2017 IL App (2d) 160503-U
No. 2-16-0503
Order filed February 3, 2017



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| DGDB LLC SERIES IV, | ) | Appeal from the Circuit Court |
| | ) | of Du Page County. |
| Plaintiff-Appellee, | ) | |
| v. | ) | No. 16-LM-1175 |
| | ) | |
| JOHN HEIKKINEN, | ) | Honorable |
| | ) | Brian J. Diamond, |
| Defendant-Appellant. | ) | Judge, Presiding. |

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court properly denied the defendant's motion to dismiss the plaintiff's complaint for forcible entry and detainer. Sanctions were warranted against the defendant and his attorney for filing a frivolous appeal.

¶ 2 On May 16, 2016, the plaintiff, DGDB LLC Series IV, filed a forcible entry and detainer lawsuit against the defendant, John Heikkinen. The defendant filed a motion to dismiss the lawsuit. On June 14, 2016, the trial court denied the motion to dismiss and granted immediate possession of the premises to the plaintiff. On June 16, 2016, the trial court denied the defendant's motion to reconsider. The defendant appeals from these orders. We affirm and impose sanctions for the filing of a frivolous appeal.

¶ 3 BACKGROUND

¶ 4 The defendant is the adult son of Scott and Jennifer Heikkinen. The defendant resided with his parents in their home at 1816 Syracuse Road in Naperville. On September 9, 2010, the home was the subject of a foreclosure action (trial court case No. 10-CH-5103). On July 6, 2015, the trial court entered an order of foreclosure. On November 17, 2015, the property was sold to the plaintiff. On January 15, 2016, the foreclosure sale was confirmed, an order of possession was issued against Scott and Jennifer, and a sheriff's deed was issued to the plaintiff. It is undisputed that the defendant was not named as a party in the foreclosure proceeding. On April 1, 2016, Scott and Jennifer filed a notice of appeal as to the final judgment in the foreclosure proceeding.

¶ 5 On May 16, 2016, the plaintiff filed a lawsuit pursuant to the Forcible Entry and Detainer Act (the Act) (735 ILCS 5/9-101 *et seq*. (West 2014)), naming both the defendant and "unknown occupants." In the complaint, the plaintiff alleged that it was entitled to the premises, 1816 Syracuse Road, and that the defendant had unlawfully withheld possession. The complaint requested possession of the premises and the costs of the lawsuit but did not request any monetary damages. On May 20, 2016, the defendant and unknown occupants were served with summons and complaint. On May 25, 2016, the hearing date set forth in the summons, the defendant was given until June 1, 2016, to file an answer and the hearing date on the complaint was set for June 14, 2016.

¶ 6 On May 27, 2016, the defendant filed a combined section 2-615 and section 2-619 motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)). As to dismissal under section 2-615 (735 ILCS 5/2-615 (West 2014)), the defendant argued that the complaint for forcible entry and detainer failed to state a cause of action as the complaint did not set forth facts to support the plaintiff's alleged entitlement to possession of the property or that the defendant unlawfully withheld possession. As to dismissal

under section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2014)), the defendant argued that, once Scott and Jennifer filed a notice of appeal in the foreclosure proceeding, the trial court lacked subject matter jurisdiction to reverse or modify the order of possession in this forcible entry and detainer proceeding. The defendant also requested that Rule 137 sanctions be entered against the plaintiff for filing a frivolous complaint.

¶ 7 On June 14, 2016, the trial court held a hearing on the defendant's combined motion to dismiss. The plaintiff explained that an order was entered in the foreclosure action on the subject property granting it possession and title of the property. The plaintiff noted that the sheriff would only evict parties specifically listed on the order of possession, namely, Scott and Jennifer. When the sheriff went to evict based on the order of possession, the sheriff determined that the defendant was an adult resident, which required the eviction to be cancelled. Thus, the plaintiff's only recourse was to file a forcible entry and detainer lawsuit. Following argument, the trial court denied the defendant's motion to dismiss. The trial court found that the complaint was sufficient for purposes of section 2-615 and that the complaint for forcible entry and detainer was an appropriate avenue to evict the defendant under the circumstances.

