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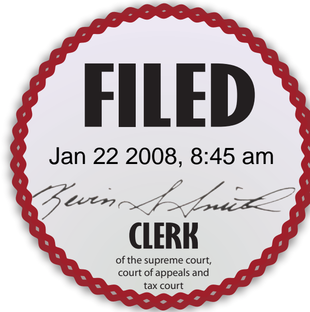

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IN THE
COURT OF APPEALS OF INDIANA

JAMES GARRETT SMALL,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 49A04-0702-CV-101
	)	
INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION, et al,	)	
	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-0609-CT-38472

January 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

James Small appeals the dismissal of his complaint against numerous State agencies and government officials (collectively "the State Defendants") and Carolyn Shreve. We affirm and remand.

Issue

The restated issue is whether the trial court properly granted the State Defendants's motion to dismiss.

Facts

The facts alleged in Small's complaint, which we deem to be true for purposes of a motion to dismiss, are as follows. Small has a child, A.S., who was born on July 8, 1980. Shreve is the mother. In a paternity action initiated in December 1980, in the Marion County Circuit Court, Small was ordered to pay $25.00 per week in child support. The support order included a Title IV-D assignment to the Indiana Department of Welfare, now part of the Indiana Family and Social Services Administration (hereinafter "FSSA"), because Shreve was receiving Aid to Families with Dependent Children ("AFDC") benefits of $60.00 per month. Shreve stopped receiving AFDC benefits in December 1984, after having received a total of $3060.00.

In March 1986, Shreve abandoned A.S. and left Indiana without telling Small. The Marion County Department of Public Welfare, now the Department of Child Services (hereinafter "DCS"), took custody of A.S. and initiated a child in need of services ("CHINS") proceeding. Small was not notified of the CHINS proceeding. A.S. was made a ward of the DCS and continued to be one until the juvenile court ordered his

emancipation on July 13, 1998. As of the date of A.S.'s emancipation, the FSSA had retained $3888.00 of Small's child support payments through its Title IV-D assignment.

In fact, between 1989 and 1998 the FSSA retained all of the child support payments that Small had made because it could not locate Shreve. On August 15, 2000, the FSSA located Shreve and sent her a check for $7,958.60 in previously retained child support, which Shreve cashed. Small asserts he overpaid Shreve the amount of support she was due by $6283.00, largely because A.S. was not in Shreve's care for most of his childhood.

Despite A.S.'s emancipation in 1998, the Marion County Clerk continued sending child support invoices to Small for the $25.00 weekly amount, marked "Child Current Support," until January 2002. App. p. 149. Additionally, the invoices included a charge of $10.00 per week, marked "Child Miscellaneous." Id. Although the invoices for current child support stopped coming as of January 2002, Small has continued to receive invoices for the $10.00 weekly "miscellaneous" amount. Small is not aware of any order authorizing collection of the $10.00 weekly "miscellaneous" amount and asserts that despite repeated inquires, he has not been provided with a copy of any such order.

On September 19, 2006, Small filed a complaint in the Marion County Superior Court against Shreve, the FSSA, the DCS, the Marion County Prosecutor ("the Prosecutor"), the Secretary of the FSSA, the Director of the DCS, and the Director of the Indiana Department of Child Services. The complaint sought a judgment against Shreve for the $6283.00 he claims she was overpaid for child support, plus punitive damages. It also sought injunctive relief in the form of an order stating that any judgment for child

support for A.S. was satisfied, an order ending the ongoing collection of the $10.00 weekly "miscellaneous" amount, and an order directing the Prosecutor to contact credit reporting agencies to clarify that he has not been in arrears in his child support obligation. Finally, the complaint sought release of a lien apparently placed by the FSSA in 1989 against a truck owned by Small.

