2017 IL App (1st) 162159-U

No. 1-16-2159

Fifth Division
August 25, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

FEDERAL HOME LOAN MORTGAGE CORPORATION, Plaintiff-Appellee, v. MAGDALENA TWAROWSKI, KATARZYNA TWAROWSKA, and CZESLAW KROL, Defendants (Magdalena Twarowksi, Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County. No. 15 M1 723922 The Honorable Deborah J. Gubin, Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's grant of summary judgment and order of possession in favor of the plaintiff is reversed where there is a question of fact as to whether plaintiff prematurely terminated a *bona fide* lease on the subject property.

¶ 2 The instant appeal arises from the trial court's grant of a motion for summary judgment and entry of an order of possession in favor of plaintiff Federal Home Loan Mortgage

Corporation. Defendant Magdalena Twarowski appeals *pro se*, arguing that the trial court erred in granting summary judgment in plaintiff's favor. For the reasons that follow, we reverse.

¶ 3 BACKGROUND

¶ 4 On November 30, 2015, plaintiff filed a forcible entry and detainer complaint against defendant and two others,[1] alleging that plaintiff was entitled to possession of a single family home in Palatine, Illinois, that was unlawfully being occupied by them. The complaint alleged that plaintiff became the owner of the property after it had been the subject of a judicial sale in a different case, and attached as an exhibit the order approving the sale and the judicial deed granting the property to plaintiff. The complaint further alleged that plaintiff had served a 90-day notice to terminate tenancy on all of the defendants and sought the entry of an order of possession. The complaint attached as an exhibit the notices served on the defendants, which stated that "[p]ursuant to 735 ILCS 5/9-207.5(a), Federal Home Loan Mortgage Corporation is terminating your tenancy and this is your notice to vacate and surrender possession of the property to Federal Home Loan Mortgage Corporation no later than at least ninety (90) days from the date you receive service of this notice or upon the expiration of your Bona Fide lease, whichever is longer." The matter was set for trial on December 23, 2015.

¶ 5 On December 22, 2015, defendant filed a *pro se* appearance.

¶ 6 On December 23, 2015, the trial court entered an *ex parte* order of possession in favor of plaintiff, finding that plaintiff was entitled to the possession of the property.

[1] The two others are not parties to the instant appeal. When referring to the three defendants, we use the plural "defendants." When referring to defendant-appellee Magdalena Twarowski, we use the singular "defendant."

¶ 7 On January 6, 2016, counsel filed an "amended additional appearance" on behalf of all three defendants. On the same day, counsel filed a motion to vacate the *ex parte* order of possession, claiming that counsel had not appeared in court for trial because the matter had not been placed in counsel's calendar "[d]ue to a docketing error." On January 15, 2016, the trial court granted the motion and vacated the *ex parte* order of possession.

¶ 8 On February 1, 2016, plaintiff filed a motion for summary judgment. The motion claimed that defendants failed to file an answer to the complaint and had presented no counteraffidavits or supporting documents that would demonstrate that they had a superior interest in the property so as to create a genuine issue of material fact.

¶ 9 On February 11, 2016, defendants filed a response to the motion for summary judgment, which appears to have been drafted by defendant *pro se*. The response admitted that defendants had been served a 90-day notice, but argued that "[d]efendants have had [a] Bona Fide lease for over seven (7) years and Defendants[']s present lease does not expire until September 2017." Thus, defendants claimed that "[d]efendants have demonstrated their rights to possess the subject property." The response claims that it is "supported by affidavit," but no affidavit appears in the record on appeal. On the same day the response was filed, defendants also filed a request for "additional time to file [a] supporting affidavit and documents supporting" defendants' response.

¶ 10 On February 25, 2016, the trial court entered an order granting defendants additional time to file a response to plaintiff's motion for summary judgment. On February 26, 2016, defendants, through counsel, filed a response to the motion for summary judgment. The response claimed that defendants have lived at the property since at least August 2008, when they signed a 10-year lease that would expire in August 2018. During the course of the

tenancy, the property became subject to foreclosure and was ultimately acquired by plaintiff. The response claimed that there was a genuine issue of material fact as to whether plaintiff had prematurely terminated defendants' lease.