¶ 8 The parties immediately proceeded to trial on the complaint for forcible entry and detainer. Attorney Patrick Williams testified that he was the plaintiff's attorney in this case and in the foreclosure case related to the subject property. After the plaintiff was the successful bidder at the foreclosure sale, the trial court granted the plaintiff's motion to intervene in the foreclosure case. The plaintiff presented the court with a certified copy of the trial court's order approving the foreclosure sale. It was marked as Plaintiff's Exhibit 1. Williams further testified that after the order was entered approving the foreclosure sale, the sheriff issued a sheriff's deed, which was recorded on January 25, 2016. The sheriff's deed was admitted as Plaintiff's Exhibit 2. Williams testified that there were several evictions scheduled after January. Scott and

Jennifer had filed various motions in the trial court and the appellate court seeking to stay the foreclosure proceedings. All the motions were ultimately denied and Scott and Jennifer filed a notice of appeal in the underlying foreclosure case. Williams testified that there were no orders of stay regarding the order of possession in the foreclosure case. At the third attempt to proceed with eviction, the sheriff, and the plaintiff, realized for the first time that the defendant also resided at the property. The eviction was cancelled and then the plaintiff filed its forcible entry and detainer lawsuit against the defendant. Williams testified that the defendant was served with summons and complaint at the subject property. The defendant did not present any evidence on his own behalf. The trial court granted judgment in favor of the plaintiff on its action for forcible entry and detainer, ordered possession *instanter*, and awarded costs to the plaintiff in the amount of $277. The defendant moved to stay the order pending appeal. The trial court denied the motion.

¶ 9 On June 15, 2016, the defendant filed an emergency motion to stay the eviction and a motion to reconsider. In that motion, the defendant argued that the plaintiff had failed to provide evidence that it had complied with the notice provisions of section 9-107.5 of the Code (735 ILCS 5/9-107.5 (West 2014)) and that, therefore, the order granting the eviction was void for lack of subject matter jurisdiction.

¶ 10 On June 16, 2016, a hearing was held on the motions for a stay and for reconsideration. At the hearing, the defendant argued that unknown occupants were not properly served. The defendant also argued that the June 15, 2016 order referred to the defendant and "unknown owners," but did not refer to unknown occupants. The defendant argued that the eviction did not apply to Scott and Jennifer Heikkinen. The defendant argued that Illinois law prohibited a sheriff from executing an order of possession less than 30 days after the entry of the order and that the order had just been entered yesterday. The plaintiff responded that the order of

possession had been granted in the foreclosure case more than 30 days ago, in January 2016. The plaintiff argued that there was no basis to reconsider or stay anything. Following argument, the trial court denied the motion for reconsideration and denied the motion for a stay. The trial court found no merit in any of the defendant's arguments and further clarified that it intended to enter the eviction order as to all unknown occupants. The trial court ordered that the eviction proceed that day. The defendant filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 On appeal, the defendant argues that the trial court erred in (1) denying its combined motion to dismiss; and (2) granting the complaint for forcible entry as no written demand and no notice was given to the defendant and unknown occupants as required under sections 9-102 and 9-107.5 of the Code (735 ILCS 5/9-102, 107.5 (West 2014)).

¶ 13 The defendant's first contention is that the trial court erred in denying his motions to dismiss. A motion to dismiss brought under section 2-615 of the Code attacks the sufficiency of the complaint, on the basis that, even assuming the allegations of the complaint to be true, the complaint does not state a cause of action that would entitle the plaintiff to relief. 735 ILCS 5/2-615 (West 2014); *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8 (1992). A section 2-619 motion to dismiss likewise assumes the allegations of the complaint are true, but asserts an affirmative defense or other matter which would defeat the plaintiff's claim. 735 ILCS 5/2-619 (West 2014); *Nielsen-Massey Vanillas, Inc., v. City of Waukegan*, 276 Ill. App. 3d 146, 151 (1995). Under either section, a claim should not be dismissed on the pleadings "unless it is clearly apparent that no set of facts can be proved which will entitle [the] plaintiff to recover." *Id.* We review the denial of a motion to dismiss pursuant to either section *de novo*. *Wallace v. Smith*, 223 Ill. 2d 441, 447 (2002).

