2017 IL App (3d) 150541-U

Order filed May 11, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

RONNA MARTIN, individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. LAVALLIE & ASSOCIATES, INC., an Illinois Corporation, Defendant-Appellee.	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-15-0541 Circuit No. 14-CH-2426 Honorable Michael J. Powers, Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Lessor's tender of relief did not moot lessee's class action claims for violations of the Illinois Security Deposit Interest Act (Act) and breach of contract, regardless of the basis for and ultimate merits of lessee's motion for class certification, where lessee's motion for class certification was filed prior to lessor's tender offer and lessor did not establish that the motion for class certification was a "contentless shell motion" or that lessee failed to pursue her class action claims with diligence; (2) defendant management company was a "lessor" under the Act where the defendant held itself out as a lessor by signing a lease with the plaintiff lessee on behalf of an undisclosed principal who owned the property at issue; (3) lessee's alleged breaches of the lease did not preclude

her claims against lessor; (4) lessor did not establish as a matter of law that the property at issue failed to satisfy the Act's "contiguity" requirement, thereby warranting dismissal of the lessee's claims under section 2-619 of the Code of Civil Procedure, where the evidence submitted by the lessor did not establish that lessee could prove "no set of facts" that would establish contiguity; (5) a 2016 amendment to Section 2 of the Act could not be applied retroactively to bar lessee's claims which accrued prior to the amendment where the amendment was substantive and not merely procedural; and (6) the remedies sought by the lessee were not improper.

¶ 2 The plaintiff, Ronna Martin (Martin), is the former tenant of a property managed by Defendant LaVallie & Associates, Inc. (LaVallie). Martin filed a class action complaint against LaVallie asserting claims for the violation of the Illinois Security Deposit Interest Act (Act), 765 ILCS 715/1, *et seq.* (West 2014) and for breach of contract. Martin's class action complaint alleged that LaVallie breached its form Lease and violated the Act by refusing to remit to its tenants the interest that had accrued on the tenants' security deposits. On the same day that she filed her class action complaint, Martin filed a motion for class certification. Several months later, LaVallie issued tenders of relief to Martin in her individual capacity.

¶ 3 LaVallie subsequently filed a combined amended motion to dismiss Martin's complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-616, 2-619 (West 2014)). LaVallie argued that: (1) Martin's claims were mooted under *Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc.*, 2014 IL App (1st) 131543, because LaVallie had tendered to Martin the amounts sought in her complaint, including reasonable attorney fees; (2) the Act was inapplicable to LaVallie because the rental units at issue are not part of a complex containing 25 or more units located on "contiguous" parcels of real estate; (3) LaVallie was not a "lessor" as contemplated by the Act, and was therefore not subject to the Act' provisions, because LaVallie did not own Martin's unit; and (4) Martin was not entitled to recover under the Act because she had defaulted on her lease with LaVallie. LaVallie also

argued that Martin had sought damages and other remedies (such as injunctive relief) which are not recoverable under the Act or for breach of contract.

¶ 4 The trial court granted LaVallie's section 2-619 motion to dismiss with prejudice. The trial court's order stated the dismissal was granted "pursuant to *Ballard*," "based on [LaVallie's] tender *** to plaintiff."

¶ 5 This appeal followed.

¶ 6 FACTS

¶ 7 On November 10. 2014, Martin filed a class action complaint against LaVallie asserting claims for violations of the Act and for breach of contract. In the complaint, Martin alleged that: (1) Martin is a former tenant of a duplex managed by LaVallie; (2) although LaVallie did not own the rental property at issue, Martin entered into a residential lease with LaVallie in 2011 which identified LaVallie as the "lessor" of the property; (3) Martin paid LaVallie an $800 security deposit: (4) Martin subsequently renewed the annual lease for three consecutive years; and (5) LaVallie had failed to pay Martin interest on her security deposit, in violation of the Act and the Lease. On information and belief, Martin also alleged that LaVallie did not pay interest on security deposits to any of its renters. Martin sought various remedies, including the certification of the case as a class action, compensatory and actual damages, restitution and disgorgement of defendant's revenues generated from the alleged unlawful activities committed by LaVallie, statutory damages authorized by the Act, an order enjoining LaVallie from continuing the allegedly unlawful practices, and attorney fees and costs.

