

2012 IL App (2d) 110584-U
No. 2-11-0584
Order filed May 30, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

JAMES P. NEWMAN, Individ. and derivatively)	Appeal from the Circuit Court
on behalf of THE COMMONS OF FOX MILL)	of Kane County.
HOMEOWNERS ASSOCIATION, INC.,)	
)	
Plaintiff-Appellant,)	
)	
v.)	No. 10-MR-594
)	
FOX MILL LIMITED PARTNERSHIP and)	
B&B ENTERPRISES,)	
)	
Defendants-Appellees)	
)	Honorable
(The Commons of Fox Mill Homeowners)	Thomas E. Mueller,
Association, Inc., Nominal Defendant).)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: The trial court's dismissal of plaintiff's complaint was reversed where the allegedly duplicative pending action that would have been the basis for dismissal had been dismissed prior to the court's order dismissing the complaint. The cause was remanded for further proceedings.

¶ 1 Plaintiff, James P. Newman, appeals from the trial court’s order granting defendants’ motion to dismiss. For the following reasons, we reverse and remand for further proceedings.

¶ 2 **BACKGROUND**

¶ 3 In the 1990s, defendants, Fox Mill Limited Partnership and B&B Enterprises, developed the Fox Mill community in the Village of Campton Hills, Illinois. Fox Mill was comprised of four neighborhoods—the Commons, the Hamlet, the Settlement, and the Farmstead. Each neighborhood had its own homeowners association, of which the respective lot owners were members. Each neighborhood homeowners association was an individual Illinois not-for-profit corporation. The Commons of Fox Mill Homeowners Association, Inc. (the Commons) was incorporated on September 12, 1995. There was also a Fox Mill Master Homeowners Association, Inc. (the Master), of which all of the property owners in the Fox Mill subdivision were members. The Master was incorporated as a separate Illinois not-for-profit corporation in 1994. By virtue of his owning a lot in the Commons neighborhood in the Fox Mill community, plaintiff was a member of both the Commons and the Master.

¶ 4 From 1994 through July 2008, defendants annually appointed the Master’s board of directors. On July 31, 2008, defendants transferred control of the Master to the Fox Mill residents. The community held an election at that time to select the Master’s next board of directors.

¶ 5 On December 14, 2010, plaintiff filed his verified complaint for declaratory relief, individually, and derivatively, on behalf of the Commons. The Commons was included as a nominal defendant. Plaintiff alleged that defendants¹ had controlled the Commons’ board of directors by appointment from the time the Commons was incorporated. Plaintiff further alleged that, although

¹Our references to “defendants” do not include the Commons.

defendants gave notice that an election would be held for a Commons' board of directors on March 4, 2008, no election occurred. According to plaintiff, there had never been a Commons election in compliance with its bylaws, which required that its directors be elected from and by its members. Plaintiff alleged that the Commons had had no board of directors since 2008. In the prayer for relief, plaintiff requested that the trial court require defendants to turn over control of the Commons immediately, supervise an election for a Commons' board of directors at defendants' expense, and require defendants to turn over all Commons' assets following the election.

¶ 6 On March 18, 2011, defendants filed a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). Defendants argued that, because the issues presented by plaintiff's complaint were raised in another Kane County case, *Fox Mill Master Homeowners Association v. Fox Mill Limited Partnership (Fox Mill)*, No. 10-L-51, which was pending on appeal (*Fox Mill Master Homeowners Association v. Fox Mill Limited Partnership*, No. 2-10-1208), the complaint should be dismissed as duplicative pursuant to section 2-619(a)(3) of the Code (735 ILCS 5/2-619(a)(3) (West 2010)). Defendants also contended that the complaint should be dismissed under section 2-619(a)(2) of the Code (735 ILCS 5/2-619(a)(2) (West 2010)) because plaintiff lacked standing both individually, for failure to allege individual harm to himself, and derivatively, because the Commons had already assigned its claims to the Master in *Fox Mill*.