¶ 14 The defendant argues that the trial erred in denying his section 2-615 motion to dismiss because the complaint did not set forth facts to establish the plaintiff's right to possession of the premises or that the defendant unlawfully withheld possession. The defendant argues that Illinois is a fact pleading state and that the allegations of the complaint set forth only legal conclusions. The defendant further argues that dismissal was proper because the claim for possession was based on the order of possession entered in the foreclosure case and that the order was not attached to the complaint as required by statute. See 735 ILCS 5/2-606 (West 2014) (if a complaint is based on a written instrument, it must be attached to the pleading as an exhibit or recited therein). The defendant's arguments are without merit.

¶ 15 An action under the Act "is a special statutory proceeding, summary in its nature, in derogation of the common law, and a party seeking this remedy must comply with the requirements of the statute." (Internal quotation marks omitted.) *Eddy v. Kerr*, 96 Ill. App. 3d 680, 681 (1981). Section 9-106 of the Act provides:

> "On complaint by the party *** stating that such party is entitled to the possession of such premises (describing the same with reasonable certainty), and that the defendant (naming the defendant) unlawfully withholds the possession thereof from him, her or them, the clerk of the court shall issue a summons." 735 ILCS 5/9-106 (West 2014).

Accordingly, it is well settled that "a complaint in a Forcible Entry and Detainer Action is sufficient if the plaintiff states he is entitled to possession and that the defendant unlawfully withholds possession from him because the proceeding is statutory and this is all the statute requires." *Chicago Housing Authority v. Walker*, 131 Ill. App. 2d 299, 301 (1970). In the present case, the plaintiff's complaint for forcible entry and detainer alleged that it was entitled to the possession of 1816 Syracuse Road, Naperville, and that the defendant was withholding

possession. This complaint complied with the requirements of the statute. See 735 ILCS 5/9-106 (West 2014).

¶ 16 The defendant also argues that the complaint was insufficient because it failed to comply with section 2-606 of the Code because the order of possession in the foreclosure case was not attached to the complaint for forcible entry and detainer. The defendant contends that because the plaintiff introduced the order for possession from the foreclosure case into evidence at the trial on the complaint for forcible entry and detainer, that the complaint was somehow founded on that document. This argument is without merit. As explained above, the plaintiff's complaint complied with the requirements of the statute. The statute did not require that an order of possession be attached to a complaint for forcible entry and detainer. Further, evidence of title was admissible for the purpose of establishing the plaintiff's right to immediate possession. *Teton, Tack & Feed, LLC v. Jimenez*, 2016 IL App (1st) 150584, ¶ 16 (noting that evidence of title may be admissible in a forcible entry and detainer action for the purpose of establishing or clarifying one's right to immediate possession). Accordingly, the trial court did not err in denying the defendant's section 2-615 motion to dismiss.

¶ 17 The defendant next argues that the trial court erred in denying his section 2-619 motion to dismiss because the matter raised in the complaint for forcible entry and detainer had already been adjudicated in the foreclosure case and was on appeal. The defendant argues that the trial court thus did not have subject matter jurisdiction over the action in forcible entry and detainer. This argument is also without merit. First, the defendant has failed to cite any relevant authority for the proposition that, under the circumstances in this case, any appeal in the foreclosure proceeding precluded the plaintiff from filing a complaint in forcible entry and detainer against the defendant. The failure to cite relevant authority is a violation of our supreme court's rule

concerning an appellant's brief, and forfeits our consideration of the argument. 210 Ill. 2d R. 341(h)(7); *Fortech, L.L.C. v. R.W. Dunteman Co.*, 366 Ill. App. 3d 804, 818 (2006).

