2017 IL App (1st) 16-3400-U

THIRD DIVISION
December 27, 2017

No. 1-16-3400

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

NB PAD HOLDINGS III, L.L.C.,	)	
	)	Appeal from the Circuit Court
Plaintiff-Appellee,	)	of Cook County, Illinois,
	)	Cook County, Illinois,
	)	Municipal Department.
v.	)	
	)	
DALIA AHMED, ELIZABETH AHMED,	)	No. 15 M2 001698
	)	
Defendants-Appellants	)	The Honorable
	)	Thaddeus Machnik
	)	Judges Presiding.
(Unknown Occupants,	)	
	)	
Defendants).	)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred by finding that the plaintiff properly served its demand for possession of the property on the defendants, as required under section 9-104 of the Forcible Entry and Detainer Act (735 ILCS 5/9-104 (West 2014)). Without proper service the trial court was without jurisdiction to grant possession of the property to the plaintiff.

¶ 2 This cause of action arises from a forcible entry and detainer action filed subsequent to a foreclosure, by the plaintiff, NB PAD Holdings III L.L.C. (hereinafter NB PAD)[1] seeking possession of the property located at 5137 West Dobson Street, in Skokie, Illinois (hereinafter property) against the defendants, Dalia Ahmed (hereinafter Dalia), Elizabeth Ahmed (hereinafter Elizabeth) and unknown occupants. After the forcible entry and detainer action proceeded to a bench trial, the defendants moved for a directed finding on the grounds that the plaintiff had not served them with proper notice as required under sections 9-104 and 9-211 of the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-104, 9-211 (West 2014)). The court reserved ruling on that motion and permitted the defendants to testify. After their testimony, the circuit court denied the motion for a directed finding and entered a judgment of possession in favor of the plaintiff. The defendants now appeal, contending that the trial court erred when it found that proper service of the demand for possession was made. For the reasons that follow, we reverse.

¶ 3 I. BACKGROUND

¶ 4 The record reveals the following relevant facts and procedural history. The property was originally owned by the defendants' parents, Ray and Migdalia Ahmed (hereinafter Ray and Migdalia). After they defaulted on their mortgage payments, Northbrook Bank & Trust Company (hereinafter Northbrook Bank) filed a foreclosure action against them in case No. 09 CH 32970. After the foreclosure judgment was entered, on April 16, 2014, the property was sold at a judicial sale with Northbrook Bank as the purchaser. On September 3, 2014, the foreclosure court entered an order approving report of sale, confirming the sale and possession of the mortgaged premises against Ray and Migdalia.

¶ 5 On September 24, 2014, Northbrook Bank filed a supplemental petition for order of

[1] NB PA Bank Holdings L.L.C. stands for "Northbrook Bank Holdings, Purchased Assets Division," and is a subsidiary of Northbrook Bank & Trust Company.

possession against Dalia in the foreclosure action, pursuant to section 1701(h)(1) of the Illinois Mortgage Foreclosure Law (IMLF) 735 ILCS 5/15-1701(h)(1) (West 2014)). On October 15, 2014, the property was conveyed by way of assignment to one of Northbrook Bank's subsidiaries--the plaintiff. The supplemental petition was amended to substitute the plaintiff as the petitioner, as well as include Elizabeth as a second defendant.

¶ 6 On April 14, 2015, the foreclosure court denied the second amended supplemental petition for order of possession for want of an affidavit as to the amount of due rent.

¶ 7 On April 28, 2015, the plaintiff filed the instant forcible entry and detainer action, seeking possession of the premises. Named as the defendants were Dalia, Elizabeth and unknown occupants. The defendants were served by substitute service on their place of residence on June 14, 2015.

¶ 8 The defendants appeared and filed a motion to dismiss on the grounds that the plaintiff had pending a supplemental petition for possession, directed against them in the foreclosure case. After briefing, on August 7, 2015, the trial court initially granted the defendants' motion to dismiss. The plaintiff filed a motion to reconsider, asserting that it was in the process of dismissing the pending foreclosure case. The plaintiff then filed an amended motion to reconsider on the grounds that the trial court in the foreclosure action had now clarified that the dismissal of the supplemental petition for possession in that case had been a dismissal with prejudice.