¶ 7 With respect to section 2-619(a)(3), defendants argued in their motion to dismiss that the dispositive issue in the present case was whether all of the neighborhood homeowners associations, the Commons in particular, were already governed by a single, unified board of directors. According to defendants, that question turned upon the applicability of the Master's Second Amended Bylaws

(bylaws)—“the same document, arguments and issues that were presented, determined and now on appeal in 10-L-51.” The parties dispute whether the bylaws were ever adopted. Although the bylaws are not contained in the record on appeal, the parties do not dispute that the bylaws provided that the Master’s board of directors would be “elected at the same time, place and manner” as the four neighborhood boards of directors, including the Commons, and that the “boards shall be comprised of the same individuals acting as one, unified board.”

¶ 8 In *Fox Mill*, the case alleged by defendants to be duplicative of the present case, the Master, individually, and as assignee of each of the neighborhood associations, had brought suit against defendants in the instant case, as well as several other defendants, seeking damages for alleged breaches of fiduciary duty, conversion, legal malpractice, conspiracy, and statutory violations. Plaintiff in the instant case, Newman, was the attorney for the plaintiff, the Master, in *Fox Mill*. Attached to the *Fox Mill* complaint were assignments of rights by each of the four neighborhood associations, including the Commons, made by Ed Fiala, who purported to be the president of each association.

¶ 9 The trial court dismissed *Fox Mill* for lack of standing on June 29, 2010. The court found that the “controlling documents” had to be read together. The court began by noting that, in previous litigation, both parties had admitted the existence of the bylaws, stating, “I think that’s an established fact.” The court then found that the controlling documents included the Master’s covenants and the covenants of the neighborhood associations, stating, “The master homeowners association, my reading of it is it inherits the rights and obligations of all four of the neighborhood associations, which include all of those covenants.” The neighborhood associations’ covenants required approval

by a majority of homeowners prior to the payment of fees incurred for the purpose of legal action.² The court found that, although no fees had yet been paid, the Master had certainly obligated itself to pay legal fees. Because the Master had not obtained the required approval prior to filing the complaint, the court dismissed the suit for lack of standing. The Master timely appealed that judgment (*Fox Mill*, 2-10-1208).

¶ 10 Meanwhile, in the instant case, while defendants' motion to dismiss was pending, plaintiff filed a motion for default judgment as to the Commons, the nominal defendant, based on its failure to answer or appear. As well, plaintiff filed a motion to compel defendants to comply with discovery.

¶ 11 Plaintiff also filed a response to defendants' section 2-619 motion to dismiss, to which he attached a "Corporation File Detail Report," printed from the website of the Illinois Secretary of State, indicating that the Commons had been involuntarily dissolved on January 5, 2011. Plaintiff asserted that there was no Commons' board of directors; that, therefore, no one filed the necessary corporate documents; and that, as a result, the Commons was involuntarily dissolved. Plaintiff argued that the present case was not duplicative of *Fox Mill* because the plaintiffs and the claims in each case were different. Plaintiff contended that, in *Fox Mill*, the Master sought damages for injuries it suffered prior to defendants' turnover of the Master. Those claims, according to plaintiff, had no bearing on the present case, in which he sought equitable relief—for a turnover of the Commons to its members—on behalf of himself, individually, and on behalf of the Commons, derivatively. Plaintiff maintained that the assignments by the Commons and the other neighborhood

²The record in the instant case includes the Commons' covenants, which contain the referenced provision in section 3.3, entitled "Initiation of Legal Action."

associations in *Fox Mill* turned out to be illusory, “hence this lawsuit,” because, although defendants had represented to the Fox Mill community during the 2008 turnover of the Master that all five associations were to be combined into one, they never were. Plaintiff further argued that the bylaws issue was a “red herring” and not dispositive of the trial court’s dismissal of *Fox Mill* for lack of standing, which was based on the Master’s failure to comply with the neighborhood associations’ covenants. Finally, plaintiff argued that he did have standing—individually, due to the loss of his right to vote and participate in governing the Commons (the covenants of which encumbered his home), and derivatively, due to the fact that the Commons had no board of directors and had been involuntarily dissolved.