¶ 8 On the same day that Martin filed her class action complaint, she filed an eight-page motion for class certification. The motion identified LaVallie as the defendant, defined the putative class, and set forth 17 separate paragraphs of class allegations. The motion asked the

trial court to reserve its ruling on class related issues, allow the parties to conduct discovery on class related issues, and grant Martin leave to file a supporting memorandum following the close of class discovery. Martin scheduled a presentment hearing on the motion for March 2, 2015.

¶ 9 On December 28, 2014, LaVallie filed a motion seeking leave to file a responsive pleading within 28 days. The trial court granted LaVallie's motion on December 29, 2014. On January 26, 2015, LaVallie moved for a second extension of time to respond to Martin's complaint. LaVallie stated that the extension was necessary because the parties had indicated an intent to engage in settlement discussions. The trial court granted LaVallie's motion and ordered LaVallie to file a responsive pleading by March 3, 2015.

¶ 10 On February 26, 2015, LaVallie issued an unsolicited tender of relief for Martin's individual claims. The tender did not provide for attorney fees and costs, which are available for violations of the Act.

¶ 11 On March 3, 2015, LaVallie filed a combined motion to dismiss under sections 2-615 and 2-619 of the Code (735 ILCS 5/2-616, 2-619 (West 2014)). In its section 2-619 motion, LaVallie argued that its tender of relief mooted Martin's claims under *Ballard* because: (1) the pending class certification motion lacked a sufficient factual and evidentiary basis; and (2) Martin never presented the motion for class certification. LaVallie also argued that: (1) the rental units at issue were not part of a complex containing 25 or more units located on "contiguous" parcels of real estate, as required by the Act; (2) LaVallie was not a "lessor" as contemplated by the Act because it did not own Martin's unit. LaVallie also contended that Martin's complaint should be dismissed under section 2-615 because Martin had failed to allege that she was not in default of the lease and because Martin sought certain damages that were not authorized by the Act or recoverable for breach of contract.

¶ 12 In her Response in opposition to LaVallie's motion to dismiss, Martin argued that *Ballard* was wrongly decided and contrary to Illinois law. She noted that *Ballard* was currently on appeal to the Illinois Supreme Court. Martin also contended that LaVallie's tender was ineffective to moot her claims because it failed to account for her reasonable attorney fees and costs. In addition, Martin argued that the Act applied to LaVallie because property managers like LaVallie were "lessors" under the Act and Martin alleged in her complaint that she had fully complied with all of the terms of the Lease.

¶ 13 Moreover, Martin maintained that the Parkview Estates subdivision (Parkview Estates), where Martin had rented property from LaVallie, satisfied the Act's "contiguity" requirement because: (1) LaVallie managed approximately 85 rental units owned by Louge Development Company, LLC (Louge) in Parkview Estates, more than 25 of which directly abutted each other; and (2) Martin's rental unit was one of over 25 properties in Parkview Estates owned by Louge and managed by LaVallie that shared a common boundary (Bogdan Lane); thus, these properties were "contiguous" under Illinois law even though not all of them directly abutted each other. In support of the latter argument, Martin submitted an affidavit signed by Gregg M. Barbakoff, one of her attorneys, together with a map of Parkview Estates that Barbakoff swore he had obtained by performing an online property search on PropertyShark.com. Barbakoff attested that PropertyShark.com is a "real estate search engine that aggregates public records on properties throughout the county." The map generated by PropertyShark.com purported to show all of the units owned by Louge in Parkview Estates by marking each such unit with a dot.

¶ 14 In her Response, Martin withdrew her claims for disgorgement and restitution, but maintained all her other claims for relief.

¶ 15 LaVallie did not file a reply to Martin's Response. Instead, LaVallie issued a second tender to Martin on April 9, 2015. Unlike its first tender, LaVallie's second tender offered to pay Martin's attorney fees and costs. Five days after issuing its second tender, LaVallie sought leave to file an amended motion to dismiss, which the trial court granted.

¶ 16 On April 21, 2015, LaVallie filed an amended motion to dismiss under sections 2-615 and 2-619 of the Code. LaVallie's amended 2-619 motion raised the same arguments under *Ballard* that were raised in LaVallie's initial motion to dismiss. LaVallie also argued, once again, that the rental units at issue were not part of a complex containing 25 or more units located on "contiguous" parcels of real estate, as required by the Act, and that LaVallie was not a "lessor" as contemplated by the Act because it did not own Martin's unit. Moreover, LaVallie contended that Martin was barred from recovering under the Act because she had defaulted on the Lease in various respects.