¶ 11 The response claimed that defendants' grandmother had entered into a 10-year lease agreement with the former owner of the property on behalf of defendants, who were minors at the time, in order to permit defendants to occupy the property until they had completed their schooling. The response argued that this lease was a *bona fide* lease, as it was an arms' length transaction, was not substantially less than the fair market rent for the property, and was entered into before the date of the filing of the foreclosure action. Accordingly, the response claimed that plaintiff prematurely terminated the lease by serving the 90-day notice prior to August 2018.

¶ 12 The response references an attached "Exhibit A," which purports to be defendant's affidavit. However, the record on appeal contains no attachment.

¶ 13 On March 2, 2016, defendants' counsel filed a motion to withdraw, claiming that she had been terminated by defendants on March 1, 2016.

¶ 14 On March 11, 2016, defendants filed a *pro se* "amended response to plaintiff's motion for summary judgment." The response appears to be almost identical to the response filed by counsel, other than the fact that the "amended response" contained defendant's affidavit as "Exhibit A." The affidavit states that defendant has lived in the property nearly her entire life, and that her grandmother had signed a 10-year lease agreement so that defendant and her sister could finish school while living at the property. The affidavit states that a copy of the lease is attached as "exhibit B." Exhibit B is a one-page lease agreement between Bozena Siedlecka, the landlord, and Alina Jaskowiak, Katarzyna Twarowska, and defendant as

tenants. It is dated August 1, 2008, and states that it has a lease term from that date until July 31, 2018.

¶ 15 The record on appeal then contains a letter from defendant to the trial court, filed March 11, 2016. The letter states that "[o]n February 11th 2016,[2] I filed my own Response to Plaintiff's Motion for Summary Judgment because my attorney *** refused to file a response to Plaintiff's Motion [for] Summary Judgment." The letter then attaches a copy of the *pro se* response filed by defendant on February 11, 2016.

¶ 16 On April 15, 2016, the trial court granted defendants' counsel leave to withdraw and gave defendants until May 6, 2016, to file an appearance through new counsel or *pro se*. The trial court also granted defendants until June 3, 2016, to file a response to plaintiff's motion for summary judgment.

¶ 17 On June 23, 2016, defendants filed a *pro se* motion to dismiss[3] pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). The motion claimed that plaintiff is a third-party debt collector and that defendants do not owe plaintiff any debt. The motion further claimed that, "in an attempt to collect a debt," on March 2, 2016, plaintiff propounded discovery requests on defendants, including a set of interrogatories, requests to admit, and requests for production of documents, in violation of the federal Fair Debt Collection Practices Act (FDCPA) (15 U.S.C. § 1692 *et seq.* (2014)). The motion additionally claimed that on March 15, 2016, defendants sent plaintiff a "request to Plaintiff to Validate the Alleged Debt," to which plaintiff never responded; the letter was attached as

[2] We note that defendant, in fact, filed two *pro se* responses to the motion for summary judgment, one on February 11, 2016, and one on March 11, 2016.

[3] The *pro se* motion, at different points, requested dismissal of "plaintiff's summary judgement [*sic*]" and "Plaintiff's claims in its [*sic*] entirety." In her *pro se* brief on appeal, defendant again claims that the motion was a "motion to dismiss Plaintiff's motion for summary judgment." Section 2-615, however, is applicable only to pleadings, not to motions. See 735 ILCS 5/2-615 (West 2014).

an exhibit to the motion. The motion claimed that this lack of response was also a violation of the FDCPA and that these violations of the FDCPA mandated dismissal. The motion also claimed that dismissal was required because "affirmative defenses exist that defeat the Plaintiff's claims."

¶ 18 On July 1, 2016, the trial court entered an order finding that plaintiff was entitled to the possession of the property and ordering defendants evicted from the property. This appeal follows.

¶ 19 ANALYSIS

¶ 20 On appeal, defendant claims that the trial court erred in granting plaintiff's motion for summary judgment and entering an order of possession. As an initial matter, plaintiff asks us to strike defendant's brief and affirm the trial court's judgment because "it amounts to conclusory assertions without analysis and invites this Court to review the record itself to find error." As plaintiff notes, " '[a] reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository into which the appealing party may dump the burden of argument and research.' " *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) (quoting *People v. Hood*, 210 Ill. App. 3d 743, 746 (1991)). Defendant's *pro se* status does not relieve her of her burden of complying with this court's rules concerning the contents of briefs. *Oruta v. B.E.W. & Continental*, 2016 IL App (1st) 152735, ¶ 30. Here, however, we understand the issues raised in defendant's brief, so we choose not to strike it. Accordingly, we proceed to the merits of defendant's arguments on appeal.