¶ 12 On June 15, 2011, the trial court heard argument on plaintiff’s motion to compel defendants to comply with discovery. Plaintiff had requested any documents that reflected adoption of the bylaws by either the Master or the Commons. Defendants objected to the discovery requests because they “improperly [sought] discovery of fact and issues currently before” the appellate court in *Fox Mill*—namely, the bylaws issue. Defendants argued, “[W]e don’t think a motion to compel is proper when the propriety of this case is squarely at issue[,] whether or not [plaintiff] should even be allowed to bring a claim asking for there to be an election when the second amended bylaws demonstrate that that particular issue was resolved and on appeal.” Defendants noted that, since the pending motions had been filed, the Master entered a resolution on May 11, 2011, deeming the bylaws operative. Defendants also reported that the appellate court had granted the Master’s motion to voluntarily dismiss the pending appeal in *Fox Mill* on June 10, 2011. Defendants maintained that there was therefore a “final order entered stating that the second amended bylaws are in power.”

Defense counsel concluded, “I think that ends the issue, and although we’re not arguing that today at this moment, I think should resolve my client’s *[sic]* involvement in any way in this case.”

¶ 13 Plaintiff responded that the parties in the present case and in *Fox Mill* were different. He challenged the validity of the purported May 11, 2011, resolution adopting the bylaws and further contended that, even if the Master had properly adopted the bylaws, the Master could not bind the Commons, which was a separate corporate entity with its own bylaws. Plaintiff noted that his discovery requests properly sought documents related to defendants’ claim in the present case that the associations had been collapsed by the bylaws.

¶ 14 Based on these arguments, the trial court denied the motion to compel. The court then stated that defendants’ section 2-619 motion to dismiss needed to be set for argument. Defendants indicated that they were prepared to argue the motion but that it would “be effectively the same argument we just raised now.” Plaintiff agreed, stating, “[W]e can argue, but if you’re inclined to believe these corporations are merged, I’ve made my argument right now.” The court responded, “Okay. I guess I can enter an order granting the 2-619 motion to dismiss.”

¶ 15 The court next addressed plaintiff’s motion to default the Commons. The court granted the motion to default because the Commons never filed an appearance, and then inquired what relief plaintiff would seek from the Commons at a prove-up hearing. Plaintiff replied that he wanted defendant, B&B Enterprises, to “turn over the Commons.” The court stated that, because it granted the motion to dismiss, B&B was “out.” Plaintiff responded, “Okay. So if they’re out, we still don’t have a board of directors.” The court replied, “Again, based on the second amended bylaws, it sounds like—it appears to me that the—the individuals serving on the master board are one and the same as those that would serve on the board for the Commons.” Plaintiff asserted that the Master

had not taken the position that it represented the Commons and noted that the Commons' corporation had been involuntarily dissolved. The court said that plaintiff could ask for relief in the default order to appoint three individuals to serve as officers to revive the corporation and have an election.

¶ 16 The court entered its written order on June 15, 2011, which stated:

“1) The Commons Homeowners Association is defaulted.

2) Plaintiff's motion to compel is denied.

3) FMLP's [Fox Mill Limited Partnership] motion to dismiss is granted.

4) Pursuant to motion to default the Commons HOA, the Court orders that Plaintiff James Newman has the authority to [a]ppoint 3 [b]oard [m]embers (officers) for the Commons HOA with leave to file the appropriate corporate documents to revive the Commons HOA with the Illinois Secretary of State.

5) The current Board of Directors for the Master HOA has not filed the appropriate corporate document[s] for the Commons HOA and is not serving in that capacity.

6) This matter is dismissed in its entirety and is final.”

Plaintiff filed a notice of appeal the same day.

