2016 IL App (1st) 143931-U

SIXTH DIVISION
SEPTEMBER 30, 2016

No. 1-14-3931

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HEARTLAND BANK AND TRUST COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	
KONSTANTINA ANTONIOU and ALL UNKNOWN OCCUPANTS,	)	No. 14 M 1706310
	)	
	)	
Defendants	)	Honorable
	)	Jerry A. Esrig,
(Konstantina Antoniou, Defendant-Appellant).	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: In this forcible entry and detainer proceeding, the trial court's order granting summary judgment and an order of possession in plaintiff's favor is affirmed, as the defendant's affirmative defenses raised no genuine issues of fact. Specifically, the affirmative defenses based on the defendant's claim that she held a "lifetime lease" entitling her to remain in the property were without merit, as the declaration submitted in support of the purported lease was barred under the doctrine of judicial estoppel. Further, the defendant's reliance upon statutory provisions regarding required presuit notice in landlord-tenant disputes was unavailing, in the absence of a landlord-tenant relationship between the plaintiff and the defendant.

¶ 2 Konstantina Antoniou (Konstantina) appeals from the entry of summary judgment in favor of plaintiff-appellee Heartland Bank and Trust Company (Heartland) in this action brought pursuant to the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq.* (West 2014)) to compel Konstantina to vacate a residential property in Western Springs, Illinois (the property). It is undisputed that Konstantina's son mortgaged the property in 2004, which resulted in a 2010 judgment of foreclosure and judicial sale of the property to Heartland's predecessor in interest. However, Konstantina avers that questions of fact remain precluding summary judgment, particularly with respect to her claimed leasehold interest in the property. For the following reasons, we find that summary judgment was warranted and affirm the trial court.

¶ 3 BACKGROUND

¶ 4 The record reflects that Konstantina is elderly, is in ill health, and for many years has resided in the subject property with her son, Konstantinos "Gus" Antoniou (Gus) as well as Kevin Tierney, who serves as her primary caretaker. Although Konstantina is the named party, her son Gus has stated that she does not understand the nature of this lawsuit and has not been involved in defending this action.

¶ 5 The parties do not dispute that Gus previously owned the property and mortgaged it in 2004 and that a foreclosure proceeding resulted in a judicial sale to the mortgagee, Western Springs National Bank (WSNB), Heartland's predecessor in interest. Konstantina, Tierney, and Gus have remained in the property since the 2010 foreclosure and sale.

¶ 6 Notably, following the 2010 mortgage, WSNB litigated a separate petition for possession against Tierney concerning the same property. In support of Tierney's defense in that proceeding, Gus submitted an affidavit stating that Tierney had leased the property from Gus

since February 2004, that the lease was not affected by the 2010 foreclosure, and that, after the 2010 foreclosure, Gus and Konstantina remained on the property as Tierney's "guests." In October 2010, the trial court in that case ruled against Tierney, finding that the evidence "belie[d] Tierney's and [Gus's] assertions that they entered into the claimed lease agreement."

¶ 7 Konstantina asserts a similar defense to the present action based on a separate purported lease from her son Gus for the same property, that she claims was not affected by the 2010 foreclosure. Specifically, Konstantina claims that in January 2002, she transferred to Gus her beneficial interest in a separate residence at 2852 North Mobile Avenue in Chicago, Illinois (the Chicago property), in consideration for her "lifetime lease" of the property, which was reduced to writing in November 2003.

¶ 8 The written lease submitted by Konstantina states:

> "This Lease is made and entered into this 10 day of November 2003, by Konstantinos D. Antoniou beneficiary and Owner (lessor) for the property known as 5221 S. Central Western Springs Illinois *** (Property) and Konstantina (Diana) Antoniou personally and including her caretakers ***.
>
> The term of the Lease shall run from this day to the day in which the lessees meet their death. The lessees shall pay a onetime total payment and consideration of Ten dollars ($10.00) to the Lessor as full and final consideration for the term of this lease. The consideration shall be paid at the time this lease is signed and witnessed. No security deposit is required per this lease."

The lease also states that it "has priority and shall at no time be subordinate, junior or inferior to a mortgage or lien on the property." Notably, the written lease makes no mention of the Chicago property that Konstantina now claims was transferred to Gus as additional consideration.

¶ 9 The subject property was subsequently mortgaged in March 2004 as security for a promissory note entered into by Gus with WSNB. The mortgage was executed in the name of a land trust of which Gus was the beneficiary, and for which WSNB served as trustee.

¶ 10 In June 2007, WSNB brought a foreclosure action on the property. Konstantina was *not* named in that foreclosure action. On October 8, 2008, a judgment of foreclosure and sale was entered in favor of WSNB, which had purchased the property at a sheriff's sale in December 2009. On March 23, 2010, the trial court approved the sheriff's report of sale and entered an order for possession of the property which directed the sheriff to evict Gus but did not mention Konstantina. On the same date, the Sheriff of Cook County issued a deed granting the property to WSNB.

¶ 11 According to an uncontroverted affidavit submitted with Heartland's complaint, WSNB was subsequently closed and the Federal Deposit Insurance Corporation (FDIC) became receiver of WSNB's assets. On or about April 8, 2011, the FDIC and Heartland entered into a purchase agreement by which Heartland acquired WSNB's assets, including the property. On July 11, 2011, the FDIC conveyed the property to Heartland through a quitclaim deed.

¶ 12 On July 12, 2011, Heartland filed the first of two forcible entry and detainer complaints against Konstantina. On May 17, 2012, Konstantina answered Heartland's complaint and asserted affirmative defenses, including that (1) the WSNB loan was subordinate to her preexisting lease; (2) Heartland had failed to provide proper notice of termination of possession; and (3) WSNB's mortgage was invalid because the land trust had improperly executed the mortgage on March 12, 2004, *before* the land trust had gained title to the property through a March 31, 2004, "Deed in Trust."

