arcola if it was going to respond to his FOIA request. Arcola responded that the information was sent to its attorney, Mark Petty, and Arcola believed he responded. Kraft indicated Petty did not respond. On May 23, 2014, Arcola replied, suggesting Petty may have responded to Kraft's attorney. Kraft responded by stating he only had an attorney in one case and asked Petty to respond to him.

¶ 26 E. Hearing on Case Nos. 14-MR-16, 14-MR-17, and 14-MR-20

¶ 27 In December 2014, the trial court conducted a hearing on the motion for summary judgment in case No. 14-MR-16 and the complaints for declaratory judgment in case Nos. 14-MR-16, 14-MR-17, and 14-MR-20. Kraft appeared *pro se*.

¶ 28 On the motion for summary judgment in case No. 14-MR-16, Kraft argued he submitted a FOIA request on April 12, 2014, but Arcola did not respond. He claimed any response by Arcola to Kraft's attorney was inappropriate because he requested the records and was acting *pro se* in case No. 14-MR-16. Kraft also complained that Petty was not an employee of Arcola.

¶ 29 Petty argued he was obligated to respond to Kraft's lawyer and prohibited from having direct communication with Kraft. Petty also contended he was an employee of Arcola. Petty claimed Kraft received the requested information, thereby creating a genuine issue of material fact.

¶ 30 The trial court found Kraft filed a FOIA request seeking copies of public records. The court also found Petty was an employee of Arcola. As a genuine issue of material fact existed as to whether Arcola responded to the FOIA request, the court denied the motion for summary judgment.

¶ 31 On the complaints for declaratory judgment, Kraft argued he submitted FOIA requests on April 12, April 25, and May 4, 2014, but never received a response. He argued he did not have an attorney pertaining to these requests and Arcola was not restricted from providing public records to the requester based on Rule 4.2 of the Illinois Rules of Professional Conduct (eff. Aug. 1, 1990). Further, Kraft claimed Petty was not an employee of Arcola. Petty reserved argument.

¶ 32 After the trial court asked Kraft if he was resting, Kraft stated he "had no evidence because I was never provided a response from the requester." Petty asked for a directed finding, arguing Kraft failed to present any evidence that he made a request or that Arcola failed to comply if there was a request.

¶ 33 The trial court found Kraft failed to sustain his burden of proof as to the element of Arcola's failure to respond to the FOIA requests. The court allowed Arcola's motion for a finding in its favor. Kraft appealed (case Nos. 4-15-0028, 4-15-0029, and 4-15-0030), and this court consolidated all four cases.

¶ 34 II. ANALYSIS

¶ 35 A. Case No. 4-15-0255

¶ 36 1. *Admission of Exhibits*

¶ 37 Kraft argues the trial court erred in refusing to admit exhibit Nos. 1, 2, and 3 into evidence. We disagree.

¶ 38 Initially, we note Kraft has failed to comply with Illinois Supreme Court Rule 341(e) (eff. Feb. 1, 2013) in the filing of his brief. These four consolidated cases consist of 12 volumes and over 1,500 pages, but Kraft does not cite the record in his statement of facts, which consists of three paragraphs. Ill. S. Ct. R. 341(e)(6) (eff. Feb. 1, 2013) (requiring the statement of facts to include citations to the record). Moreover, in arguing the trial court erred in refusing to admit exhibit Nos. 1 and 2, Kraft does not cite the common-law record where these exhibits can be found. Ill. S. Ct. R. 341(e)(7) (eff. Feb. 1, 2013) (requiring the argument section to contain pages of the record relied on). A party's failure to comply with Rule 341 is grounds for disregarding its arguments on appeal. *Jeffrey M. Goldberg & Associates, Ltd. v. Collins Tuttle & Co.*, 264 Ill. App. 3d 878, 886, 637 N.E.2d 1103, 1109 (1994).

¶ 39 "The decision to admit or exclude evidence rests within the sound discretion of the trial court and that decision will not be disturbed absent an abuse of discretion." *Kovera v. Envirite of Illinois, Inc.*, 2015 IL App (1st) 133049, ¶ 55, 26 N.E.3d 936. "A clear abuse of discretion occurs when 'the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *Blum v. Koster*, 235 Ill. 2d 21, 36, 919 N.E.2d 333, 342 (2009) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)).

¶ 40 Under the "best evidence rule," there is "a preference for the production of the original of a writing when the contents of the writing are sought to be proved." *Jones v.*

Consolidation Coal Co., 174 Ill. App. 3d 38, 42, 528 N.E.2d 33, 36 (1988). Accordingly, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required," except as provided elsewhere by statute or by the Illinois Rules of Evidence. Ill. R. Evid. 1002 (eff. Jan. 1, 2011).

