2018 IL App (1st) 162993-U

FIRST DIVISION
March 19, 2018

No. 1-16-2993

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

HAROLD ELGAZAR, Plaintiff-Appellant, v. THE CITY OF CHICAGO; 1332 N. MILWAUKEE INC; and TICE, INC. d/b/a Standard Bar & Grill, Defendants-Appellees.	))))))))))	Appeal from the Circuit Court of Cook County No. 15 CH 18193 The Honorable Rodolfo Garcia, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's judgment dismissing plaintiff's complaint is affirmed where plaintiff sought to collaterally attack an administrative order that is voidable rather than void and he is therefore not entitled to any relief.

¶ 2 This appeal arises of out of a dispute between plaintiff Harold Elgazar and defendant Tice, Inc., which operates Standard Bar and Grill (Standard) in Chicago's Wicker Park neighborhood. Starting in 2012, Standard sought a zoning variation in order to obtain a public place of amusement (PPA) license so that it could host live music events. Elgazar owns the building adjacent to Standard and he objected to the zoning variation. After a public hearing, the

Zoning Board of Appeals for the City of Chicago (ZBA) granted the variation. Elgazar sought administrative review in the circuit court. The circuit court vacated the ZBA's decision and remanded the matter for a new public hearing and to make findings consistent with the applicable zoning ordinance. The ZBA conducted a second public hearing and in August 2013, granted Standard a zoning variation. Elgazar again sought administrative review, arguing that the ZBA's decision was against the manifest weight of the evidence. The circuit court affirmed the ZBA's decision. On appeal, we affirmed the decisions of the ZBA and the circuit court. *Elgazar v. Zoning Board of Appeals of the City of Chicago*, 2015 IL App (1st) 140968-U (*Elgazar I*).

¶ 3 Elgazar then filed a complaint in the circuit court seeking declaratory and injunctive relief, which is the subject of this appeal. His complaint alleged that the ZBA's August 2013 decision to grant Standard a zoning variation was void because (1) the ZBA lacked jurisdiction where Standard failed to provide notice to all property owners that were entitled to notice of the hearing on its variation application, (2) the ZBA lacked authority to grant the variation following remand from the circuit court because the ZBA failed to consider all of the factors required by the zoning ordinance, and (3) the variation approval violated Elgazar's due process rights under the Illinois Constitution. The City of Chicago (City) filed a combined section 2-619.1 motion to dismiss Elgazar's complaint pursuant to section 2-615 and section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619, 2-619.1 (West 2016)). Standard adopted the City's motion. The circuit court dismissed Elgazar's complaint, finding that it was barred by *res judicata*. Elgazar's motion to reconsider was denied, and Elgazar appeals. For the following reasons, we affirm the judgment of the circuit court.

¶ 4 BACKGROUND

¶ 5 A thorough recitation of the history of the parties' dispute can be found in our prior order affirming the ZBA's decision granting Standard's zoning variation. *Elgazar*, 2015 IL App (1st) 140968-U. We recite only those facts necessary for an understanding of our disposition. For purposes of this appeal, we recite and accept as true all well-pleaded facts set forth in the complaint and draw all reasonable inferences from these facts in favor of plaintiff. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). However, conclusions of law or fact will not be accepted as true unless supported by specific factual allegations. *Merrilees v. Merrilees*, 2013 IL App (1st) 121897, ¶ 14 (citing *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 47 (1991)).

¶ 6 Standard is a bar and grill located at 1332 North Milwaukee Avenue with a capacity exceeding 100 patrons. Standard is located in a business B3-3 zoning district, and is located within 125 feet of a residential RS-3 district. When Standard decided to host live music events, it was required to obtain a zoning variation due to its capacity and proximity to a residential RS-3 district in order to obtain a PPA license. *Elgazar*, 2015 IL App (1st) 140968-U, ¶ 7 (citing Chicago Municipal Code §§ 4-156-305, 17-3-0301, 17-13-1101-M (2012)). In May 2012, Standard filed an application for a zoning variation with the ZBA, and a public hearing was held in July 2012. The ZBA heard testimony from witnesses including Elgazar, who owns a building located at 1330 North Milwaukee Avenue. He rented the first floor to a commercial tenant and the upper apartments to residential tenants. Elgazar objected to Standard's request due to the loud music being disruptive to his tenants. The ZBA granted Standard's zoning variation, and Elgazar, acting *pro se*,[1] sought administrative review in the circuit court. Following a hearing,

[1]Elgazar has represented himself through all of the proceedings before the ZBA, the circuit court, and this court, as well as in the present appeal.

the circuit court vacated the ZBA's decision and remanded the case with instructions that the ZBA "rehear the variation and come up with a finding." *Id.* ¶ 10.