¶ 17 On July 15, 2011, defendants filed a “Motion to Reconsider or Alternatively to Clarify” the June 15, 2011, order. Defendants argued that the trial court improperly granted substantive relief against the nominal defendant, the Commons, when it authorized plaintiff to appoint board members for the Commons. Defendants requested:

“that the Court reconsider the relief granted at paragraphs 4-6 of the June 15, 2011 [o]rder, which appears to reflect an error in application of its ruling to the case facts. Indeed, as worded, [t]he Commons could now appear to have a board of directors different than those as [*sic*] determined by

Fox Mill's [s]econd [a]mended [b]y-laws. That document was an issue clearly addressed and decided in the 10-L-51 case, and which [*sic*] was a primary basis for finding dismissal appropriate in this case.”

Defendants concluded that there was a “potential ambiguity” with respect to the finality and effect of the court’s order.

¶ 18 Also on July 15, 2011, the Master filed a petition to intervene, in which it explained that the neighborhood associations originally functioned within their own areas but that “the impracticality of five layers of administration became more evident and certain documents were adopted or followed which provided for unified control of all associations through the master association.” The Master alleged that by 2008 when defendants “turned over control of all of the associations, only one board of directors existed and functioned for all assets of Fox Mill.” The Master contended that in 2009, “acting at the direction of its Board, including plaintiff Newman,” it had sued the present defendants; that case was dismissed by stipulation after the developers agreed to convey by warranty deed all common areas of the Fox Mill community to the Master. Thus, according to the Master, there was nothing left for individual management by the neighborhood associations. The Master sought leave to intervene because its interests were not being represented, yet it could be bound by the trial court’s June 15, 2011, order that essentially recreated the Commons—an entity whose only role would be to usurp the Master’s legitimate authority.

¶ 19 On August 17, 2011, the trial court heard argument on defendants’ motion to reconsider or clarify. The court began by hearing the parties’ arguments as to what effect, if any, plaintiff’s previously filed notice of appeal had on the court’s authority to hear the motion to reconsider. The court ruled that it “always retain[ed] jurisdiction, especially when a motion is timely filed, to clarify

or supplement” it prior order. The court granted defendants leave to file a supplemental exhibit—an August 11, 2011, e-mail from Ed Fiala to the Master, stating that the Commons was in good standing with the state and that he was its president. In the e-mail, Fiala asked the Master for “the segregated funds that were earmarked for the Commons” in order to retain legal and management services and proceed with the Commons’ first election. Plaintiff offered the following explanation of Fiala’s e-mail:

“But the plan here was to have the corporation—create the corporation, have an election, and then allow the corporation to collapse itself, which is the only way it can be done under the covenant. It has to be done by a vote of the people in the Commons. That’s what [the Master’s counsel] and I agreed was the only way that we could fix the issue in Fox Mill and do it right, and that’s all that I think Mr. Fiala is asking to do here.”

Defendants responded that plaintiff was again attempting to collaterally attack the judgment in *Fox Mill* in which the court had ruled that there was a common board of directors for all of the associations. Defense counsel continued:

“We went through this ad nauseam now a variety of times asking for an election—having a record now which this transcript will be a part of—going up to an appellate court in which an election is allowed but a motion to dismiss is granted on the basis that the nature of that election, or whether it had existed, occurred already in 10-L-51 is the problem we brought.”

¶ 20 After hearing argument, on August 17, 2011, the trial court entered its written order that it said was consistent with its intent on June 15, 2011, stating:

“Defendants[’] motion is granted. The June 15, 2011 order is hereby amended to clarify paragraphs 4-6 referring to the appointment of ad hoc directors for the Commons of Fox Mill HOA,

to wit ‘The ad hoc directors, having been appointed solely by the Court to act where the existing board had not by reinstating the Commons of Fox Mill HOA as a corporation before the Sec. of State, are not granted nor intended to be authorized to take any substantive act by or on behalf of the Commons of Fox Mill HOA.’ ”

The court agreed with the Master’s counsel that the clarification order rendered moot the Master’s petition to intervene and denied it as such.

¶ 21 Plaintiff filed an amended notice of appeal on August 18, 2011.