> "The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if—
>
> (1) Original Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
>
> (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
>
> (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing; or
>
> (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue." Ill. R. Evid. 1004 (eff. Jan. 1, 2011).

Under the Illinois Rules of Evidence, " 'a duplicate of a document should be admissible in

Illinois to the same extent as an original unless a genuine issue is raised as to the authenticity of the original or unless it would be unfair to admit the duplicate as an original under the circumstances present in the case where the document was offered into evidence.' " *Law Offices of Colleen M. McLaughlin v. First Star Financial Corp.*, 2011 IL App (1st) 101849, ¶ 30, 963 N.E.2d 968 (quoting *People v. Bowman*, 95 Ill. App. 3d 1137, 1143, 420 N.E.2d 1085, 1089 (1981)); see also Ill. R. Evid. 1003 (eff. Jan. 1, 2011).

¶ 41 a. Exhibit No. 1 (The Coombe Letter)

¶ 42 In the case *sub judice*, Kraft's counsel sought to admit exhibit No. 1 into evidence. Coombe testified the exhibit appeared to be a cover letter he sent to Kraft, although it had been "altered a little bit" and included handwriting that was not his. Petty objected, arguing the exhibit was not the original document. The court sustained the objection. Counsel then called Kraft to the stand. He testified he received the original letter but he did not know what he did with it. He stated, "[i]t could be on my desk now or it might be in my book." Kraft stated the exhibit was a copy of the document he received. However, when asked whether it was a true and accurate copy of the original he received, Kraft stated he did not know without comparing them side by side. The trial court refused to admit exhibit No. 1 into evidence.

¶ 43 Here, the evidence clearly shows exhibit No. 1 was not an original document. Moreover, the exceptions to the requirement of an original writing do not apply here because Kraft himself testified he had the original. Kraft argues the duplicate copy should suffice in this case. However, the controlling issue was whether Arcola's response complied with Kraft's FOIA request. Even Kraft could not identify whether exhibit No. 1 was the same as the original without comparing them at the same time. We find the trial court did not abuse its discretion in refusing to admit exhibit No. 1.

¶ 44 b. Exhibit No. 2 (The Shields Affidavit)

¶ 45 At the December 2014 hearing, Baig asked Shields about a copy of her amended affidavit in support of the motion for involuntary dismissal. Shields stated her signature was on the second page of the affidavit. When asked whether the entire attached document was what she sent to Kraft in response to his FOIA request, Petty objected. The trial court sustained the objection, stating Shields had given no testimony as to the attachments and whether they were the same attachments she forwarded to Kraft. Upon further questioning, Shields stated the information was consistent with what Kraft requested, but she could not tell "whether this is actually what we sent." When Baig asked Shields whether the documents were those provided to Kraft, Petty objected. The court sustained the objection, finding the exhibit had not been authenticated because Shields could not tell if that was actually what was sent. After Baig attempted to admit exhibit No. 2 into evidence, the court denied the request, stating a proper foundation had not been laid.

¶ 46 Here, although Shields stated she signed the affidavit, she could not tell if the attached documents were actually sent in response to Kraft's FOIA request. Also, Baig made no claim to the trial court that the exhibit should be admitted as an admission by a party opponent. We find the trial court did not abuse its discretion in refusing to admit exhibit No. 2.

¶ 47 c. Exhibit No. 3 (The Petty Letter)

¶ 48 Kraft argues the trial court erred in refusing to admit exhibit No. 3, which he claims was a December 5, 2014, letter from Petty to Baig containing a response to a separate FOIA request. Kraft does not cite the pages of the record where exhibit No. 3 can be found, and our review of the record indicates it was not included. Thus, we will not address Kraft's argument.

¶ 49 We note Kraft has supplied exhibit No. 3 in the appendix to his brief. However, "parties cannot use briefs and appendices to supplement the record." *In re Parentage of Melton*, 321 Ill. App. 3d 823, 826, 748 N.E.2d 291, 294 (2001); see also *People v. Wright*, 2013 IL App (1st) 103232, ¶ 38, 986 N.E.2d 719 ("The inclusion of evidence in an appendix is an improper supplementation of the record with information *dehors* the record."). Thus, any consideration of exhibit No. 3 in the appendix would be inappropriate.

¶ 50 2. *Directed Finding*

¶ 51 Kraft argues the trial court erred in granting Arcola's motion for a directed finding. We disagree.

¶ 52 At the conclusion of Kraft's case in chief, Petty moved for a directed finding. Section 2-1110 of the Code provides as follows:

> "In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered." 735 ILCS 5/2-1110 (West 2014).