¶ 7 Following remand, the ZBA conducted a second public hearing on Standard's variation application. The ZBA again heard testimony from various witnesses including Elgazar. The ZBA also heard testimony that Standard competed with eight other bars and restaurants within a three block radius, which either had or did not need PPA licenses. The ZBA heard testimony concerning Standard's ability to be competitive and the character of the neighborhood. Elgazar testified that the noise from Standard affected the "reasonable use and enjoyment" of his building. The ZBA further heard testimony that even without a PPA license, Standard could play prerecorded music at the same "loudness level." *Id.* ¶ 15. On August 26, 2013, the ZBA issued a written decision finding that Standard had established the criteria necessary for a zoning variation set forth in section 17-13-1107 of the Chicago Municipal Code (Chicago Municipal Code § 17-13-1107 (2012)). Elgazar again sought administrative review in the circuit court, which affirmed the ZBA's decision. Elgazar's motion to reconsider was denied, and he appealed to this court.

¶ 8 On appeal, Elgazar argued in part that the ZBA's decision to grant the zoning variation was against the manifest weight of the evidence. We concluded "that there was ample support for the ZBA's decision to grant the variation to Standard and, therefore, its decision was not against the manifest weight of the evidence." *Elgazar*, 2015 IL App (1st) 140968-U, ¶ 29. We affirmed the decisions of the ZBA and the circuit court. *Id.* ¶ 49.

¶ 9 On December 16, 2015, Elgazar filed a 47-page complaint in the circuit court seeking declaratory and injunctive relief, which is the subject of this appeal. Count I alleged that Standard failed to provide notice of its May 2012 application for a zoning variation to all

surrounding property owners that were entitled to notice, and that Standard's application failed to include proof that proper notice was given. Specifically, Elgazar alleged that Standard identified three properties by their property identification number (PIN) and listed those properties as "exempt." Elgazar claimed that Standard failed to identify the record owner of the properties and failed to send notice to those properties. He additionally asserted that Standard failed to give notice to the record owners of six PINs comprising a condominium building, and that those property owners were entitled to notice.[2] Elgazar further alleged that the ZBA scheduled and conducted a public hearing without Standard having fully complied with all of the notice requirements. He alleged that Standard failed to make a *bona fide* effort to provide written notice to all property owners entitled to notice, and claimed that Standard's noncompliance "renders the ZBA's approval of zoning variation invalid or void for lack of jurisdiction or authority." Count II alleged that the ZBA failed to make all of the required findings before granting Standard's variation, and therefore "had no power to issue" the variation, and that "[n]oncompliance with the approval factors set forth in the [z]oning [o]rdinance renders the ZBA's approval of the requested zoning variation invalid or void for lack of jurisdiction or authority." Count III alleged that the ZBA's zoning variation was "wholly and completely unlawful," that the City's failure to enforce its zoning regulations deprived Elgazar of "a reasonable use and enjoyment of his property," and that the ZBA's decision was "arbitrary and capricious, and therefore was an invalid exercise of the police power which denied [Elgazar] his constitutional guarantee of substantive due process rights under section 2, article I of the Illinois Constitution (Ill. Const. 1970, art. I, § 2)." Elgazar sought (1) an order declaring the ZBA's August 26, 2013, decision

[2]Elgazar's complaint contains numerous assertions regarding the record owners of certain properties, but does not allege that those individuals or entities were the record owners of the properties at the time Standard filed its variation application.

"null and void," (2) an injunction prohibiting "deejay and/or live music entertainment requiring a [PPA] license" at Standard, and (3) costs.

¶ 10 The City filed a section 2-619.1 motion to dismiss the complaint. In relevant part, the City argued that the complaint should be dismissed pursuant to section 2-619 of the Code because all of Elgazar's claims were barred by *res judicata*: (1) *Elgazar I* constituted a final judgment on the merits of Elgazar's challenge to the ZBA's decision, (2) all of Elgazar's claims arose from the same transaction or occurrence litigated in *Elgazar I*, and (3) the same parties were involved. The City also argued that collateral estoppel barred count II of Elgazar's complaint. Standard adopted the City's motion to dismiss.