¶ 13 Heartland moved for summary judgment. At a hearing on December 31, 2013, the trial court (not the same judge who entered the order that is the subject of this appeal) indicated its belief that Konstantina was not a "tenant" but that her claimed interest was more accurately described as a "life estate." The court remarked that her "life estate, to the extent it existed, was extinguished by virtue of the foreclosure." Nevertheless, the trial court denied Heartland's motion for summary judgment because Heartland had failed to provide 90 days presuit notice to Konstantina, pursuant to the version of section 15-1701(h)(4) of the Mortgage Foreclosure Law (Foreclosure Law) then in effect. 735 ILCS 5/15-1701(h)(4) (West 2012).[1] The court thus indicated that Heartland "needs to start over after having served a 90-day notice."

¶ 14 On January 3, 2014, the court granted Heartland's motion to voluntarily dismiss the matter, without prejudice. On February 11, 2014, Heartland (through a process server) posted a "[30]-day notice to vacate" at the property demanding that Konstantina surrender possession of the property on or before March 13, 2014.

¶ 15 On March 21, 2014, Heartland filed the instant action against Konstantina. The complaint alleged that Konstantina has no valid possessory interest in the property and that Heartland is entitled to immediate possession. The complaint attached several documents, including the March 2010 sheriff's deed conveying the property to WSNB, as well as an affidavit averring that Heartland had purchased WSNB's assets from the FDIC.

[1]Prior to November 18, 2013, section 15-1701(h)(4) provided, in part, that "No mortgagee-in-possession, receiver or holder of a certificate of sale or deed, or purchaser who fails to file a supplemental petition under this subsection during the pendency of a mortgage foreclosure shall file a forcible entry and detainer action against an occupant of the mortgaged real estate until 90 days after a notice of intent to file such action has been properly served upon the occupant." 735 ILCS 5/15-171(h)(4) (West 2012).

¶ 16 Heartland was unable to serve Konstantina personally with the complaint in this action. The sheriff's office unsuccessfully attempted personal service on April 13, April 17, and April 21, 2014. On May 15, 2014, the court granted Heartland's motion to appoint a special process server, John Valle. According to Valle, he attempted to serve Konstantina at the property on June 4, 2014, and June 10, 2014, but received no response when he knocked and rang the doorbell of the property.

¶ 17 Unable to serve Konstantina personally, Heartland posted a "Notice Requiring Appearance In Pending Action" at the property pursuant to section 9-107 of the Act, which permits constructive service in lieu of personal service where a defendant is "concealed within [the] State." 735 ILCS 5/9-107 (West 2012). The notice was posted and mailed on June 19, 2014. Konstantina's attorney filed an appearance and jury demand on July 1, 2014.

¶ 18 Konstantina moved to quash service, arguing that constructive service by posting was improper because she was not "concealed within [the] State so that process cannot be served upon" her. 735 ILCS 5/9-107 (West 2012). In support, she submitted affidavits of Gus, Tierney, and two additional caretakers stating that she rarely leaves the residence and had remained in the state at all relevant times.

¶ 19 On August 19, 2014, the court held an evidentiary hearing on the motion to quash service. Tierney testified that since 2004 he had lived at the property with Konstantina and her son Gus. Tierney testified that Konstantina was in her nineties and that he is her primary caretaker. Tierney stated that Konstantina rarely leaves, is never at home alone, and that she does not answer the door. Tierney testified he probably would have been at the property on June 4 and June 10 but that he had not heard anyone knock or ring the doorbell.

¶ 20 Gus also testified that he lived at the property. He stated that his mother is "94, 95 years old" and suffers from dementia and severe hearing loss. He testified that Konstantina would not hear a doorbell. Gus testified that he was not present at the property on June 4 or 10, 2014.

¶ 21 Heartland's process server testified that he attempted service on June 4 and June 10, 2014. On the evening of June 10, he saw lights in the house and observed a silhouette walking within the house. However, no one responded after he rang the doorbell and knocked on the door. Finding the process server's testimony credible, the court denied the motion to quash service and directed Konstantina to answer the complaint.

¶ 22 On August 26, 2014, Konstantina filed her answer and affirmative defenses. Konstantina's answer admitted the 2010 foreclosure judgment and judicial sale to WSNB but denied that she was bound by that action. Konstantina's answer also pleaded she lacked sufficient information as to the truth of Heartland's allegations that it had since purchased the property pursuant to a purchase agreement with the FDIC. Her answer denied that she unlawfully withheld possession of the property or that Heartland was entitled to possession.

¶ 23 Konstantina asserted four affirmative defenses. First, she asserted that Heartland's posting of a demand for possession was invalid pursuant to section 9-211 of the Act, which permits service of a demand or notice upon a "tenant" by posting only if "no one is in the actual possession of the premises." 735 ILCS 5/9-211 (West 2014). As a second affirmative defense, Konstantina averred that the "[30-]day notice," served by Heartland on February 11, 2014, was "insufficient under Illinois and federal laws that require that ninety days be served on this defendant."

¶ 24 In a third affirmative defense, Konstantina asserted that the 2010 foreclosure had not affected her interest in the property as she had been a "tenant in possession of the Property, but

not a party to the foreclosure." In that defense she alleged that (1) she had entered into a lease with Gus granting her the right to occupy the property until her death, (2) WSNB either knew or had constructive notice that Konstantina resided there when the March 2004 loan was executed, and (3) her lease "predated and was never subordinated to the [WSNB] loan."

¶ 25 As a fourth affirmative defense, Konstantina alleged that Gus's March 2004 note and mortgage in favor of WSNB were null and void, because they were executed by Gus's land trust on March 12, 2004, yet it was not until March 31, 2004, that a deed conveyed the property into the land trust. Thus, she claimed that Heartland had no valid interest in the property.

¶ 26 On September 12, 2014, the parties submitted cross-motions for summary judgment. Konstantina moved for partial summary judgment, solely based on her first affirmative defense that Heartland's posting of a 30-day notice was improper under section 9-211 of the Act.