¶ 18 Even absent forfeiture, the plaintiff proceeded within the strictures of the law. At the time the plaintiff filed its complaint in forcible entry and detainer, more than 90 days had passed since the date of the order confirming the judicial sale. Accordingly, because more than 90 days had passed, the plaintiff could not have filed a supplemental petition for possession against the defendant in the foreclosure proceeding. See 735 ILCS 5/15-1701(h)(1) (West 2014) (stating that a supplemental petition for possession against a person not named as a party to the foreclosure proceeding must be done within 90 days of the order confirming the sale). Furthermore, section 15-1701(d) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15-1701(d) (West 2014)) provides that, 30 days after an order confirming the sale of mortgaged real estate is entered, the holder of the certificate of sale or the deed issued pursuant to that certificate is entitled to proceed under the provisions of the Act against occupants of the mortgaged real estate who were not made parties to the foreclosure. It is undisputed that the defendant was an occupant of the mortgaged real estate and that he was not a party to the foreclosure proceeding. As such, the plaintiff proceeded under the clear directives of both the Foreclosure Law and the Act and, therefore, the trial court did not err in denying the defendant's section 2-619 motion to dismiss.

¶ 19 Further, the defendant's argument that any failure to comply with the Foreclosure Law or the Act would vitiate the trial court's subject matter jurisdiction is belied by our supreme court's reasoning in *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 337-38 (2002), explaining that a statutory requirement or prerequisite cannot be jurisdictional, since jurisdiction is conferred on the circuit courts by our state constitution. The failure to comply with the statutory notice requirements of the Act may serve as a defense but it does not deprive

the court of subject matter jurisdiction. *Morris v. Martin–Trigona*, 89 Ill. App. 3d 85, 88 (1980); see also *American Management Consultant v. Carter*, 392 Ill. App. 3d 39, 57 (2009) (noting that the failure to follow the proper statutory procedures under the Act precludes a plaintiff from obtaining relief under the statute).

¶ 20 The defendant's next contention on appeal is that the trial court erred in granting the complaint for forcible entry and detainer because written demand was not made pursuant to section 9-102 of the Act and no notice was given to the defendant as required by section 9-107.5 of the Act. The plaintiff argues that these arguments are forfeited as they were not raised in the trial court. The plaintiff is correct that these arguments were not raised in the trial court and thus would generally be considered forfeited on appeal. *Bank of New York Mellon v. Rogers*, 2016 IL App (2d) 150712, ¶ 72 ("It is well settled that issues not raised in the trial court are forfeited and may not be raised for the first time on appeal."). However, the rule of waiver is a limitation on the parties and not on the courts (*C.Capp's LLC v. Jaffe*, 2014 IL App (1st) 132696, ¶ 23) and, thus, we will address these arguments.

¶ 21 While section 9-102(a)(6) of the Act requires a third-party purchaser at a foreclosure sale to make a "demand in writing" in order to maintain an action in forcible entry and detainer, the demand is to be made to the "party to such order or judgment" when he or she "refuses or neglects to surrender possession thereof." 735 ILCS 5/9-102(a)(6) (West 2014). However, it is undisputed that the defendant was not a party to the foreclosure proceeding and, thus, this statute did not require that the defendant receive a written demand. Rather, the provision of the statute allowing the plaintiff's present action was section 9-102(a)(2), which allows an action for forcible entry and detainer "when a peaceable entry is made and the possession unlawfully withheld." 735 ILCS 5/9-102(a)(2) (West 2014). Under this subsection, a written demand is not

necessary to maintain an action for forcible entry and detainer. *Vogel v. Dowdy*, 107 Ill. 2d 68, 76 (1985).