No defendants ever filed an answer to Small's complaint.[1] Instead, on October 11, 2006, the State Defendants filed a motion to dismiss Small's complaint under Indiana Trial Rule 12(B)(3) for improper venue. The motion averred that Small's complaint should be heard by the Marion County Circuit Court, where the paternity proceedings were held and the original child support orders were entered. On November 10, 2006, Small filed an amended complaint. On December 8, 2006, the State Defendants filed a second motion to dismiss, this time alleging that dismissal was proper under Trial Rules 12(B)(3), 12(B)(1), and 12(B)(6). On December 11, 2006, the trial court dismissed Small's complaint. On January 23, 2007, it denied Small's motion to correct error. Small now appeals.

Analysis

We begin by noting that before the trial court, the State Defendants argued that dismissal of Small's complaint was required under subsections (1), (3), and (6) of Indiana Trial Rule 12(B). On appeal, the State Defendants abandon their argument that dismissal was proper under subsection (1)—lack of subject matter jurisdiction—or subsection (3)—

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[1] In fact, it appears that Shreve has yet to respond to Small's complaint in any way.

improper venue. Instead, they now focus on subsection (6)—failure to state a claim for which relief may be granted—and an entirely new subsection, (8)—the same action pending in another Indiana court—that they never invoked before the trial court.

The trial court's order of dismissal did not specify upon what basis it was granting the motion to dismiss. When a trial court grants a motion to dismiss without reciting the grounds relied upon, we presume on review that the court granted the motion to dismiss on all the grounds in the motion. Lawson v. First Union Mortgage Co., 786 N.E.2d 279, 281 (Ind. Ct. App. 2003). Trial Rule 12(B)(6) is the only basis for dismissal that the State Defendants cited both at the trial court level and on appeal. As a general rule, a party cannot present an argument on appeal that was not first presented to the trial court. See Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 834 (Ind. Ct. App. 2005), trans. denied. We will not consider Trial Rule 12(B)(8) in this opinion.

Nevertheless, the State Defendants's argument under Rule 12(B)(6) essentially is just a slight rephrasing of its argument under Rule 12(B)(8): namely, that Small is entitled to no relief in this cause of action because any modification of his child support obligation must be directed to the court that originally established that obligation, i.e. the Marion Circuit Court. We review de novo a dismissal under Trial Rule 12(B)(6), and no deference to the trial court's decision is required. Dominiack Mech., Inc. v. Dunbar, 757 N.E.2d 186, 188 (Ind. Ct. App. 2001). A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a claim, not the facts supporting it. Id. "We must determine whether the complaint states any facts upon which the trial court could have granted relief, viewing the complaint in the light most favorable to the non-moving party." Id. We may

look only to the complaint and the reasonable inferences to be drawn therefrom, and may not resort to any other evidence in the record. Id. "A motion to dismiss is properly granted only when the allegations present no possible set of facts upon which the plaintiff could recover." Id. We will affirm a trial court's granting of a Rule 12(B)(6) motion to dismiss if it is sustainable on any basis found in the record. City of New Haven v. Reichhart, 748 N.E.2d 374, 378 (Ind. 2001).

There are essentially three components to Small's complaint: first, that he grossly overpaid the amount of child support that was properly due to Shreve because she abandoned A.S. when he was six years old, but fraudulently failed to tell Small that she did so; second, that he fully discharged his support obligation both as to Shreve and the Title IV-D assignment but the State Defendants improperly pursued collection of support despite that discharge; and third, that he improperly is being required to this day to pay $10.00 per week in some form of child support for a child who now is twenty-seven years old. As for the first two claims, we conclude they clearly are attempts to collaterally attack child support orders entered by the Marion Circuit Court in the original paternity action involving A.S. In other words, there is no question that there exist or existed orders requiring Small to pay child support to Shreve, and assigning at least some of those support payments to the FSSA so long as Shreve was receiving AFDC benefits. Small's argument that those orders became invalid at some point, for whatever reason, must be addressed to the court that entered them.