¶ 27 On the same date, Heartland filed a motion for summary judgment, arguing its right to possess was established, since Konstantina's answer had admitted that WSNB obtained the property following a foreclosure and failed to deny that Heartland had acquired WSNB's interest in the property. Heartland also argued that Konstantina's affirmative defenses should be disregarded because she had failed to verify them.

¶ 28 Heartland's motion for summary judgment further argued that each of the four affirmative defenses lacked merit. With respect to Konstantina's first and second affirmative defenses, Heartland urged that no presuit notice was required before filing its forcible entry and detainer action. Heartland recognized that section 9-207.5 of the Act specifies the minimum notice to be provided by the purchaser of a foreclosed property before terminating a tenant's "bona fide lease." 735 ILCS 5/9-207.5 (West 2014). However, Heartland urged that this provision did not apply because Konstantina's purported lease from Gus did not meet the

requirements of a "bona fide" lease, as set forth in section 15-1224 of the Foreclosure Law. 735 ILCS 5/15-1224 (West 2014).

¶ 29 With respect to Konstantina's third affirmative defense—that she had a valid lease superior to Heartland's interest—Heartland claimed that the existence of the lease had been resolved against her, citing the trial court's comments in Heartland's earlier forcible entry and detainer action against Konstantina, prior to Heartland's voluntary dismissal of that action. Heartland also pointed out that, in a prior proceeding by WSNB against Tierney, the trial court rejected a similar claimed lease by Gus and Tierney. Thus, Heartland claimed there was no issue of material fact that Konstantina's lease did not exist.

¶ 30 With respect to the fourth affirmative defense—that WSNB's mortgage was void because it was executed before the land trust held title to the property—Heartland's summary judgment motion argued, *inter alia*, that the mortgage was still valid pursuant to the after-acquired title doctrine under the Conveyances Act (765 ILCS 5/7 (West 2012)).

¶ 31 On September 20, 2014, Konstantina responded to Heartland's motion for summary judgment, relying primarily on a declaration by Gus regarding the supposed lease. In the declaration, Gus stated that he moved into the subject property in September 1997 "and shortly thereafter a land trust that I controlled became the legal and beneficial owner of that property."

¶ 32 Gus also declared that his parents had owned the Chicago property, that his father was deceased, and that in 1996 his mother had placed the Chicago property in a land trust, for which she was the sole beneficial owner. Gus's declaration attached a corresponding "Trust Agreement, Dated February 13 1996" (the 1996 Trust) listing the Chicago property.

¶ 33 Gus declared that in January 2002, his mother transferred her interest in the Chicago property to him, in return for his agreement to lease to her the subject property for the rest of her

life without monthly rent. Gus's declaration attached a document titled "assignment of the Beneficial Interest" dated January 3, 2002, which indicated assignment to Gus of 100% of the interest in the 1996 Trust but did specify any consideration. Gus averred that this arrangement had been reduced to writing in the November 2003 lease. Gus further declared that WSNB had known that his mother lived at the property but "never inquired" why his mother lived there.

¶ 34 The court heard oral argument on October 16, 2014. Heartland's counsel urged that there was "a complete lack of evidence" that the lease existed, other than Gus's "self-serving declaration." The court remarked that Heartland had raised questions about Gus's credibility but expressed doubt that it could determine the truth of Gus's statements in a motion for summary judgment.

¶ 35 On November 10, 2014, the trial court issued an order denying the parties' cross-motions for summary judgment, other than to grant summary judgment in favor of Heartland with respect to Konstantina's fourth affirmative defense.

¶ 36 With respect to Konstantina's claim of a leasehold interest, the court found that Gus's declaration and the purported written lease raised genuine issues of material fact. The court recognized that the written lease did not mention the supposed transfer of the Chicago property as consideration for the lease, and that in a prior action, Gus "previously produced a different competing lease" with Tierney. Nevertheless, the court found that Gus's declaration was sufficient to preclude summary judgment. The court also rejected Heartland's argument that the statements made by the trial judge regarding Konstantina's "life estate" in the earlier, voluntarily dismissed action precluded her from claiming a lease in this action.

¶ 37 In the same order, the court rejected Konstantina's claim that section 9-209 or 9-211 of the Act required presuit written demand of payment prior to filing an action, concluding that

those provisions applied only to actions for unpaid rent. However, the court reasoned that—if there was in fact a *bona fide* lease—Konstantina may have been entitled to 90 days' presuit notice under section 9-207.5 of the Act. However, the court found that "the validity and *bona fide* nature of the Lease are factual questions which cannot be resolved at the summary judgment stage."

¶ 38 The court thus granted summary judgment to Heartland only with respect to Konstantina's fourth affirmative defense. In all other respects, the court denied the parties' cross-motions for summary judgment.

¶ 39 On November 10, 2014, Heartland filed a motion to reconsider, based on its discovery of a prior affidavit by Gus contradicting his declaration in this case. Heartland stated that its counsel had "further reviewed the circuit court's extensive electronic file for 07 CH 16155," the prior action by WSNB seeking possession against Tierney, and discovered an affidavit by Gus dated April 26, 2010 (the 2010 affidavit).

¶ 40 Gus's 2010 affidavit claimed that (1) he had purchased the property in May 2001 from Tierney's mother; (2) Tierney had begun living with Gus and Konstantina "about 50% of the time" in 2003; and (3) after Tierney's mother died in 2004, Tierney (as lessee) and Gus (as lessor) entered into a lease under which Tierney paid $500 in monthly rent. Gus claimed he had disclosed Tierney's lease when he applied for a loan with WSNB in 2004 and that Tierney's lease had remained in effect, despite the 2010 foreclosure and judicial sale to WSNB.