¶ 17 In her Response in opposition to LaVallie's amended motion to dismiss, Martin again argued that *Ballard* was wrongly decided, contrary to Illinois law, and currently on appeal to the Illinois Supreme Court. She also raised the same arguments she had raised in her initial response regarding LaVallie's status as a "lessor" under the Act and the subdivision's satisfaction of the Act's "contiguity" requirement.[1] In addition, Martin argued that any purported defaults on the Lease by Martin occurred after February 28, 2014, during her fourth and final lease with LaVallie. Because the Act required LaVallie to pay interest on Martin's security deposit within 30 days of the end of each 12-month lease period, any alleged default committed during the fourth lease-year period could not effect Martin's entitlement to collect interest on her security deposit within 30 days after the end of her first, second, and third leases.

[1] In support of the latter argument, Martin resubmitted the Barbakoff affidavit and the Propertyshark.com map.

¶ 18 After hearing oral arguments, the trial court entered an order granting LaVallie's amended motion to dismiss under section 2-619 "based on the tender *** to plaintiff." The court's order expressly provided that "dismissal is pursuant to *Ballard*." The trial court never ruled on LaVallie's other three arguments for dismissal. Nor did the trial court rule on Martin's motion for class certification, which remained pending at the time of the dismissal.

¶ 19 This appeal followed. Briefing was initially scheduled to close on January 28, 2016. On January 27, 2016, after Martin had filed her opening brief on appeal and LaVallie had filed its appellee's brief, LaVallie moved for leave to file an amended brief addressing an amendment to the Act that became effective on January 1, 2016. Our appellate court granted LaVallie's motion, and LaVallie filed its amended brief on February 16, 2016. Martin subsequently filed an amended reply brief.

¶ 20 This appeal followed.

¶ 21 ANALYSIS

¶ 22 1. The trial court's dismissal of Martin's complaint pursuant to *Ballard*

¶ 23 Martin argues that the trial court's dismissal order, which was based entirely on *Ballard*, must be reversed because *Ballard* is no longer good law. In *Ballard*, the First District of our appellate court held that a defendant's tender of relief as to one claim raised in the plaintiff's class action complaint mooted that claim, even though the plaintiff had filed a motion for class certification concurrently with its complaint. *Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc.*, 2014 IL App (1st) 13154322, ¶¶ 59-60. Our appellate court reasoned that the plaintiff's motion for class certification failed to "bring[ ] the interests of the other class members before the court," as required by the Illinois Supreme Court's decision in *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450 (2011), because the class certification motion "was

entirely devoid of any factual allegations in support of class certification" (having been filed "before any discovery had taken place and before Ballard had any knowledge of the class") and the motion "had never been presented" or ruled upon by the trial court. *Id.* ¶ 60.

¶ 24 While this appeal was pending, our supreme court reversed *Ballard*. *Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc*., 2015 IL 118644. Our supreme court ruled that a motion for class certification filed before a defendant's tender offer prevents the tender offer from mooting the class action claims, even if the motion is ultimately found to lack merit. *Ballard RN Center, Inc.*, 2015 IL 118644, ¶¶ 34, 36, 38-40, 43. Rejecting our appellate court's interpretation of *Barber*, our supreme court ruled that *Barber* "does not impose any sort of threshold evidentiary or factual basis for the class certification motion." *Id.* ¶ 36. The court observed that *Barber* "contains no explicit requirement for the class certification motion, other than the timing of its filing." *Id.* Although the supreme court "agree[d] in principal" with our appellate court's suggestion that "a contentless 'shell' motion" or "otherwise frivolous pleading" would be "insufficient to preclude a mootness finding under *Barber* (*id.* ¶ 38), it held that the class certification motion filed by the plaintiff in *Ballard* was not such an empty "shell" motion (even though it lacked certain factual allegations pending discovery), because it "identified [the] defendant, the applicable date or dates, and the general outline of the plaintiff's class action allegations" and it "effectively communicate[d] the fundamental nature of the putative class action." *Id.*

¶ 25 In this case, Martin argues that the Illinois Supreme Court's reversal of *Ballard* invalidates the sole basis for the trial court's decision to grant LaVallie's 2-619 motion to dismiss. LaVallie concedes that the Illinois Supreme Court has overruled *Ballard*, and it does not argue that the eight-page class certification motion filed by Martin was a "contentless shell

motion." However, LaVallie argues that Martin did not act with reasonable diligence in pursuing her motion for class certification, which, it asserts, was required by the supreme court in *Barber* and *Ballard*. LaVallie notes that Martin did not initiate any discovery on the class certification motion from the time the motion was filed in November 2014 until the case was dismissed in July 2015. Moreover, although Martin initially noticed the motion for March 2, 2015, she did not set the motion for a hearing, move to continue the motion, or take any other action on the motion when that date arrived.