¶ 22 ANALYSIS

¶ 23 Plaintiff first argues that the trial court erred in granting defendants’ motion to dismiss pursuant to section 2-619(a)(3). Section 2-619(a)(3) of the Code provides for involuntary dismissal when “there is another action pending between the same parties for the same cause.” 735 ILCS 5/2-619(a)(3) (West 2010). Section 2-619(a)(3) promotes judicial economy by avoiding duplicative litigation. *Village of Bensenville v. City of Chicago*, 389 Ill. App. 3d 446, 479 (2009). The same-parties requirement is satisfied, despite a difference in the parties’ names or number, if the parties’ interests are sufficiently similar. *Village of Bensenville*, 389 Ill. App. 3d at 479. The crucial inquiry as to the same-cause requirement is whether both actions “arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof, or relief sought materially differs between the two actions.” (Internal quotation marks omitted.) *Village of Bensenville*, 389 Ill. App. 3d at 479. The movant bears the burden of proving the same-parties and the same-cause requirements by clear and convincing evidence. *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 853 (2010). Even when the same-parties and same-cause requirements are met, dismissal is not mandatory; rather, the court is to exercise its discretion by weighing the following factors: “(1)

comity; (2) the prevention of multiplicity, vexation, and harassment; (3) the likelihood of obtaining relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in a local forum.” *Village of Bensenville*, 389 Ill. App. 3d at 479-80.

¶ 24 We first address our standard of review, which is disputed by the parties. In his opening brief, plaintiff provides a less-than-concise statement of the applicable standard of review, asserting that “[g]enerally, dismissals under section 2-619 are reviewed *de novo*.” Defendants respond that our review of a section 2-619(a)(3) dismissal is for abuse of discretion, citing *Village of Bensenville*, 389 Ill. App. 3d at 480. Defendants have correctly stated the standard of review. At oral argument, plaintiff expounded on his theory of *de novo* review. Plaintiff contended that the reason for a trial court’s discretion under section 2-619(a)(3), as opposed to other section 2-619 dismissals, is that the court must review discretionary factors as to the effect of the pending action. Plaintiff argued that, in the instant case, because there was no other action pending by the time the trial court decided the motion, the court did not exercise any discretion. While plaintiff’s argument is not unappealing, we need not reach it, since under either standard of review, we must reverse the trial court’s section 2-619(a)(3) dismissal of plaintiff’s complaint.

¶ 25 When defendants filed their motion to dismiss, the appeal in *Fox Mill* was pending before this court. However, on June 10, 2011, five days before the trial court granted defendants’ motion to dismiss in the present case, the pending appeal was dismissed. As noted above, section 2-619(a)(3) provides for involuntary dismissal when “there *is* another action pending between the same parties for the same cause.” (Emphasis added.) 735 ILCS 5/2-619(a)(3) (West 2010). The plain language of the Code allows for dismissal if the other action is presently pending. Pending, used as an adjective, signifies something “not yet decided” (Webster’s Third New International Dictionary

1669 (1993)) or something “awaiting decision” as in a “pending case” (Black’s Law Dictionary 1169 (8th ed. 2004)). Thus, once the pending appeal was dismissed, it was no longer awaiting decision and, therefore, was no longer pending. Consequently, at the time the court entertained the motion to dismiss on June 15, 2011, there was no potentially duplicative action pending and that portion of the motion to dismiss based on section 2-619(a)(3) became moot. See *Bernhardt v. Fritzshall*, 9 Ill. App. 3d 1031, 1045 (1973) (holding that the defendants’ motion to dismiss, based on a pending action, was rendered moot when the pending action was withdrawn after the motion was filed); J.T.W., Annotation, *Plea of Abatement Because of Pendency of Prior Action As Affected By Termination of That Action*, 118 A.L.R. 1477 (1939) (“The rule, however, is now well established in most jurisdictions that termination of the prior action even after the filing of the plea in abatement may be sufficient to defeat such plea based on the pendency of a prior action between the same parties and for the same cause.”). Accordingly, the trial court erred in dismissing the complaint on this basis. See *Wright v. Keifer*, 131 Ill. App. 298, 302 (1907) (holding that the trial court erred in not allowing the plaintiff, in response to the defendant’s motion to dismiss based on a pending action, to assert that the pending suit had been dismissed subsequently to the defendant’s filing the motion).