¶ 22 Further, the record indicates that the defendant and "unknown occupants" were properly served notice pursuant to section 9-107.5 of the Act. Under section 9-107.5 of the Act, an unknown occupant may be served "by delivering a copy of the summons and complaint naming 'unknown occupants' to the tenant or any unknown occupant or person of the age of 13 or upwards occupying the premises." 735 ILCS 5/9-107.5(a) (West 2014). In the present case, the record contains two affidavits of service. One affidavit indicates that the defendant was personally served with notice of summons and complaint. The second affidavit of service indicates that "unknown occupants" were served by leaving a copy of the summons and complaint with the defendant at the subject property. Accordingly, the plaintiff satisfied the notice requirements of the Act.

¶ 23 In his reply brief, the defendant argues for the first time that he was required to receive notice pursuant to section 15-1508.5 of the Foreclosure Law (735 ILCS 5/15-1508.5 (West 2014)). It is well settled that issues raised for the first time in the appellant's reply brief shall be deemed forfeited on appeal. 210 Ill. 2d R. 341(e)(7). Nonetheless, we will address the issue. *C.Capp's*, 2014 IL App (1st) 132696, ¶ 23. Once again, the defendant's argument is without merit. Section 15-1508.5 of the Foreclosure Act governs notice given by a foreclosure purchaser to an occupant of the purchased real estate. Its purpose is to notify the occupant of the sale, and, in part, to inform the occupant that the purchaser is not requesting that the occupant vacate the premises at that time. 735 ILCS 5/15-1508.5(a)(2)(iv) (West 2014)). The present case was brought under the Act, which has its own provision governing notice, and is most applicable here, where the purchaser is seeking immediate possession of the premises. 735 ILCS 5/9-107.5 (West 2014). The defendant has failed to cite any authority to support the proposition that the

plaintiff must comply with the notice provisions of the Foreclosure Law in a case, such as this, that does not directly concern a foreclosure.

¶ 24 Finally, the plaintiff argues that this appeal was frivolous and that sanctions are warranted under Illinois Supreme Court Rule 375 (eff. Feb. 1, 1994). Pursuant to Rule 375(b), this court has the inherent jurisdiction to impose sanctions and award attorney fees, reasonable costs, and other necessary expenses. 155 Ill. 2d R. 375(b); *First Federal Savings Bank of Proviso Township v. Drovers National Bank of Chicago*, 237 Ill. App. 3d 340, 344 (1992). Rule 375(b) allows us to impose an appropriate sanction upon a party or a party's attorney if "it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, or the manner of prosecuting or defending the appeal or other action is for such purpose." 155 Ill. 2d R. 375(b). An appeal or other action will be deemed frivolous if a reasonable prudent attorney would not in good faith have filed such an appeal or taken such action. Ill. S. Ct. R. 375, Committee Comments (adopted Aug. 1, 1989).

¶ 25 We agree that this appeal warrants sanctions. All of the issues raised on appeal lacked merit and were clearly controlled by existing law. The defendant's counsel knew or should have known that the issues lacked merit at the time of the appeal and, therefore, we find a reasonable, prudent attorney acting in good faith would not have sought to extend the lawsuit by pursuing this appeal. The defendant and his attorney failed to cite any cases in direct support of their legal theories and did not offer any good-faith argument for the extension, modification, or reversal of existing law. The only conclusion is that this appeal was brought for an improper purpose, such as to delay, harass, or cause needless expense for the plaintiff. Accordingly, we grant the plaintiff's motion for sanctions. The plaintiff filed an affidavit and detailed statement of expenses and attorney fees in defending this appeal. These expenses totaled $5,483.75. The

defendant responded to the motion for sanctions in his reply brief. We have reviewed the affidavit and statement of expenses, and the defendant's response, and find that the fees and costs set forth are reasonable. We thus enter judgment in favor of the plaintiff, and against the defendant and his attorney, in the amount of $5,483.75.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed. We impose sanctions upon the defendant and his attorney in the amount of $5,483.75, payable to the plaintiff forthwith.

¶ 28 Affirmed; sanctions imposed.