¶ 26 We do not find these arguments persuasive. Contrary to LaVallie's assertion, neither *Barber* nor *Ballard* imposes any "due diligence" requirement on a plaintiff's pursuit of her class certification motion after that motion is filed. All that matters under *Barber* and *Ballard* is whether the class certification motion is filed prior to the defendant's tender offer. If it is (as it was in this case), the defendant's tender offer does not moot the class action claims. Some older federal cases appear to hold or imply that a plaintiff must also pursue her class certification motion with diligence if she is to avoid the mooting of her claims by a tender from the defendant. See, *e.g.*, *Susman v. Lincoln American Corp.*, 587 F.2d 866, 871 n.4 (7th Cir. 1978) and *Epenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874 (7th Cir. 2012) (quoting *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003)). However, the Illinois Supreme Court has not expressly adopted any such diligence requirement. Although Illinois courts "may consider federal case law for guidance on class action issues because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure" (*Ballard*, 2015 IL118644, ¶ 40), the Illinois Supreme Court has not adopted any diligence requirement in reliance on federal case law. Regardless, reliance on federal law would not help LaVallie in this case, because the United States Supreme Court recently held that an unaccepted settlement offer

is a "legal nullity" that cannot moot a plaintiff's putative class action, even if the plaintiff fails to file a motion for class certification prior to the settlement offer. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 670 (2016).

¶ 27 In any event, Martin pursued her class action claim with reasonable diligence. LaVallie did not enter its appearance in the case until December 29, 2014. Martin could not initiate any discovery prior to that date without obtaining prior leave of court. *LaSalle National Bank of Chicago v. Akande*, 235 Ill. App. 3d 53, 65 (1992). Moreover, LaVallie filed its motion to dismiss on March 3, 2015, and the parties spent the remainder of the case (a period of slightly more than 4 months) briefing LaVallie's dismissal motions. Under these circumstances, it cannot be said that Martin's pursuit of her class certification motion was unreasonably dilatory.

¶ 28 2. Other Grounds for Dismissal

¶ 29 LaVallie argues that the trial court's dismissal may be affirmed on other grounds. It notes that this court may affirm the trial court's judgment dismissing Martin's complaint for any reason supported by the record, regardless of the trial court's rationale for the dismissal. Thus, LaVallie argues that, even if dismissal is no longer justified under *Ballard*, dismissal is warranted on each of the other three alternative grounds raised in LaVallie's amended motion to dismiss.

¶ 30 As an initial matter, LaVallie argues that Martin forfeited the right to raise arguments regarding the three alternative grounds for dismissal asserted in LaVallie's amended motion to dismiss because she failed to address any of these issues in her opening brief on appeal. LaVallie is incorrect. The trial court's dismissal order was expressly predicated entirely upon the defendant's tender offer and our appellate court's decision in *Ballard*, which was subsequently reversed. Martin appealed based on that issue alone because it was the expressed

basis of the trial court's ruling. In its response brief, LaVallie urges us to affirm the trial court's dismissal order on other grounds that LaVallie raised below which were not ruled upon by the trial court. Martin is not barred from responding to LaVallie's arguments on these issues. See, *e.g.*, *People v. Whitfield*, 228 Ill. 2d 502, 514 (2007); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 378-79 (2003). "Supreme Court Rule 341(j) permits appellants to reply to arguments presented in the brief of the appellee." *Id.*; see also Ill. S. Ct. R. 341(j) (eff. Jan, 1, 2016); *Van Meter*, 207 Ill. 2d at 378-79 (denying appellees' motion to strike argument raised for the first time in appellant's reply brief because argument was responding to arguments raised by the appellees in their response brief). "It would be unfair for us to require an appellant, when writing his or her opening brief, to anticipate every argument that may be raised by an appellee." *Whitfield*, 228 Ill. 2d at 514.