¶ 41 In the 2010 affidavit, Gus further stated that Tierney had paid him monthly rent through March 2010, after which he told Tierney that WSNB was the "new owner" of the property. Gus averred that as of April 2010, Tierney no longer paid rent to Gus, but that "[m]y mother and I are staying at the house as [Tierney's] guests."

¶ 42 Heartland's motion to reconsider argued that Gus's 2010 statement that he and his mother were Tierney's "guests" contradicted his later declaration in this case, because Konstantina "cannot both be a guest of Kevin Tierney and a tenant under her own lease." Thus, Heartland urged that Gus's 2010 affidavit demonstrated that Konstantina's purported lease did not exist.

¶ 43 On November 24, 2014, Konstantina filed a motion to strike Heartland's motion to reconsider, which argued that Heartland failed to offer a valid reason for failing to discover Gus's 2010 affidavit prior to the summary judgment hearing. Further, she argued that Gus's 2010 affidavit did not directly contradict or deny the existence of her purported lease.

¶ 44 On the same date, Konstantina filed a "motion to excuse unverified affirmative defenses" in which she argued that her lack of verification should be excused due to her age, poor health, and "decline in cognitive acuity in recent years." In support of that motion, Gus submitted a separate declaration stating that his mother "does not understand that she is a defendant in a legal action" and "has been unable to assist in the defense of this case" due to her mental condition.

¶ 45 Also on November 24, 2014, Heartland filed an "Emergency Amended Motion to Reconsider" which contained additional legal argument and identified an additional document as "newly discovered evidence" undermining Konstantina's claimed lease. Heartland first argued that the court had "misapplied existing contract law" in considering Gus's declaration. Heartland argued that, since the written lease unambiguously stated that the sole consideration was $10, Gus's declaration that the transfer of the Chicago property had also served as consideration for the lease constituted improper extrinsic evidence of the lease's terms.

¶ 46 With respect to the 2010 affidavit, Heartland's amended motion urged that it "was not easily discoverable" because the file for the previous action in which it had been submitted was "extensive and stored in an off-site warehouse." Heartland claimed that the 2010 affidavit had

been "hiding in the middle of [a] conglomerate file" containing "several pleadings scanned together."

¶ 47 Apart from the 2010 affidavit, Heartland's amended motion to reconsider identified a second document as "newly discovered evidence": a marital settlement agreement that formed part of a July 2007 judgment for dissolution of marriage for Gus and his former spouse (the MSA). Within an article of the MSA describing Gus's real estate holdings, Gus had represented that "he has no current interest and that he has never had an interest [in] 2852 N. Mobile, Chicago, IL," the Chicago property. Thus, Gus had represented that he had no interest in the same property that he later claimed was conveyed to him by Konstantina as consideration for her lifetime lease. Heartland urged that, in light of Gus's prior inconsistent positions, his declaration in this case was barred by the doctrine of judicial estoppel.

¶ 48 On November 25, 2014, the court heard oral argument on Heartland's motion to reconsider. Konstantina's counsel argued that the motion should be denied since the new evidence relied upon by Heartland could have been raised in the summary judgment hearing.

¶ 49 Heartland's counsel argued that the court should apply judicial estoppel to Konstantina's claim of a lease to the subject property, in light of Gus's conflicting statements in the 2010 affidavit and MSA. Heartland argued that it would be improper to have a trial at which Gus would testify about the purported lease, and then be cross-examined about the conflicting statements from the 2010 affidavit and the MSA. Heartland urged that this would be problematic because "it takes it from being a simple credibility issue to putting it before the jury for them to decide when he was lying." Arguing that the purpose of judicial estoppel is to "prevent[ ] litigants from deliberate[ly] shifting positions to suit the exigencies of the moment," Heartland claimed that Gus was engaging in such behavior.

¶ 50 The trial court repeatedly asked Konstantina's counsel how Gus's prior statements could be reconciled with his declaration in this proceeding. With respect to the 2010 affidavit's statement that he and his mother were in the house as Tierney's "guests," Konstantina's counsel argued it was "not a direct contradiction" of the existence of the lease and may have merely reflected Gus's "opinion on his possessory interest at that time." However, the court remarked that the "guest" statement directly contradicted Konstantina's position that she had a lease for the property.

¶ 51 When the court proceeded to ask Konstantina's counsel how Gus's statement in the MSA regarding the Chicago property did not contradict his declaration in this case, counsel requested the opportunity to prepare a written response. The court asked "how having more time [to respond] is going to reconcile that statement with the statements he's made in this courtroom"? Konstantina's counsel responded: "I don't know that it would, but I submit that statement is incorrect, and we have provided documentary evidence of his interest" in the Chicago property.

¶ 52 At that point, the trial court remarked that it had previously denied summary judgment "with some reluctance because I felt that Gus was very, very close to the line in the way in which he's treated the Court in t[his] series of cases" but that the 2010 affidavit and MSA "now convince me that he has crossed over that line."

¶ 53 The court recognized that "where there are legitimate questions of fact, *** that it's up to the jury to decide" but found that "in this case that line has been crossed." The court stated that it would not permit Gus "to go to a jury having submitted affidavits which are clearly contrary and cannot be reconciled with the position he's taken in this court." The court further remarked that it would not allow Gus to continue "playing fast and loose with the Court."

¶ 54 Thus, after noting that Heartland's counsel "has explained adequately to me why he did not have that evidence at the time" of the initial summary judgment hearing, the trial court granted the motion to reconsider on November 25, 2014. At the same time, the court entered summary judgment in favor of Heartland and entered a corresponding order of possession.

¶ 55 On December 23, 2014, Konstantina filed her notice of appeal from "the rulings made by the trial court on November 25, 2014." The notice of appeal also sought review of the court's August 2014 order denying her motion to quash service of process.

¶ 56 ANALYSIS

¶ 57 We note that we have jurisdiction pursuant to Illinois Supreme Court Rule 303(a) because Konstantina filed a timely notice of appeal from a final judgment of the circuit court. Ill. S. Ct. R. 303(a) (eff. Jan. 1, 2015).