¶ 9 On November 12, 2015, the trial court vacated its dismissal order and reinstated the case. The defendants then filed a motion for summary judgment on the grounds that the forcible entry and detainer action was barred by the doctrine of *res judicata* since the same issue, namely possession of the property had already been determined by the foreclosure judge in dismissing

the supplemental petition. The court initially granted the defendants' motion for summary judgment, but upon the plaintiff's motion to reconsider, vacated that order and set the matter for trial.

¶ 10 The case proceeded to a bench trial on October 13, 2015, at which the following relevant evidence was adduced.

¶ 11 Northbrook Bank's attorney, Jennifer Hughes, first testified regarding the foreclosure proceedings. She stated that the order approving the judicial foreclosure sale contained, *inter alia*, an order of possession against Ray and Migdalia granting possession of the property to Northbrook Bank and directing the sheriff to dispossess them. A copy of that order approving the sale dated September 3, 2014, and including an order of possession against Ray and Migdalia was introduced into evidence.

¶ 12 Hughes testified that after the foreclosure court entered the order approving the judicial sale, she personally prepared and sent by regular and certified mail two requisite notices. She explained that the IMFL requires that a notice or demand for possession be made on any occupants of the foreclosed property, who are not named in the order approving sale, so as to inform them that the new owner, in this case, the plaintiff, intends to dispossess them. Accordingly, in order to apprise such occupants of the foreclosure, Hughes prepared and mailed by regular and certified mail a notice pursuant to section 1701(e) of the IMLF (735 ILCS 5/15-1701(e) (West 2014)), advising Ray, Migdalia and "unknown occupants of the property" that ownership of the property had changed and asking them to contact her office or the plaintiff to discuss further occupancy. Attached to this notice was the order approving judicial sale, including the order of possession in favor of Northbrook Bank and against Ray and Migdalia, which permitted the sheriff to take possession of the property.

¶ 13 Hughes testified that she also prepared and mailed by regular and certified mail a notice of termination of tenancy (colloquially known as the 90-day notice) pursuant to section 9-207.5 of the Forcible Entry and Detainer Act (735 ILCS 5/9-207.5 (West 2014)). This notice was addressed to "unknown occupants" and sent to the address of the property, and informed the addressees that the plaintiff intended to file an eviction action against them after the expiration of the statutory 90 days.

¶ 14 On cross-examination, Hughes acknowledged that she never received a return receipt for the notices she sent via certified mail.

¶ 15 On cross-examination, Hughes also acknowledged that after sending both notices, she subsequently learned that Elizabeth and Dalia were in possession of the property. She admitted, however, that she never made or attempted to make a demand for possession personally directed against them.

¶ 16 Northbrook Bank's vice president, Alexander Durek, next testified that he was responsible for managing the assets associated with the property. He acknowledged that while the plaintiff is the record owner of the property, it does not yet have possession. Durek stated that Elizabeth and Dalia, together with their parents, Ray and Migdalia still have possession of the property. He testified that he is not aware of any agreements allowing anyone a right to possession of the premises, or any documents that give Elizabeth, Dalia, or their parents the right to possession of the property.

¶ 17 On cross-examination, Durek acknowledged that he has never visited or been at the property.

¶ 18 After the close of the plaintiff's case, the defendants filed a motion for a directed finding. The defendants argued that the plaintiff was required to comply with section 9-104 of the Forcible Entry and Detainer Act (735 ILCS 5/9-104 (West 2014)), which required personal

service on the tenant or someone over the age of 13 in possession of the residence, or if no one was in possession, by posting. The defendants acknowledged that Hughes had testified that she mailed the demand for possession by certified mail, but argued that she did not get a return receipt. Accordingly, they asserted that because there was no question that the defendants were in possession and proper service had not occurred, the trial court was without jurisdiction and could not award possession.

¶ 19 The trial court reserved ruling on the motion for directed finding, and proceeded with the defendants' case-in-chief. Dalia first testified that she is 22 years old and that she continues to live at the property with her parents and sister, and has lived there since third grade. Dalia further averred that she never saw the notice of termination of tenancy that Hughes testified she mailed to the property address.