¶ 53 Our supreme court has set forth a two-step analysis for trial courts when ruling on a section 2-1110 motion. *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 275, 786 N.E.2d 139, 148-49 (2003).

> "First, the court must determine, as a matter of law, whether the plaintiff has presented a *prima facie* case. A plaintiff establishes a

> *prima facie* case by proffering at least 'some evidence on every element essential to [the plaintiff's underlying] cause of action.' [Citation.] If the plaintiff has failed to meet this burden, the court should grant the motion and enter judgment in the defendant's favor. [Citation.] Because a determination that a plaintiff has failed to present a *prima facie* case is a question of law, the circuit court's ruling is reviewed *de novo* on appeal. [Citations.]" *People ex rel. Sherman*, 203 Ill. 2d at 275, 786 N.E.2d at 148-49.

¶ 54 If the trial court finds the plaintiff has established a *prima facie* case, the court then moves to the second step. There, the court, as trier of fact, "must consider the totality of the evidence presented, including any evidence which is favorable to the defendant." *People ex rel. Sherman*, 203 Ill. 2d at 276, 786 N.E.2d at 149. The "court must weigh all the evidence, determine the credibility of the witnesses, and draw reasonable inferences therefrom." *People ex rel. Sherman*, 203 Ill. 2d at 276, 786 N.E.2d at 149.

> "After weighing the quality of all of the evidence, both that presented by the plaintiff and that presented by the defendant, the court should determine, applying the standard of proof required for the underlying cause, whether sufficient evidence remains to establish the plaintiff's *prima facie* case. If the circuit court finds that sufficient evidence has been presented to establish the plaintiff's *prima facie* case, the court should deny the defendant's motion and proceed with the trial. [Citation.] If, however, the court determines that the evidence warrants a finding in favor of

> the defendant, it should grant the defendant's motion and enter a judgment dismissing the action. [Citation.] A reviewing court will not reverse the circuit court's ruling on appeal unless it is contrary to the manifest weight of the evidence." *People ex rel. Sherman*, 203 Ill. 2d at 276, 786 N.E.2d at 149.

¶ 55 Here, the trial court granted Arcola's motion for a directed finding, stating Kraft had failed to establish a *prima facie* case. A review of the transcript reveals Kraft failed to establish Arcola violated the Act by failing to adequately respond to his FOIA request. Kraft's exhibits were correctly denied admission into evidence. Moreover, the witnesses that testified did not show Arcola failed to comply with the Act. Thus, as Kraft failed to present a *prima facie* case, the court did not err in granting the motion for a finding in Arcola's favor at the close of his case in chief.

¶ 56 3. *Request for Index of Records*

¶ 57 Kraft argues the trial court erred in failing to grant his request for an index of records. We disagree.

¶ 58 Section 11(a) of the Act states a party denied access to public records may file suit for injunctive or declaratory relief. 5 ILCS 140/11(a) (West 2014). Section 11(e) of the Act provides as follows:

> "On motion of the plaintiff, prior to or after in camera inspection, the court shall order the public body to provide an index of the records to which access has been denied. The index shall include the following:
>
> (i) A description of the nature or contents of

> each document withheld, or each deletion from a released document, provided, however, that the public body shall not be required to disclose the information which it asserts is exempt; and
>
> (ii) A statement of the exemption or exemptions claimed for each such deletion or withheld document." 5 ILCS 140/11(e) (West 2014).

Here, Kraft's request for an index of records came after he rested his case. Given that he failed to prove even a *prima facie* case of a FOIA violation by Arcola, the court did not err in refusing to require Arcola to supply an index.

¶ 59 B. Case Nos. 4-15-0028, 4-15-0029, 4-15-0030

¶ 60 Kraft argues the trial court erred in granting Arcola's motion for judgment and in not finding Arcola violated the Act. We disagree.

¶ 61 In his brief, Kraft argues the trial court should have found Arcola violated the Act by (1) failing to submit responses to the requester and (2) allowing a nonqualified individual to provide responses. However, at the December 2014 hearing, Kraft did not present any evidence. He did not testify that he did not receive the materials or that his attorney did not receive them. He did not call Baig to testify whether she received the documents from Arcola. Moreover, he did not call any witnesses from Arcola to testify whether they received his FOIA requests and provided the necessary response to the requests. Thus, as Kraft failed to present any evidence that Arcola failed to comply with the Act, the trial court did not err in entering judgment in favor of Arcola.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we affirm the trial court's judgment in these consolidated cases.

¶ 64 Affirmed.