¶ 58 On appeal, Konstantina makes separate arguments regarding the motion to reconsider and the entry of summary judgment.[2] First, she urges that the motion to reconsider should have been denied because Heartland did not set forth a sufficient excuse for not having presented the "newly discovered evidence" earlier. She also argues that she should have been given another opportunity to submit a written response to the motion to reconsider.

¶ 59 Separately, Konstantina urges that summary judgment should have not been granted because there were genuine issues of fact pertaining to her first three affirmative defenses[3]: (1)

[2]Notably, despite its inclusion in her notice of appeal, Konstantina's appellate briefing does not make any argument regarding the denial of the motion to quash service. Thus, her challenge to that order is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

[3]Konstantina's initial appellate brief also argued the merits of her fourth affirmative defense, which claimed that WSNB's mortgage was invalid because Gus's land trust did not acquire title until after execution of the mortgage. However, her reply brief states that she has "elected to withdraw" the argument, as our court has already rejected it in the context of a

that her leasehold interest was superior to Heartland's interest in the property; (2) that her *bona fide* lease entitled her to receive 90 days of presuit notice pursuant to section 9-207.5 of the Act (735 ILCS 5/9-207.5 (West 2012)); and (3) that Heartland's service of the 30-day notice by posting was improper, pursuant to section 9-211 of the Act. 735 ILCS 5/9-211 (West 2012).

¶ 60 We first address the motion to reconsider. "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the hearing, changes in the law, or errors in the court's previous application of existing law." *Emrikson v. Morfin*, 2012 IL App (1st) 111867, ¶ 29. " 'Newly discovered evidence' is evidence that was not available prior to the hearing. [Citation.] In the absence of a reasonable explanation regarding why the evidence was not available at the time of the original hearing, the circuit court is under no obligation to consider it. [Citation.]" *Id.* ¶ 30.

¶ 61 Where, as here, new matters were raised in a motion to reconsider, we review the trial court's ruling on the motion for an abuse of discretion. "A ruling on a motion to reconsider is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 347 (2002). "A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view." (Internal quotation marks omitted.) *Emrikson*, 2012 IL App (1st) 111687, ¶ 14.

¶ 62 Notably, in asserting that the court's grant of the motion to reconsider was an abuse of discretion, Konstantina's opening brief makes no mention whatsoever of the MSA. Thus, to the

---

separate action to quiet title initiated by Gus. See *Antoniou v. Heartland Bank & Trust Co.*, 2015 IL App (1st) 150015-U, ¶ 24 (holding that any defect caused by execution of the mortgage prior to transfer of title was cured by the "after-acquired-title doctrine," codified in section 7 of the Conveyances Act (765 ILCS 5/7 (West 2012))).

extent the motion to reconsider was based on the submission of the MSA, her argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 63 Limiting her argument to the 2010 affidavit, Konstantina urges that Heartland did not offer a "reasonable explanation" as to why it did not bring that document to the court's attention earlier. She contends that Heartland's failure to discover the 2010 affidavit within the "extensive" electronic file for the prior litigation is insufficient, and that we should not permit a party to wait until after a summary judgment hearing to search for "newly discovered" evidence.

¶ 64 We recognize that Heartland did not claim that it was physically impossible for it to have located the 2010 affidavit at an earlier time. Rather, Heartland essentially conceded that it had not thoroughly reviewed the "extensive" file in the prior litigation prior to the initial hearing on its motion for summary judgment. Nonetheless, given our deferential standard of review, we cannot say the trial court abused its discretion in accepting Heartland's explanation and permitting it to submit the 2010 affidavit in its motion to reconsider. Our case law requires only "a reasonable explanation regarding why the evidence was not available at the time of the original hearing." *Emrikson*, 2012 IL App (1st) 111687, ¶ 30. Heartland painted a picture of voluminous files stored offsite in which it suggested that the document was misfiled in the middle of an unrelated section of the file. We cannot say that no reasonable trial court would agree that Heartland had offered an adequate explanation as to why it had not previously discovered the document. Thus, we decline to find that the court abused its discretion in granting Heartland's motion to reconsider.

¶ 65 Similarly, we decline to find that the court erred in denying Konstantina's counsel's request for an additional opportunity to respond in writing to that specific issue raised during the motion to reconsider. We have recognized that "it [is] well within the circuit court's discretion

to grant or withhold permission regarding a briefing schedule." *TIG Insurance Co. v. Canel*, 389 Ill. App. 3d 366, 375 (2009). We cannot say that the trial court abused its discretion in this instance.

¶ 66 Konstantina's brief suggests, erroneously, that she was given no opportunity at all to respond in writing to the motion to reconsider. However, in response to Heartland's original motion to reconsider, Konstantina submitted a motion to strike that opposed the court's consideration of the 2010 affidavit. The record reveals that it was the specific question regarding Gus's inconsistent positions with respect to the MSA for which counsel sought leave for a written response when questioned by the court during oral argument on the motion to reconsider.

¶ 67 Konstantina did not file any written response to the *amended* motion to reconsider (filed November 24), which first identified the MSA. It was only during the November 25, 2014, oral argument, after the trial court pressed Konstantina's counsel as to how Gus's prior statements could be reconciled with his declaration, that her counsel asked for a further opportunity to submit a written response. Moreover, Konstantina's counsel acknowledged that, even if allowed that opportunity, the written response might not be able to reconcile Gus's past statements.

¶ 68 We acknowledge that the MSA was not brought to the court's attention until the amended motion to reconsider, filed only one day prior to oral argument. However, as noted above, even on appeal, Konstantina's opening brief[4] makes no specific argument regarding the MSA. Under these circumstances, we do not find that the trial court abused its discretion in declining

[4]Konstantina's reply makes brief references to Gus's statement in the MSA regarding his lack of interest in the Chicago property. However, as the MSA was not discussed in her opening brief, her arguments regarding the MSA are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

Konstantina's request for an additional written submission in order to respond to the court's specific inquiry regarding the MSA.