¶ 31 As alternative bases for dismissal, LaVallie argues that: (1) LaVallie is not a "lessor" under the Act, and is therefore not subject to the Act's requirements; (2) the relevant properties in Parkview Estates fail to satisfy the Act's "contiguity" requirement; and (3) Martin is barred from seeking recovery under the Act because she defaulted on some of her lease obligations. LaVallie also argues that an amendment to the Act, which became effective on January 1, 2016, should be applied retroactively to defeat Martin's claims. We address each of these issues in turn below.

¶ 32 A. Whether LaVallie is a "Lessor" Under the Act.

¶ 33 LaVallie argues that it is not subject to the Act's requirements because it is not a "lessor" as contemplated by the Act. Section 1 of the Act provides, in relevant part, that

¶ 34 "[a] *lessor* of residential real property, containing 25 or more units in either a single building or a complex of buildings located on contiguous parcels of real property, who

receives a security deposit from a lessee to secure the payment of rent or compensation for damage to property shall pay interest to the lessee on the security deposit." (Emphasis added.) ILCS 715/1 (West 2014).

LaVallie contends that it is not a "lessor" under Section 1 because it is merely a property manager and is not the owner of Martin's rental unit.

¶ 35 This argument fails. The Act's requirements apply to management companies or other agents of a property owner if such agents hold themselves out as the lessors of a rental property by signing a lease with the tenant. See, *e.g.*, *Kutcher v. Barry Realty, Inc.*, 362 Ill. App. 3d 756, 759-62 (2005); *Gittleman v. Create, Inc.*, 189 Ill. App. 3d 199, 203-04 (1989); see generally *Hayward v. Tinervin*, 123 Ill. App. 3d 302, 305 (1984) (holding that the defendant was a "lessor" within the meaning of the Illinois Security Deposit Return Act because "it held itself out to plaintiff as the lessor and that the plaintiff was entitled to rely upon that representation"). The Act's legislative history supports this conclusion. During the Illinois House debates, Representative Merlo, the bill's sponsor, stated that the landlord "or the management firm" would be liable under the Act. 79th Ill. Gen. Assem., House Proceedings, May 11, 1976, at 13 (statement of Representative Merlo). This conclusion also follows from general principles of agency law. "Generally, an agent who contracts with a third party on behalf of an undisclosed or partially disclosed principal is liable personally on the contract." *Kutcher*, 362 Ill. App. 3d at 762; see also *Jameson Realty Group v. Kostiner*, 351 Ill. App. 3d 416, 430 (2004).[2]

[2] In *Munroe v. Brewer Realty & Management Co.*, 206 Ill. App. 3d 699 (1999), the First District of our appellate court stated that a "lessor" under the Act must be limited to the party that actually conveys a possessory interest to the tenant, *i.e.*, the owner. However, *Kutcher* (a subsequent First District decision) declined to follow *Munroe* and ruled that *Monroe*'s statement that a management company may not be a "lessor" under the Act was nonbinding *dicta*. *Kutcher*, 362 Ill. App. 3d at 761-62.

¶ 36 Here, as in *Kutcher, Gittleman,* and *Hayward*, LaVallie held itself out as the lessor and executed the Lease with Martin on behalf of its undisclosed principal (Louche). Accordingly, LaVallie is subject to liability under the Act.

¶ 37 B. Whether the Property at Issue Satisfies the Act's "Contiguity" Requirement

¶ 38 As noted above, the Act applies only to lessors of residential real property containing 25 or more units in either a single building or a complex of buildings "located on contiguous parcels of real property." 765 ILCS 715/1 (West 2014). LaVallie argues that the properties it manages in Parkview Estates do not satisfy this statutory requirement of "contiguity." LaVallie contends that the plain and ordinary meaning of "contiguous" requires that the parcels must "touch" or "adjoin" in a "reasonably substantial physical sense." See *In the Matter of Belmont Fire Protection District* , 92 Ill. App. 3d 682, 688 (1981); *Henry County Board v. Village of Orion,* 278 Ill. App. 3d 1058, 1067 (1996); *In re Petition to Disconnect Certain Territory from the Frankfort Fire Protection District*, 275 Ill. App. 3d 500, 501-02 (1995). Beallis, LaVallie's property manager, swore in his affidavit that Martin's former rental unit was located on the west side of Bogdan Lane in one of six contiguous lots owned by Louge, each of which contained two units owned by Louge and managed by LaVallie. According to Beallis's affidavit and the accompanying map he submitted, this string of six contiguous parcels was bordered on both its north and south sides by parcels that were not owned by Louge.[3] LaVallie argues that the "contiguity" of Louge/LaVallie units was therefore broken at those two points. In sum, LaVallie maintains that Martin's former property was one of only 12 units located on contiguous parcels