¶ 11 Elgazar filed a written response in which he argued, in relevant part, that (1) *res judicata* does not apply to void judgments, (2) the complaint challenged the validity of the ZBA's decision, which did not relate to the claims in *Elgazar I* challenging the merits of the ZBA's decision, and (3) fundamental fairness barred the application of *res judicata*.

¶ 12 The circuit court conducted a hearing on the City's motion. On that same date, the circuit court entered a handwritten order granting the City's motion "for the reasons stated on the record." At the hearing, the circuit court considered *Pedigo v. Johnson*, 130 Ill. App. 3d 392 (1985), and ultimately found that *res judicata* applied because Elgazar "could have or should have raised" his claims during the proceedings in *Elgazar I*. The circuit court therefore dismissed Elgazar's complaint with prejudice. Elgazar filed a motion to reconsider, which the circuit court denied. Elgazar filed a timely notice of appeal.

¶ 13 ANALYSIS

¶ 14 On appeal, Elgazar argues that *res judicata* does not bar his complaint alleging that the ZBA's decision is void for lack of jurisdiction. He contends that the ZBA's jurisdiction was

never litigated at any stage of *Elgazar I* and that he may collaterally attack a void judgment at any time. He insists that the merits of his claim—that the ZBA's decision is void—are not properly before this court, and that the only issue on appeal is whether his complaint is barred by *res judicata*. Central to Elgazar's argument on appeal is the principle that a "void order" may be attacked either directly or collaterally at any time in any court.

¶ 15 Our supreme court has stated that "a party may challenge a judgment as being void at any time, either directly or collaterally, and the challenge is not subject to forfeiture or other procedural restraints." *LVNV Funding, LLC v. Trice*, 2015 IL 116129, ¶ 38. A judgment is void if it suffers from "the most fundamental defects, such as lack of personal jurisdiction or lack of subject matter jurisdiction." *Id.* Here, Elgazar alleges in his complaint that the ZBA's August 2013 decision is void because Standard's application for a zoning variation failed to identify all of the property owners entitled to notice and failed to give notice to those property owners. Elgazar contends that motions to dismiss under section 2-619 of the Code admit the legal sufficiency of a complaint and that the circuit court should have accepted as true his allegation that the ZBA's decision was void.

¶ 16 We conclude that the ZBA had jurisdiction to grant the zoning variation, and therefore the ZBA's decision is not void but is merely voidable. Therefore, Elgazar's complaint is barred by *res judicata*.

¶ 17 We review *de novo* a circuit court's ruling on a motion to dismiss. *Lyons v. Ryan*, 201 Ill. 2d 529, 534 (2002). A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20. In ruling on a section 2-619 motion, we accept as true all well-pleaded facts in plaintiff's complaint and draw

all reasonable inferences in plaintiff's favor. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 85 (1995). Conclusions of law or fact, however, will not be accepted as true unless supported by specific factual allegations. *Merrilees*, 2013 IL App (1st) 121897, ¶ 14 (citing *Ziemba*, 142 Ill. 2d at 47 (1991)).

¶ 18 Section 2-619(a)(4) of the Code "allows a party to raise the affirmative defense of *res judicata*." *Morris B. Chapman & Associates v. Kitzman*, 193 Ill. 2d 560, 565 (2000). "*Res judicata* prohibits repetitive litigation in an effort to obtain judicial economy and to protect litigants from the burden of retrying an identical cause of action with the same party or a privy." *Pedigo*, 130 Ill App. 3d at 394. "The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). For the doctrine to apply, three requirements must be met: "(1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies." *Id.* at 335. *Res judicata* extends to not only what was actually decided in the first action, but also to matters that could have been decided. *Id.*

¶ 19 "Although the term 'jurisdiction' is not strictly applicable to an administrative agency, it may be used to refer to the authority of the administrative agency to act." *J&J Ventures Gaming LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 23 n.6 (citing *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill. 2d 192, 243 (1989)). "An administrative agency 'only has the authorization given to it by the legislature through the statutes. Consequently, to the extent an agency acts outside its statutory authority, it acts without jurisdiction.' " *Farrar v. City of Rolling Meadows*, 2013 IL App (1st) 130734, ¶ 14 (quoting

Business & Professional People, 136 Ill. 2d at 243). An administrative agency's "jurisdiction" comprises three aspects: (1) personal jurisdiction over the parties; (2) subject matter jurisdiction, meaning the power to hear and determine causes of the general class of cases to which the particular case belongs; and (3) the scope of authority under the enabling statute. *Newkirk*, 109 Ill. 2d at 36.