¶ 69 Having concluded that the motion to reconsider was properly allowed, we turn to consideration of summary judgment. Konstantina contends that summary judgment should not have been granted because genuine issues of material fact remained with respect to three of her affirmative defenses: (1) that she "has a valid, *bona fide* lease that is superior to Heartland's mortgage"; (2) that, as "a *bona fide* lessee, she was entitled to a 90-day [presuit] notice but only received a 30-day notice"; and (3) that "service of process by posting on the door of the subject property was impermissible" under the Act.

¶ 70 Her first two arguments depend upon her claimed lease. She argues that Gus's declaration in this case, describing the purported exchange of her interest in the Chicago property for her lifetime lease at the subject property, creates an issue of fact as to the existence of the lease that must be resolved by a jury.

¶ 71 We again note that Konstantina's opening appellate brief fails to address the MSA, and erroneously claims that the trial court relied *only* on the 2010 affidavit in entering summary judgment. Thus, she claims that the court's ruling "hinged on a single statement in Gus's affidavit, *** that Gus and [Konstantina] were residing in the property as 'guests,' " and that the court used this "isolated statement as definitive evidence contradicting the authenticity of [her] lease."

¶ 72 She argues that although the 2010 affidavit might be conflicting evidence, it was not *conclusive* evidence that the lease did not exist. Rather, she argues that it "served only to create more tension between the parties' positions and, if anything, further justified a trial by jury." Thus, she argues that the trial court erred by finding that the "guests" statement precluded the

existence of her claimed lease. Surprisingly, her opening brief makes no mention of the doctrine of judicial estoppel, notwithstanding Heartland's reliance on that doctrine in the trial court, and her reply brief also fails to respond to the judicial estoppel argument raised in Heartland's brief.

¶ 73 In our view, Konstantina's appellate argument misconstrues the reasoning of the trial court in entering summary judgment. That is, the trial court did not make a *factual finding* that the claimed lease did not exist. Rather, the court indicated that its ruling was based on the policy underlying judicial estoppel. The court found that Gus was "playing fast and loose with the Court" and should not be permitted to maintain inconsistent positions in multiple actions. Although the trial court did not use the specific phrase "judicial estoppel," it is clear to us from the context and substance of the court's statement that the trial court was invoking that doctrine, as it had been urged to do by Heartland's counsel in seeking to strike consideration of Gus's declaration.

¶ 74 Thus, the trial court found that Gus was estopped from asserting the existence of the lease. This is *not* the same as making a factual finding, as "[t]he court's concern under the doctrine of judicial estoppel is with inconsistent positions taken by the plaintiffs, *not with the truthfulness of either position.*" (Emphasis added.) *Smeilis v. Lipkis*, 2012 IL App (1st) 103385, ¶ 53; *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996) ("judicial estoppel precludes a contradictory position without examining the truth of either statement"). In other words, the trial court need not have decided whether Gus's declaration was truthful in order to apply the doctrine.

¶ 75 We agree that judicial estoppel was properly invoked in this case. "Judicial estoppel is an equitable doctrine invoked by the court at its discretion" the purpose of which "is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions

according to the exigencies of the moment. [Citation.] Judicial estoppel applies *** when litigants take a position, benefit from that position, and then seek to take a contrary position in a later proceeding." (Internal quotation marks omitted.) *Seymour v. Collins*, 2015 IL 118432, ¶ 36.

¶ 76 The doctrine "is flexible and not reducible to a pat formula. [Citation.] Not every requirement *** will necessarily apply under the circumstances of a particular case. [Citation.] This is especially true when strict application of a requirement would frustrate the public policy underlying the application of the doctrine." *Smeilis*, 2012 IL App (1st) 103385, ¶ 46.

¶ 77 Our supreme court "has identified five prerequisites as 'generally required' before a court may invoke the doctrine of judicial estoppel. The party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some benefit from it. [Citations.]" *Seymour*, 2015 IL 118432, ¶ 37. Judicial estoppel "must be proved by clear and convincing evidence" as this "evidentiary standard properly accounts for a degree of caution with which this doctrine should be considered and applied." (Internal quotation marks omitted.) *Id.* ¶ 39.

¶ 78 In *Seymour*, our supreme court recognized that generally, exercises of discretion are reviewed under a deferential abuse of discretion standard. *Id.* ¶ 41. However, the supreme court reasoned that when judicial estoppel results in the dismissal of a case, the nondeferential *de novo* standard of review should apply: "[W]here a trial court has exercised its discretion in the application of judicial estoppel, we review for abuse of discretion. However, where the exercise of that discretion results in the termination of the litigation *** via the procedural mechanism of

a motion for summary judgment, it follows, as well, that we review that ruling *de novo*." *Id.* ¶¶ 48-49.

¶ 79 Thus, we review *de novo* the application of judicial estoppel in this case, keeping in mind that judicial estoppel is flexible, and "not every requirement *** will necessarily apply under the circumstances of a particular case." *Smeilis*, 2012 IL App (1st) 103385, ¶ 46. We conclude that judicial estoppel was appropriately applied in this case in light of both the 2010 affidavit and the MSA. Each of those documents established that Gus, in prior proceedings, had taken a position that contradicted his declaration in this case regarding Konstantina's lease.

¶ 80 Specifically, as recognized by the trial court (1) Gus's statement in the 2010 affidavit that his mother remained in the property as a "guest" of Tierney conflicted with Gus's claim in this case that Konstantina occupied the property under her own lifetime lease and (2) Gus's representation in the MSA that he never owned any interest in the Chicago property directly contradicts his declaration in this case that he received the Chicago property as consideration for his mother's lease. We easily find that the first four of the five "prerequisites" to judicial estoppel identified in *Seymour* apply, as Gus had "(1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial proceedings, [and] (4) intending for the trier of fact to accept the truth of the facts alleged." 2015 IL 118432, ¶ 47.