[3] One of these parcels was managed by LaVallie, but the other was not.

of real property owned by Louge and managed by LaVallie. That is 13 fewer units than the 25 required by the Act.[4]

¶ 39 In response, Martin submitted Barbakoff's affidavit and a map of the Parkview Estates subdivision printed from PropertyShark.com which purportedly marked all properties owned by Louge in that subdivision. Based on this map, Martin argues that: (1) the subdivision as a whole satisfied the Act's "contiguity" requirement because it included 85 units owned by Louge and managed by LaVallie, more than 25 of which directly touched or abutted each other; and (2) Martin's former unit was part of more than 25 such units that were "contiguous" even if they did not all directly touch or abut one another because they all shared the "common boundary" of Bogdan Lane. In support of the latter proposition, Martin cited *Belmont Fire Protection District*, 92 Ill. App. 3d 682 and *People ex rel. Hanrahan v. Village of Wheeling*, 42 Ill. App. 3d 825, 829 (1976), cases which held that "contiguity" can exist for annexation purposes and certain other related purposes even if the units at issue are separated by the common boundary of a street or highway. LaVallie disputes Martin's account of the governing law and argues that the map submitted by Martin should be disregarded as hearsay.

¶ 40 LaVallie moved to dismiss Martin's complaint on the "contiguity" issue under section 2-619 of the Code. A complaint is subject to involuntary dismissal under section 2-619 if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2014); see also *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21 ("A section 2–619 motion to dismiss admits the sufficiency of the complaint, but asserts affirmative matter that defeats the claim."). "Affirmative matter" within the meaning of section 2-619(a)(9) "is something in the nature of a defense that negates an alleged cause of

[4] LaVallie notes that, even if the unit managed by LaVallie on the adjoining non-Louge property is counted, Martin is still 12 units short of the number required by the Act.

action completely or refutes crucial conclusions of law or conclusions of material fact * * * contained in or inferred from the complaint." (Internal quotation marks omitted.) *Fancher v. Central Illinois Public Service Co.*, 279 Ill. App. 3d 530, 534 (1996). A section 2–619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise therefrom. *Bjork*, 2013 IL 114044, ¶ 21. When ruling on a section 2–619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party. *Id.*; see also *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). A trial court should not grant an involuntary dismissal of a complaint under section 2-619 "unless it clearly appears that *no set of facts* can be proved that will entitle plaintiff to relief") (Emphasis added.) *Id.*; see also *Estate of Herington v. County of Woodford*, 250 Ill. App. 3d 870 (1993).

¶ 41 LaVallie argues that the lack of "contiguity" in this case defeats Martin's claim. However, the evidence presented by LaVallie does not rule out the possibility that Martin could satisfy the Act's contiguity requirement. The map submitted by LaVallie depicts only a small section of the west side of Bogdan Lane. It does not purport to show all of the units in Parkview Estates or in the surrounding vicinity that are managed by LaVallie. Accordingly, LaVallie's map does not rule out the possibility that other contiguous parcels managed by LaVallie exist in the vicinity of Martin's former unit. It is possible that other such parcels abut the string of 13 contiguous properties on Bogdan Lane to the west (*i.e.*, behind the *cul-de-sac* on the west side of Bogdan Lane).[5] Based on the evidence presented at this point, LaVallie has not shown that "no set of facts" can be proved that would entitle Martin to relief under the Act. Accordingly, LaVallie has not established an affirmative matter that bars or defeats Martin's claim as a matter

[5] Although the map submitted by LaVallie labels that region as "not subdivided," that fact is not dispositive. If there are any parcels of residential real estate located in that area that are managed by LaVallie which touch or adjoin the aforementioned string of contiguous properties on Bogdan Lane, such parcels might be used to establish the Act's contiguity requirement even if they are not located within the Parkview Estates subdivision.

of law. Given the incomplete map and limited evidence presented by LaVallie at this point, dismissing Martin's claim under section 2-619 would be premature. The parties must be allowed to develop a complete factual record on issue of contiguity. Only then can it be determined whether Martin's claim under the Act can survive.

¶ 42 C. The Effect of Martin's Alleged Breaches of the Lease

¶ 43 LaVallie also argues that, because Martin breached the lease in various respects, she failed to state a claim under the Act, and her complaint may be properly dismissed on that basis.