¶ 20 On cross-examination, Dalia admitted that she receives mail at the property address, but asserted that she could not recall seeing any mail directed to "unknown occupants."

¶ 21 Elizabeth similarly testified that she resides at the property with her parents and sister and that she has resided there for the lasts couple of years. Like Dalia, she stated that prior to trial she had never seen the notice of termination of tenancy, which Hughes testified she mailed to the property. Elizabeth also did not recall ever receiving any mail at the property addressed to "unknown occupants."

¶ 22 At the close of the evidence, and after hearing arguments, the trial court entered an order denying the motion for a directed finding and entering judgment for possession in favor of the plaintiff and against the defendants. In doing so, the court noted that the evidence at trial established that a demand for possession was mailed on September 4, 2014, via regular U.S. mail and certified mail to "unknown occupants" at the address of the property. The court further

noted that there was absolutely no evidence that the defendants had a *bona fide* lease with their parents or a landlord/tenant relationship for occupancy of the property, and that the plaintiff therefore properly treated them as "unknown occupants." The court found that the plaintiff was required to make a "written demand" for the property according to section 9-102(a)(6) of the Forcible Entry and Detainer Act (735 ILCS 5/9-102(a)(6) (West 2014)), but held that because there was no landlord tenant relationship, the defendants were not entitled to personal service under section 9-104 of that Act (735 ILCS 5/9-102, 104 (West 2014)). The court also found that personal service pursuant to section 9-211 (735 ILCS 5/9-211 (West 2014)) was not necessary because the plaintiff was not seeking rent. The court therefore concluded that the service by certified and regular mail was sufficient and granted possession of the property to the plaintiff. The defendants now appeal.

¶ 23 II. ANALYSIS

¶ 24 On appeal, the defendants contend that the trial court erred in finding that the plaintiff properly served them with a demand for possession. They argue that because the plaintiff failed to strictly comply with the notice requirements of sections 9-102(a)(6) and 9-104 of the Forcible Entry and Detainer Act (735 ILCS 5/9-102(a)(6), 104 (West 2014)), the trial court was without jurisdiction to consider the possession claim. For the reasons that follow, we agree.

¶ 25 At the outset, we note that we take no issue with the trial court's factual determinations that the record was devoid of any evidence that would establish the defendants as *bona fide* lessees of the property, and that at the time the demand notices were mailed, the bank was unaware that the two defendants were residing at the property, so that it properly treated them as "unknown occupants." The only issue we are concerned with in this appeal, is whether under these facts, the trial court properly concluded that service of the demand by regular mail, or certified mail,

without receipt, satisfied the requirements of the Forcible Entry and Detainer Act so as to permit the court to grant possession to the plaintiff. For the reasons that follow, we find that it did not.

¶ 26 The question of substantial compliance with a statutory provision is a question of law and our standard of review is *de novo*. *Figuero v. Deacon*, 404 Ill. App. 3d 48 (2010).

¶ 27 The plaintiff, here proceeded under the Forcible Entry and Detainer Act. The "prime Purpose" of this Act "is to provide a speedy remedy to give possession to those entitled to it." *Sawyier v. Young*, 198 Ill. App. 3d 1047, 1050 (1990); see also *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 14. A forcible entry and detainer action is a special, limited, and statutory proceeding, summary in nature, and in derogation of the common law, and as such requires strict compliance with its statutory provisions. *American Management Consultant, L.L.C. v. Carter*, 392 Ill. App.3d 39, 58(2009). It is well established that "[a] court hearing a forcible entry and detainer claim is considered a court of special and limited jurisdiction," and that a party seeking this remedy must comply with the statutory requirements establishing the court's jurisdiction. (Internal quotation marks omitted.) *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1046, 1038 (2009); *Figuero*, 404 Ill. App. 3d at 52; see also *Nance v. Bell*, 201 Ill. App. 3d 97, 99-100 (1991). "Where the statue includes a requirement that a written demand is made and proper notice given prior to filing a complaint, the demand must be made in strict compliance with the statute or jurisdiction will not attach." *Eddy v. Kerr*, 98 Ill. App. 3d 680, 681 (1981). Where the party bringing the action fails to comply with the Act's jurisdictional requirements, the trial court lacks jurisdiction over the dispute and is powerless to award possession. *Russell v. Howe*, 293 Ill. App. 3d at 297.