¶ 81 We recognize that the fifth general requirement—that the party to be estopped has "succeeded in the first proceeding and received some benefit from it" (*id.*) does not apply to the 2010 affidavit. Gus submitted the 2010 affidavit in support of Tierney's ultimately *unsuccessful* defense of an action by WSNB against Tierney for possession of the property.

¶ 82 However, with respect to the MSA, we find that the "benefit" requirement was satisfied. Our court has held that a settlement in a prior proceeding may demonstrate a "benefit"

supporting application of judicial estoppel. *Smeilis*, 2012 IL App (1st) 103385. In *Smeilis*, our court held that judicial estoppel barred the plaintiffs' medical malpractice complaint against a treating physician, where the plaintiffs had previously obtained a settlement against other defendants for the same injury, premised on a conflicting causation theory.

¶ 83 Our court specifically rejected the plaintiffs' argument that, in order to demonstrate that the settlement was a "benefit" to support judicial estoppel, there must be a showing that the settlement resulted from the inconsistent expert opinion in the prior action. *Id.* ¶ 51. Our court noted that "the plaintiffs do not cite a single case that hold[s] that an evidentiary link must be proved between the undeniable benefit the plaintiffs received and the acknowledged inconsistent opinion." *Id.* ¶ 53.

¶ 84 Further, *Smeilis* noted that in a prior decision of our court, "judicial estoppel was applied even in the absence of a concrete benefit to the party that was estopped." *Id.* ¶ 54 (citing *Bidani v. Lewis*, 285 Ill. App. 3d 545, 547 (1996)). In *Bidani*, we held that judicial estoppel warranted dismissal of a physician's complaint asserting ownership interests in certain companies, where the physician had previously disavowed any interest in those companies in the course of settling his divorce action. *Bidani*, 285 Ill. App. 3d at 554.

¶ 85 Accordingly, we conclude that the entry of Gus's divorce settlement satisfied the "benefit" requirement for application of judicial estoppel. Gus's representation that he had no interest in the Chicago property was made in the context of an agreement deciding the division of marital property. We can infer that the representation had some relevance to the parties' agreement and that Gus benefitted from it. Thus, we find that all five "generally required" prerequisites for judicial estoppel (*Seymour*, 2015 IL 118432, ¶ 37) are met, at least with respect to the MSA. Further, we note that the absence of a benefit to Gus derived from the 2010

affidavit would not necessarily preclude application of judicial estoppel, given our recognition of the flexibility of the doctrine. See *Smeilis*, 2012 IL App (1st) 103385, ¶ 46.

¶ 86 In applying judicial estoppel in this case, we recognize the potential concern that, although the prior statements were made by Gus, his mother Konstantina, as the named defendant in this case, would be bound by such statements. However, under the facts of this case, it is clear that Gus and Konstantina's interests are aligned and so intermingled as to be one and the same, and further that Gus is the real party in interest in this case.

¶ 87 Although not named as a party, it is clear that Gus is defending the case not only as his mother's son but in his own interest as an occupant of the property. By his own testimony in court, he continues to live at the property with his mother and Tierney, notwithstanding that his interest in the property was previously foreclosed. In this regard, his position in this case mirrors WSNB's action against Tierney, in which Gus admitted that he had lost ownership through foreclosure but maintained that he and his mother were entitled to remain at the property as Tierney's "guests," pursuant to another purported lease that he claimed was unaffected by the foreclosure.

¶ 88 Moreover, although Konstantina is nominally the party, it is abundantly clear that Gus is directing the defense of this action. Konstantina's affirmative defenses depend on Gus's declaration, and she has not submitted her own testimony. This is not surprising, as Gus has stated that Konstantina does not comprehend the nature of this lawsuit and that she has taken no part in defending this action. It is clear that Gus has controlled the defense of this action from the beginning, including her claim of the purported lease. Under these circumstances, we have no difficulty applying judicial estoppel in this action based on Gus's prior inconsistent statements.

¶ 89 Having taken the position that he never had an interest in the Chicago property, Gus was estopped from thereafter claiming that he received that property as consideration for the purported lease. Similarly, having submitted an affidavit in 2010 that he and Konstantina occupied the property as "guests" of Tierney, Gus was estopped from asserting that Konstantina had a lifetime lease. Thus, we agree that judicial estoppel precluded Konstantina's first affirmative defense, premised on the existence of that lease.

¶ 90 Similarly, judicial estoppel bars Konstantina's second affirmative defense, which asserted that she was entitled to 90 days' presuit notice. Konstantina relies on section 9-207.5(a) of the Act, entitled "Termination of bona fide leases in residential real estate in foreclosure," which provides:

> "A mortgagee, receiver, holder of the certificate of sale, *** who assumes control of the residential real estate in foreclosure ***, may terminate a bona fide lease, as defined in Section 15-1224 of this Code, only: (i) at the end of the term of the bona fide lease, by no less than 90 days' written notice or (ii) in the case of a bona fide lease that is for a month-to-month or week-to-week term, by no less than 90 days' written notice." 735 ILCS 5/9-207.5(a) (West 2014).

¶ 91 Thus, only a holder of a *bona fide* lease is entitled to such notice. Under section 15-1224 of the Foreclosure Law, the requirements of a *bona fide* lease include that "(1) the mortgagor or the child, spouse, or parent of the mortgagor is not the tenant; (2) the lease was the result of an arms-length transaction"; and "(3) the lease requires the receipt of rent that is not substantially less than fair market rent for the property." 735 ILCS 5/15-1224(a) (West 2014). Section 15-

1224(e) provides that "Notwithstanding paragraph (1) of subsection (a) of this Section, a child, spouse, or parent of the mortgagor may prove by a preponderance of evidence that a written or oral lease that otherwise meets the requirements of subsection (a) of this Section is a bona fide lease." 735 ILCS 5/15-1224(e) (West 2014).