¶ 44 Section 2 of the Act provides, in relevant part, that

¶ 45 "[t]he lessor shall, within 30 days after the end of each 12 month rental period, pay to the lessee any interest ,by cash or credit to be applied to the rent due, *except when the lessee is in default under the terms of the lease.*" (Emphasis added.) 765 ILCS 715/2 (West 2014).

LaVallie claims that Martin defaulted on the Lease in four respects. Specifically, LaVallie notes that Martin: (1) failed to pay rent when due in May 2014, which required LaVallie to bring a complaint in forcible entry and detainer until Martin paid the rent on June 2, 2014; (2) failed to pay her final month's rent of $800,which was due in advance of February 2015; (3) failed to pay her final water bill in full; and (4) allowed a person other than Martin to occupy the unit, in violation of the Lease. LaVallie argues that these breaches defeat Martin's claim under the Act.

¶ 46 We do not find this argument persuasive. As Martin notes, all of Martin's purported defaults occurred after February 28, 2014 (*i.e.*, during Martin's final lease term). LaVallie has not identified any alleged default that occurred during Martin's 2011, 2012, or 2013 leases with LaVallie. The version of the Act in effect at the time required LaVallie to pay Martin interest on her security deposit within 30 days after the end of her first, second, and third 12-month lease

periods. Accordingly, even assuming that Martin breached the lease during her final lease with LaVallie, LaVallie would still be liable for those three prior interest payments. Thus, Martin's claims are not defeated by the defaults alleged by LaVallie.

¶ 47 D. Retroactive Application of the 2016 Amendment

¶ 48 LaVallie also argues that Martin's claim fails as a matter of law because it is barred by a recent amendment to the Act. Effective January 1, 2016, section 2 of the Act was amended. The following language was added (shown here in bold and underlined):

¶ 49 "[t]he lessor shall, within 30 days after the end of each 12 month rental period, pay to the lessee any interest **that has accumulated to an amount of $5 or more,** by cash or credit to be applied to the rent due, except when the lessee is in default under the terms of the lease. **The lessor shall pay all interest that has accumulated and remains unpaid regardless of the amount, upon termination of the tenancy.** " (Emphasis added.) 765 ILCS 715/2 (West 2016).

¶ 50 If this statutory amendment is applied retroactively, it would defeat Martin's claim. Under the amended statute, interest need not be paid to the lessee after the end of a 12-month rental period until such interest totals $5 or more (provided that the lease is renewed from another term and the tenancy has not been terminated). Here, the interest on Martin's $800 security deposit would have totaled $1.56 after the first year of the lease, and interest thereafter would have totaled four cents per year. Thus, by the end of the first three years of Martin's tenancy, the accumulated interest would have totaled only $1.64, which is well below the $5.00 minimum prescribed by the amended statute. At the termination of Martin's tenancy one year later, the accumulated interest would have totaled $1.68. Although the amended statute requires the lessor to pay all accumulated interest upon the termination of the tenancy (regardless of the

amount), by the time Martin terminated the lease she had defaulted on her final lease payment and water bill in an amount that far exceeded the total accumulated interest on her security deposit. Thus, if the 2016 amendment is applied retroactively, LaVallie would not be required to pay Martin anything under the Act.

¶ 51 The dispositive question is whether the 2016 amendments may be applied retroactively to defeat Martin's claim. "As a general rule, an amendatory statute will be construed prospectively rather than retroactively; the presumption of prospectivity is rebuttable, but only by the act itself which, either by express language or necessary implication, must clearly indicate that the legislature intended a retroactive application." *Harraz v. Snyder*, 283 Ill. App. 3d 254, 259 (1996); see also *Rivard v. Chicago Fire Fighters Union, Local No. 2*, 122 Ill. 2d 303, 309 (1988); *Link by Link v. Venture Stores, Inc.*, 286 Ill. App. 3d 977, 979 (1997) ("It is well-settled in Illinois that newly enacted statutes and statutory amendments usually receive only prospective application absent express language to the contrary."). The presumption that amended statutes should not be applied prospectively is based upon "the fundamental principle of jurisprudence that the retroactive application of new laws is usually unfair and the general consensus that notice or warning of the rule should be given in advance of the action whose effects are to be judged." *Harraz*, 283 Ill. App. 3d at 259; see *also Moshe v. Anchor Organization for Health Maintenance*, 199 Ill. App. 3d 585, 598 (1990). Here, there is no indication that the Illinois legislature intended for the 2016 amendment to be apply retroactively. The statutory amendments do not state that they are to be applied retroactively, and LaVallie provides no evidence suggesting that the legislature harbored any such intention.