¶ 26 In their motion to dismiss, defendants argued that lack of standing under section 2-619(a)(2) was an alternative basis for dismissal. And, in their brief, defendants urge that we affirm on this basis. Although the parties never reached the standing issue in their oral arguments before the trial court, they did argue the issue, albeit briefly, in both their written arguments to the trial court and also in their briefs on appeal. Defendants argued in their motion to dismiss that plaintiff lacked standing individually because he suffered no direct harm, and lacked standing derivatively because

the Commons had assigned all of its claims to the Master in *Fox Mill*. Plaintiff responded that he had individual standing because he had an “absolute right to elect officers and participate in the governance” of the Commons. Plaintiff also asserted that his individual standing arose under the Commons’ covenants. Plaintiff further argued that he had derivative standing because the Commons could not assert its own claim without a board of directors.

¶ 27 We may affirm the dismissal of a complaint on any ground supported by the record. *Davis v. Dyson*, 387 Ill. App. 3d 676, 682 (2008). Our review of a trial court’s decision on a section 2-619 motion for lack of standing is *de novo*. *Willmschen v. Trinity Lakes Improvement Association*, 362 Ill. App. 3d 546, 549-50 (2005). Here, however, we decline defendants’ invitation to address the standing issue. It appears to us that the issue is anything but straightforward and will require an evidentiary hearing to allow fact finding on such questions as individual and derivative standing, whether the assignments in *Fox Mill* were valid, and whether there was a board that could have asserted the claim against defendants. Given these and other subtle complexities, we determine that it would not be prudent to address the standing issue without it first having been fully presented to the trial court.

¶ 28 In summary, we hold that the trial court committed reversible error when it entertained the moot portion of the motion because the purpose of section 2-619(a)(3), the promotion of judicial economy, could not possibly be furthered where nothing was pending that could have been potentially duplicative. Thus, despite the fact that neither party explicitly raised the issue of mootness, we reverse the trial court’s dismissal of plaintiff’s complaint pursuant to section 2-619(a)(3). See *Halpin v. Schultz*, 234 Ill. 2d 381, 390 (2009) (holding that the appellate court did not improperly act as an advocate but merely sought to insure that the relevant statutory provisions

were followed when it reversed the trial court's judgment for a reason not raised by the parties); *In re G.M.*, 2012 IL App (2d) 110370, ¶ 7 (relying on *Halpin* to reverse and remand based on a reason not argued by the appellant). Because defendants' motion also sought dismissal for lack of standing under section 2-619(a)(2), we remand for further proceedings on that portion of the motion. We also vacate all of the court's remaining rulings—from June 15, 2011: the denial of plaintiff's motion to compel, the default of the Commons and the related authorization for plaintiff to appoint three board members; and from August 17, 2011: the grant of defendants' motion to reconsider or clarify and the amendment of the June 15, 2011, order to clarify it. On remand, if the trial court determines that plaintiff did not have standing to bring his complaint, all of those issues will be mooted. On the other hand, if the trial court determines that plaintiff did have standing, it can address those issues as it deems appropriate at the time. Given our disposition, we need not address plaintiff's second argument, that the trial court erred in modifying its June 15, 2011, order on defendants' motion to reconsider or clarify.

¶ 29 For the foregoing reasons, we reverse the judgment of the circuit court of Kane County dismissing plaintiff's complaint under section 2-619(a)(3) and remand the cause for further proceedings consistent with this order. All of the trial court's remaining orders are vacated. Pursuant to our supreme court's March 14, 2012, supervisory order, on remand, this case shall be consolidated into *Newman v. Fox Mill Master Homeowners Association*, No. 10-MR-593; *Newman v. Fox Mill Limited Partnership*, No. 10-L-735; *Newman Raiz, LLC v. Fox Mill Master Homeowners Association*, No. 11-L-561; and *Newman v. Fox Mill Limited Partnership*, No. 11-MR-531.

¶ 30 Reversed and remanded; all other orders vacated.