¶ 92 Although Konstantina's purported lease was clearly between the mortgagor (Gus) and his parent (Konstantina), she urges that she could prove that her lease otherwise meets the requirements of a *bona fide* lease. That is, she argues that the value of the Chicago property supposedly transferred as consideration for the lease "was greater than the fair market rental value" for the property and that "the bargain was pursuant to an arm's length transaction."

¶ 93 Konstantina's defense fails in light of our conclusion that she is estopped from relying on Gus's declaration to assert that her lease was premised on the purported transfer of her interest in the Chicago property. Absent that purported consideration (which was mentioned nowhere in the written lease), the sole consideration for the lifetime lease stated in the document is the sum of $10.[5] Clearly, $10 would not constitute "fair market rent for [the lifetime lease of] the property." 735 ILCS 5/15-1224(a)(3) (West 2014). Moreover, we can hardly say that such a lease qualifies as an "arms-length transaction." 735 ILCS 5/15-1224(a)(2) (West 2014). Having been estopped from relying on Gus's declaration, Konstantina has presented no evidence to establish a *bona fide* lease which meets the requirements of section 15-1224. Therefore, the presuit notice provisions of section 9-207.5(a) of the Act are plainly inapplicable.

[5]In light of our conclusion that judicial estoppel applied to bar consideration of Gus's declaration, we need not address Heartland's separate contract law argument that Gus's declaration could not be considered because it was extrinsic evidence offered to vary the terms of the lease.

¶ 94 Nevertheless, Konstantina further argues that "even if section 5/9-207.5 does not apply, [she] was entitled to proper service of the 30-day notice required by section 5/9-207(b)." That section, entitled "notice to terminate tenancy for less than a year," provides that:

> "Except as provided in Section 9-207.5 of this Code, in all cases of tenancy for any term less than one year *** where the tenant holds over without special agreement, the landlord may terminate the tenancy by 30 days' notice, in writing, and may maintain an action for forcible entry and detainer or ejectment." 735 ILCS 5/9-207(b) (West 2014).

¶ 95 That section is inapplicable on its face, as it applies to "all cases of tenancy *for any term less than one year*," whereas Konstantina claimed a lease with a lifetime term. (Emphasis added.) *Id.* Moreover, the provision refers to service by the "landlord" and is contained in Part 2 of the Act, which expressly governs "Recovery of Rent" and "Termination of Certain Tenancies." 735 ILCS 5/9-201 *et seq.* (West 2014). However, Heartland has never asserted that it is Konstantina's "landlord" nor has it sought to recover rent from Konstantina.

¶ 96 Konstantina further asserts that even if the Act did not otherwise require Heartland to provide her presuit notice, "Heartland bound itself to the service requirements of the statute" by posting a 30-day notice at the property. Konstantina relies on *Avdich v. Kleinert*, 69 Ill. 2d 1 (1977) but that case is clearly inapplicable. *Avdich* was a landlord-tenant dispute in which the parties' lease had contained a provision expressly waiving the landlord's statutory obligation to serve a 5-day notice before terminating the tenancy. Notwithstanding that lease provision, the landlord elected to serve a "statutory five-day notice." *Id.* at 7. Our court held that, by serving that statutory notice, the landlord "waived his right to declare the lease terminated until the five-

day period had expired." *Id.* at 9. *Avdich* is clearly distinguishable from this case, as there is no claimed landlord-tenant relationship between Heartland and Konstantina. See *North American Old Roman Catholic Church v. Bernadette*, 253 Ill. App. 3d 278, 294 (1992) (finding *Avdich* distinguishable where the parties were not in a landlord-tenant relationship). *Avdich* simply does not suggest, and we decline to hold, that a plaintiff that is *not* a landlord binds itself to landlord-tenant notice requirements by providing a written notice to vacate. Accordingly, we find that Konstantina's second affirmative defense lacks merit.

¶ 97 We similarly find no merit in Konstantina's third affirmative defense, which claims that Heartland violated section 9-211 of the Act by posting a demand for possession at the residence. Section 9-211, concerning "service of demand or notice," provides:

> "Any demand may be made or notice served by delivering a written or printed *** copy thereof to the tenant, or by leaving the same with some person ***, residing on or in possession of the premises; or by sending a copy of the notice to the tenant by certified or registered mail ***; *and in case no one is in the actual possession of the premises*, then by posting the same on the premises." (Emphasis added.) 735 ILCS 5/9-211 (West 2014).

Konstantina argues that Heartland violated this provision by posting a 30-day notice to vacate on the front door of the property, when she remained in "actual possession of the premises."

¶ 98 However, just as she improperly relied on the other landlord-tenant notice provisions of sections 9-207 and 9-207.5, Konstantina's reliance on section 9-211 is flawed, as it is contained within Part 2 of the Act, which applies to actions for "Recovery of Rent" and "Termination of

Certain Tenancies." 735 ILCS 5/9-201 *et seq.* (West 2014). This statutory provision is plainly inapplicable to the facts and circumstances of this case, as it specifies the manner of service upon the "tenant." 735 ILCS 5/9-211 (West 2014). As we have noted, Heartland has never alleged (and there is nothing in the record to suggest) that Heartland was Konstantina's landlord or sought to recover rent from her. Rather, Heartland's position has simply been that Konstantina has impermissibly failed to vacate its property. As section 9-211 of the Act is inapplicable, her corresponding affirmative defense is meritless.

¶ 99 We thus conclude that Konstantina raised no genuine issues of fact with respect to any of the affirmative defenses. Further, the uncontested allegations in Heartland's complaint and supporting affidavit established that Heartland owned the property and was entitled to possession. Thus, the trial court's entry of summary judgment in favor of Heartland was properly granted, as was the corresponding order of possession in favor of Heartland.

¶ 100 For the foregoing reasons, we affirm the circuit court of Cook County.

¶ 101 Affirmed.