¶ 52 Moreover, the 2016 amendment may not be applied retroactively because it is substantive, not merely procedural. "[C]hanges in law which merely affect existing remedies or

procedures, as opposed to substantive rules, may be applied retroactively unless a vested, constitutionally protected right will be compromised." *Link by Link*, 286 Ill. App. 3d at 979. However, if a statutory amendment is substantive, it may not be applied retroactively. *White v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*, 2014 IL App (1st) 132315, ¶ 32; *Deicke Center–Marklund Children's Home v. Illinois Health Facilities Planning Board*, 389 Ill. App. 3d 300, 303 (2009). A substantive amendment "establishes, creates or defines rights," whereas "procedure is the machinery for carrying on the suit." *White*, 2014 IL App (1st) 132315, ¶ 32; *Deicke Center–Marklund Children's Home*, 389 Ill. App. 3d at 303-04. Thus, an amended statute may not be applied retroactively if application of the new statute would "impair rights a party possessed when he acted" (*People ex rel. Madigan v. J.T. Einoder*, 2015 IL 117193, ¶ 30) or impair or interfere with the plaintiff's "accrued cause of action," which Illinois courts recognize as a "vested right." *Harraz*, 283 Ill. App. 3d at 263; *Sanelli v. Glenview State Bank*, 108 Ill.2d 1, 46 (1985). However, an amendment related solely to a remedy is procedural in nature, and a plaintiff has no vested right to any particular remedy. See *Dardeen v. Heartland Manor, Inc.*, 186 Ill. 2d 291, 298-301 (1999) (amendment repealing a statutory treble damages provision could be applied to pending claims because the plaintiff did not have a vested right to any particular remedy).

¶ 53 In this case, the 2016 amendment is substantive, not merely procedural or remedial. Relying on *Dardeen*, LaVallie argues that the amendment is procedural because it affects only the *amount* that a lessee may recover in interest, not the lessee's substantive right to collect interest under the Act. Thus, LaVallie maintains, the amendment relates only to the *remedy*, not to the underlying cause of action. We do not find this argument persuasive. The 2016 amendment changes the elements of a cause of action under the Act by providing that a lessor

must pay interest within 30 days of the end of a 12-month lease period only when the interest due totals $5 or more. This adds a new substantive requirement to the statute and, in so doing, impairs Martin's accrued cause of action under the prior version of the statute. Put another way, the amendment changes the criteria for determining a lessor's liability under the Act; it does not merely change the remedy to which a lessee is entitled when a lessor is found liable. Applying this substantive amendment retroactively to defeat Martin's accrued cause of action would be unfair and impermissible. See, *e.g.*, *People ex rel. Madigan*, 2015 IL 117193, ¶ 30; *Harraz*, 283 Ill. App. 3d at 259, 263; *Sanelli*, 108 Ill.2d at 46.

¶ 54 E. Remedies Sought By Martin

¶ 55 Finally, LaVallie argues that certain remedies that Martin seeks in her class action complaint should be stricken because they are unavailable under the Act or under the common law for a breach of contract. In the complaint's prayer for relief, Martin initially sought "compensatory and actual damages, including restitution and disgorgement of [LaVallie's] revenues to [Martin] and the other Class members" generated from LaVallie's alleged unlawful practices, statutory damages under the Act, and an order enjoining LaVallie from continuing the alleged unlawful practices. However, Martin subsequently withdrew her requests for restitution, disgorgement, and injunctive relief. She now seeks only statutory damages for LaVallie's alleged violations of the Act and "compensatory and actual damages" for LaVallie's alleged breach of contract. LaVallie correctly notes that damages for breach of contract "should place an aggrieved party in the position she would have been in had the contract been performed," and it argues that Martin is improperly seeking damages in excess of that amount. However, in her reply brief, Martin clarifies that her claim for damages is limited to the interest on her security

deposit that she would have received had LaVallie discharged its obligations under the Act and under the Lease. We therefore reject LaVallie's claims on this issue.

¶ 56 CONCLUSION

¶ 57 The judgment of the circuit court of Will County is reversed, and the matter is remanded for further proceedings.

¶ 58 Reversed; cause remanded.