¶ 28 It is well-settled that when a party receives a property after a judicial foreclosure sale, such as

the plaintiff did in this instance, it may pursue a forcible entry and detainer action to evict individuals in possession of the property, pursuant to section 9-102(a)(6) of the Act, but only after making "a demand in writing," for possession of the property. See 735 ILCS 5/9-102(a)(6) (West 2014)).

¶ 29 Section 9-104 of the Act describes the methods by which service of such written demand must be made, and provides in pertinent part:

> "The demand required by Section 9-102 of this Act may be made by delivering a copy thereof to the tenant, or by leaving such a copy with some person of the age of 13 years or upwards, residing on, or being in charge of, the premises; or in case no one is in the actual possession of the premises, then by posting the same on the premises; *or if those in possession are unknown occupants who are not parties to any written lease, rental agreement or right to possession agreement for the premises, then by delivering a copy of the notice, directed to 'unknown occupants,' to the occupant or by leaving a copy of the notice with some person of the age of 13 years or upwards occupying the premises, or by posting a copy of the notice on the premises directed to 'unknown occupants.*' " (Emphasis added.) 735 ILCS 5/9-104 (West 2014)).

¶ 30 In the present case, the trial court agreed that section 9-102(a)(6) and 9-104 of the Act (735 ILCS 5/9-102(a)(6), 9-104 (West 2014)) applied, but then inexplicably found that because there was no *bona fide* lease between the defendants and their parents, service by mail was sufficient to satisfy the requirements of the Act. Based on the aforementioned plain language of section 9-104 (735 ILCS 5/9-104 (West 2014)), we find this conclusion to be erroneous. The statute requires that where the defendants are unknown occupants, with no rental agreement or right to possession of the property, service be personal, substitute, or by way of posting of the demand

notice on the property. See 735 ILCS 5/9-104 (West 2014). It is undisputed here that the plaintiff never personally served the defendants, nor left a copy of the written demand for possession with a person of the age of 13 or older residing at the property, nor posted a copy of any such demand directed to "unknown occupants," at the property. Rather, the evidence at trial unequivocally established that the plaintiff merely mailed two demands by certified and regular mail with no evidence of a return receipt. As such, we are compelled to conclude that such service was insufficient under the statute and deprived the court of jurisdiction to consider the issue of possession. See *Figuero*, 404 Ill. App. 3d at 52

¶ 31 This is true, regardless of whether the defendants, in fact, actually received the written demand, by virtue of the fact that they lived at the property. Our courts have repeatedly held that actual receipt of such notices does not negate the strict compliance requirement of the statute. See *Carter*, 392 Ill. App. 3d at 57 (while "recogniz[ing] that defendant actually did receive notice of the plaintiff's forcible entry and detainer action," nonetheless holding that "strictly construing the statute *** the method by which notice was 'served' require[d] a finding that the defendant did not receive proper notice and preclude[d] the plaintiff form obtain[ing] relief under the statue."); see also *Figuero*, 404 Ill. App. 3d at 53 (holding that where the plaintiff testified that he served notice by posting a copy of the notice on the door and slipping another copy of the notice under the door, so that the tenant, who resided at the property, could not deny receipt of the notice, the plaintiff, nonetheless failed to comply with the strict personal service statutory requirements of section 9-211 of the Forcible Entry and Detainer Act, so as to prevent the court from acquiring jurisdiction and granting possession of the property to the plaintiff); *c.f.*, *Eddy*, 96 Ill. App. 3d at 682-83 (holding that even where parties had a contract, which provided that notice could be served by registered mail, where the Forcible Entry and Detainer Act required personal

service, the mailing and actual receipt of the notice, were insufficient to satisfy the statutory requirements, albeit the parties agreement, and the court was without jurisdiction to enter the judgment of possession.)

¶ 32 The plaintiff nonetheless argues that service of the written demand pursuant to section 9-104 of the Act was not required because the defendants were neither tenants nor unknown occupants. In that vein, the plaintiff cites to *North American Old Roman Catholic Church by Rematt v. Bernadette*, 253 Ill. App. 3d 278 (1992), in an attempt to argue that this cause of action should be considered under section 9-102(a)(2) of the Forcible Entry and Detainer Act (735 ILCS 5/9-102(a)(2) (West 2014)), which would preclude any requirement of a written demand.