¶ 21 A trial court is permitted to grant summary judgment only "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law." 735 ILCS 5/2-1005(c) (West 2014). The trial court must view these documents and exhibits in the light most favorable to the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). We review a trial court's decision to grant a motion for summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 22 "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp.*, 154 Ill. 2d at 102. However, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). The party moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624 (2007). The movant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing " 'that there is an absence of evidence to support the nonmoving party's case.' " *Nedzvekas*, 374 Ill. App. 3d at 624 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). " 'The purpose of summary judgment is not to try an issue of fact but *** to determine whether a triable issue of fact exists.' " *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 708 (2002) (quoting *Luu v. Kim*, 323 Ill. App. 3d 946, 952 (2001)). We may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Ray Dancer, Inc. v. DMC Corp.*, 230 Ill. App. 3d 40, 50 (1992).

¶ 23 In the case at bar, defendant claims that the trial court erred in granting plaintiff's motion for summary judgment because she had a *bona fide* lease and because plaintiff violated the

FDCPA. Prior to considering the propriety of the grant of the motion for summary judgment, we must first determine what filings were properly before the trial court and, therefore, may be considered by this court on appeal. In the case at bar, after plaintiff filed its motion for summary judgment, defendant filed a *pro se* response to the motion on February 11, 2016. On February 25, 2016, the trial court entered an order granting defendants additional time to file a response to the motion for summary judgment, which defendants did, through counsel, the next day. On March 2, 2016, defendants' counsel filed a motion to withdraw, claiming that she had been terminated by defendants on March 1, 2016. On March 11, 2016, prior to the order granting counsel leave to withdraw, defendant filed a *pro se* "amended response to plaintiff's motion for summary judgment." The trial court granted counsel leave to withdraw on April 15, 2016, and gave defendants until June 3, 2016, to file a response to the motion for summary judgment. On June 23, 2016, defendant filed a *pro se* "motion to dismiss."

¶ 24 According to plaintiff, we should treat defendant's "motion to dismiss" as the response to the motion for summary judgment and should not consider defendant's March 11 "amended response to plaintiff's motion for summary judgment" because it was filed prior to the trial court granting defendants' counsel leave to withdraw. Generally, hybrid representation—permitting a party to file *pro se* motions while represented by counsel—is not permitted. See, *e.g.*, *People v. Milton*, 354 Ill. App. 3d 283, 292 (2004) ("Typically, a trial court cannot consider *pro se* motions filed by a criminal defendant while he is represented by counsel," with the exception of claims of ineffective assistance of counsel); *Commonwealth Eastern Mortgage Co. v. Vaughn*, 179 Ill. App. 3d 129, 134 (1989) ("Our supreme court has held that a criminal defendant does not have the right to serve as co-counsel on his case with an attorney, *i.e.*, to both self-representation and the assistance of counsel. [Citation.] We believe

that this rule is equally applicable in civil matters."); *In re Sean N.*, 391 Ill. App. 3d 1104, 1106 (2009) (finding that a respondent at a proceeding to involuntarily administer treatment "is not entitled to hybrid representation" and the trial court therefore correctly disregarded the respondent's *pro se* motion for a continuance while he was represented by counsel). Here, because counsel had not yet been granted leave to withdraw as of March 11, counsel still represented defendants. See *Firkus v. Firkus*, 200 Ill. App. 3d 982, 989 (1990) ("Under paragraph (c) of [Illinois Supreme Court Rule 13 (eff. July 1, 1982)], an attorney's written appearance on behalf of a client before any court in this State binds the attorney to continue to represent that client in that cause until the court, after notice and motion, grants leave for the attorney to withdraw, and this is true whether a final judgment has been entered in the cause or the contract of employment has been carried out.").