In Dodd v. Estate of Yanan, 625 N.E.2d 456 (Ind. 1993), our supreme court considered a case in which an ex-wife filed suit against her deceased ex-husband's estate

in probate court, alleging that he had fraudulently induced her to sign a divorce property settlement agreement. The probate court dismissed the ex-wife's complaint for failure to state a claim upon which relief could be granted, and our supreme court affirmed. The court noted, "'a litigant defeated in a tribunal of competent jurisdiction may not maintain an action for damages against his adversary or adverse witnesses on the ground the judgment was obtained by false and fraudulent practices or by false and forced evidence.'" Dodd, 625 N.E.2d at 457 (quoting Anderson v. Anderson, 399 N.E.2d 391, 399 (Ind. Ct. App. 1979)). Rather, the ex-wife's sole possibility for relief was to successfully present her claims of fraud before the court that entered the dissolution decree and obtain a modification of that decree, and only then could she seek damages against her ex-husband's estate. Id. The ex-wife's action in the probate court was an improper collateral attack on the dissolution court's judgment. Id.

This case is very similar to Dodd. If Small believes that the fraudulent conduct of either Shreve or the State Defendants caused him to improperly overpay the amount of child support to which they were entitled, he must first present those claims to the court that imposed Small's support obligation, and either obtain a retroactive modification of that obligation or a determination that that obligation terminated as a matter of law at some point in the past, but that support improperly was collected from him thereafter.[2] If, and only if, he is successful in retroactively modifying his support obligation may he seek a judgment against Shreve for overpaid child support to which she was not entitled.

[2] We offer no opinion as to whether Small likely will be successful in this regard.

Similarly, it is the court that imposed the support obligation that is in the proper position to determine whether Small fully discharged that obligation and whether any of the State Defendants acted improperly in maintaining collection actions against Small.

As for the $10.00 per week, Small claims he is unaware of any order requiring him to pay that amount and despite requests to see a copy of such an order, the State Defendants have not been able to provide him with one. This particular claim is not seeking a modification of a child support obligation as such; in essence, Small is claiming there is no such obligation. Nonetheless, we believe the paternity court is the more appropriate forum to address whether such an order exists.

We affirm the Marion Superior Court's dismissal of Small's complaint on the basis that it is an improper collateral attack on orders entered by the Marion Circuit Court. We note that the order of dismissal did not specify whether dismissal was with or without prejudice. The dismissal should be deemed to be without prejudice to Small's ability to bring his claims before the Marion Circuit Court in an appropriate proceeding.

Conclusion

We affirm the dismissal of Small's complaint, but clarify that that dismissal is without prejudice and remand for further proceedings consistent with this opinion.

Affirmed and remanded.

KIRSCH, J., concurs.

ROBB, J., concurs in result with separate opinion.

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ROBB, Judge, concurring in result

I agree with the majority that Marion Circuit Court is the appropriate court to consider Small's complaint. However, I concur in result because I believe that Indiana Code section 33-29-6-3 would have been an appropriate alternative by which the Marion Superior Court could have handled this case. Section 33-29-6-3 provides that "the judge of the superior court may, with the consent of the judge of the circuit court, transfer any action . . . to the circuit court . . . as if originally filed with the circuit court [if] in the opinion of the superior court judge, an early disposition of the case is required." Assuming the Marion Superior Court made the appropriate finding regarding an early disposition, the case could have been transferred without requiring Small to re-file his case and pay a second filing fee. Because a specific finding by the trial court is required, however, I acknowledge that in the absence of that finding, dismissal without prejudice is

an appropriate resolution. Cf. State ex rel. Wright v. Morgan County Court, 451 N.E.2d 316, 319 (Ind. 1983) (holding that although the Morgan Superior Court could have disposed of case in which former prosecutor could not sit as judge by proceeding under Criminal Rule 13 providing for case reassignment and special judges, court also had authority pursuant to the predecessor to section 33-29-6-3 to transfer the case to the circuit court on basis of finding that an early disposition is required and not transferring the case would thwart an expeditious disposition).