¶ 33 At the outset, we note that the plaintiff never raised this argument below, nor objected when the defendants repeatedly argued, and the trial court accepted, that the plaintiff's cause of action was being properly brought pursuant to section 9-102(a)(6) of the Forcible Entry and Detainer Act (735 ILCS 5/9-102(a)(6) (West 2014)). While the plaintiff's complaint did not list the section of the Act under which the action was being brought, at the bench trial, in opening argument, the plaintiff's counsel himself conceded that this was a straightforward case involving "an eviction that comes out of a foreclosure." As such, the plaintiff's attempt, this late in the game, to argue that it was actually raising its complaint under a completely different section of the Forcible Entry and Detainer Act, which has no bearing on actions stemming from foreclosures, is at best disingenuous. Since the argument was never raised below, we find that it is forfeited for purposes of this appeal. See *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15 ("arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal).

¶ 34 Even if we were to consider the plaintiff's argument, however, we would find it to be without

merit. *Bernadette*, relied on by the plaintiff, involved a forcible entry and detainer action filed by a church against a nun to obtain possession of a convent, where the nun had been residing for 40 years and explicitly brought pursuant to section 9-102(a)(2) of the Act (735 ILCS 5/9-102(a)(2) (West 1992). *Bernadette*, 253 Ill. App. 3d at 28. The church had left the nun a letter in her pew informing her that she was to relinquish possession of the convent, and the court concluded that this letter was sufficient for purposes of service. *Bernadette*, 253 Ill. App. 3d at 281, 291. The court explained that because section 9-102(a)(2) of the Act does not contain any written demand requirement, section 9-104 describing the methods of service for any such written demand was never triggered. *Bernadette*, 253 Ill. App. 3d at 291. In doing so, however, the court explicitly distinguished section 9-102(a)(2) from other subsections of the same paragraph, including explicitly forcible entry and detainer actions arising after a judicial foreclosure sale under section 9-102(a)(6), and noted that such actions strictly required a demand in writing and therefore triggered section 9-104. *Bernadette*, 253 Ill. App. 3d at 291. Accordingly, the plaintiff's reliance on *Bernadette* is misplaced.

¶ 35 We similarly reject the plaintiff's argument that under section 9-207.5 of the Forcible Entry and Detainer Act (735 ILCS 5/9-207.5 (West 2014)) its mailing of the 90-day notice was sufficient. That section is in part II of the Forcible Entry and Detainer Act, which establishes procedures for "joint actions," *i.e.*, cases where an owner seeks both possession and judgment for past due rent, and permits a holder of a certificate of sale or a purchaser after a judicial foreclosure sale to terminate a *bona fide* lease by providing a 90-day written notice. 735 ILCS 5/9-207.5 (West 2014)). Since the instant lawsuit does not seek delinquent rents from the defendants, and the trial court correctly concluded that there was not even a scintilla of evidence that the defendants were *bona fide* lessees, this section does not apply.

¶ 36 III. CONCLUSION

¶ 37 Accordingly, for the aforementioned reasons, we conclude that the plaintiff failed to properly serve a written demand for possession on the defendants as required under sections 9-102(a)(6) and 9-104 of the Forcible Entry and Detainer Act (735 ILCS 5/9-102(a)(6), 9-104 (West 2014)). As such, the trial court was without jurisdiction to grant possession of the property to the plaintiff. In coming to this conclusion, we note that nothing prevented the plaintiff, upon choosing to proceed under the Forcible Entry and Detainer Act, from visiting the property and posting a copy of the demand for possession on the door. Instead, the plaintiff, chose, rather lazily, to rely on mailings it had made as part of its original supplemental petition for possession of the property in the mortgage foreclosure action. Since these were clearly not sufficient for purposes of the Forcible Entry and Detainer Act, the plaintiff has only itself to blame.

¶ 38 For the aforementioned reasons, we reverse the judgment of the circuit court.

¶ 39 Reversed.