¶ 20 In *Newkirk*, the plaintiffs filed a complaint in the circuit court for declaratory judgment, which attempted to collaterally attack an order issued by a mining board. The plaintiffs asserted that the mining board lacked jurisdiction to issue the order because the order failed to include certain provisions required by statute and therefore the order was void. *Id.* at 32. The circuit court dismissed the portion of the plaintiffs' declaratory judgment complaint that sought to set aside the mining board's order. Our supreme court affirmed, finding that the statute at issue imposed a mandatory rather than a permissive obligation on the mining board to comply with the statute, and thus the mining board's order was defective, but also found that the mining board had authority to issue the order. *Id.* at 34. The court observed that the mining board had personal jurisdiction over the parties, subject matter jurisdiction over the general class of cases involved, and the inherent authority to issue the order. *Id.* at 37. The court concluded that "[a]n agency's jurisdiction or authority is not lost merely because its order may be erroneous." *Id.* "[T]he general rule is that a party cannot collaterally attack an agency order in [a declaratory judgment action] unless the order is void on its face as being unauthorized by statute." *Id.* at 39. The order was voidable rather than void and thus not subject to collateral attack in a declaratory judgment action. *Id.* at 40.

¶ 21 Here, there is no dispute that the ZBA has the power to hear and determine cases involving zoning variations and has the authority to issue zoning variations. There is also no

dispute that the ZBA had personal jurisdiction over Standard throughout the course of the zoning variation proceedings and that Elgazar was an active objector before the ZBA, the circuit court, and before this court in *Elgazar I*. The ZBA had jurisdiction and its zoning decision is not void, but is merely voidable. Therefore, Elgazar cannot seek to collaterally attack the ZBA's decision through a declaratory judgment action because he could have raised all of his objections either before the ZBA or in his administrative review action. Our decision in *Elgazar I* is therefore *res judicata* as to all of the contentions raised in Elgazar's complaint.

¶ 22 Elgazar contends that Standard did not comply with all of the ZBA's regulations in initiating its application because not all of the record owners within a 100 foot radius of Standard were given notice of the variation application. He cites no authority in support of his claim that the failure to give such notice renders any portion of the ZBA proceedings void. In fact, Elgazar insists that the merits of his claim are not before this court. He argues that the only issue on appeal is whether his complaint was barred by *res judicata*, and asserts that the circuit court "overlooked" that its dismissal order was pursuant to a section 2-619 motion, which admitted the legal sufficiency of his complaint.

¶ 23 Elgazar's arguments are flawed. First, we review a circuit court's judgment, not its reasoning. The circuit court's judgment was that Elgazar's complaint was dismissed with prejudice. As a court of review, we may "sustain a circuit court's judgment for any basis supported by the record, regardless of whether the circuit court relied on the grounds and regardless of whether the circuit court's reasoning was correct." (Internal quotation marks omitted.) *Employees' Retirement System of the State of Hawaii v. Clarion Partners, LLC*, 2017 IL App (1st) 161480, ¶ 18 (citing *Rodriguez v. Sheriff's Merit Comm'n*, 218 Ill. 2d 342, 357 (2006)). Second, Elgazar's allegation in his complaint that the ZBA's decision is void is not a

well-pleaded factual allegation and is not accepted as true for the purposes of a motion to dismiss. See *Merrilees*, 2013 IL App (1st) 121897, ¶ 14. The circuit court was not required to accept Elgazar's legal conclusion as true for the purposes of the City's motion and neither are we. As discussed above, the ZBA had jurisdiction over Standard's application and had the authority to issue a final decision on that application. We need not confine ourselves to the arguments on appeal where the record reveals as a matter of law that Elgazar is not entitled to the relief he ultimately seeks.

¶ 24 Finally, we note that the ZBA provides a checklist for applicants seeking a zoning variation that identifies all of the items an applicant must submit, located at https://www.cityofchicago.org/dam/city/depts/dcd/Zoning%20Application/VariationPackage.pdf (last visited Mar. 15, 2018). Elgazar's complaint acknowledges that Standard filed materials for each of the required items on the checklist, including an affidavit from Standard that all property owners entitled to notice of the application were given notice. Therefore, Elgazar's challenges go to the sufficiency of the contents of those materials, which is an issue that the ZBA is fully capable of evaluating. Elgazar had ample opportunity to assert his challenges to Standard's application before the ZBA or on administrative review but did not do so. Elgazar is bound by the decisions of the ZBA and the circuit court, as well as our previous decision in *Elgazar I*.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 27 Affirmed.