¶ 25 However, at the time that defendant filed her *pro se* response, she had terminated counsel's employment. "Under Illinois law, a client may discharge his attorney at any time, with or without cause." *Thompson v. Buncik*, 2011 IL App (2d) 100589, ¶ 8 (citing *Wegner v. Arnold*, 305 Ill. App. 3d 689, 693 (1999)). Thus, there may be a situation in which a new attorney becomes the attorney of record even before the previous attorney has been given leave to withdraw. See *Firkus*, 200 Ill. App. 3d at 990. That is essentially what happened in the case at bar—defendant immediately began representing herself upon the termination of counsel's representation, even though counsel had not yet been granted leave to withdraw. Accordingly, we may consider defendant's March 11 *pro se* "response to plaintiff's motion for summary judgment," as well as her later-filed "motion to dismiss."

¶ 26 This determination is significant, because a large part of plaintiff's argument relies on the claim that defendant forfeited any arguments based on the existence of the lease because it

was not contained in the "motion to dismiss." While it was not discussed in the "motion to dismiss," the lease was certainly raised as an issue in defendant's *pro se* "response," which also included a copy of the lease attached as an exhibit. Accordingly, we proceed to consider the merits of defendant's argument concerning the lease.

¶ 27 Defendant claims that the trial court erred in granting summary judgment in plaintiff's favor because there was a question of fact as to whether plaintiff prematurely terminated defendant's lease. Under section 9-207.5(a) of the Code, "the purchaser at a judicial sale *** who assumes control of the residential real estate in foreclosure *** may terminate a bona fide lease *** 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). A "bona fide lease" for the purposes of section 9-207.5 is defined as:

> "[A] lease of a dwelling unit in residential real estate in foreclosure for which:
>
> (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;
>
> (3) the lease requires the receipt of rent that is not substantially less than fair market rent for the property or the rent is reduced or subsidized pursuant to a federal, State, or local subsidy; and
>
> (4) either (i) the lease was entered into or renewed on or before the date of the filing of the lis pendens on the residential real estate in foreclosure *** or (ii) the lease was entered into or renewed after the date of the filing of the lis pendens on the residential real estate in foreclosure and before the date of the judicial sale of the

residential real estate in foreclosure, and the term of the lease is for one year or less." 735 ILCS 5/15-1224(a) (West 2014).

¶ 28 Defendant claims that she was a tenant under a *bona fide* lease and, therefore, there was a question of fact as to whether plaintiff prematurely terminated her lease. As noted, in considering a motion for summary judgment, a court considers whether "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2014). In the case at bar, defendant attached her affidavit[4] to her *pro se* response to the motion for summary judgment. In the affidavit, defendant avers that she has been living at the property since 1998 and has been a tenant since 2002, when her parents sold the property. Defendant further avers that after six years, her grandmother signed a new 10-year lease agreement so that defendant and her sister could continue to reside at the property while they finished their schooling. Finally, defendant avers that a copy of the lease is attached to the affidavit. The purported lease is attached to the affidavit and is a one-page document between Bozena Siedlecka and the landlord and defendant, Alina Jaskowiak (defendant's grandmother), and Katarzyna Twarowska (defendant's sister) as the tenants. It lists the address of the property and a lease term running from August 1, 2008, until July 31st, 2018. The property is listed as containing two bedrooms and one bathroom, with rent of $800 per month; the tenants were also responsible for electricity and telephone bills. The lease was signed by Jaskowiak and Siedlecka and was notarized.

[4] The affidavit is not notarized. However, it contains a verification by certification pursuant to section 1-109 of the Code (735 ILCS 5/1-109 (West 2014)). Under section 1-109, "[a]ny pleading, affidavit or other document certified in accordance with this Section may be used in the same manner and with the same force and effect as though subscribed and sworn to under oath." 735 ILCS 5/1-109 (West 2014).

¶ 29 We agree with defendant that her affidavit and the attached lease raise a question of fact as to whether plaintiff prematurely terminated defendant's lease. On its face, there is nothing that would disqualify the lease propounded by defendant from being considered a *bona fide* lease and plaintiff makes no arguments concerning the validity of the lease. If it is considered to be a *bona fide* lease, then plaintiff would be prohibited from terminating the lease until the end of the lease period in 2018. In light of the question of fact presented by the lease, plaintiff's motion for summary judgment should not have been granted and we reverse the trial court's judgment. Due to our conclusion concerning the lease, we have no need to consider defendant's argument concerning the FDCPA.

¶ 30 CONCLUSION

¶ 31 Since a question of fact exists as to the existence of a *bona fide* lease, summary judgment in favor of plaintiff should not have been granted.

¶ 32 Reversed and remanded for further proceedings.