2018 IL App (1st) 172602-U

FOURTH DIVISION
October 18, 2018

No. 1-17-2602

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

SOPURUCHI OKEKE EWO, individually and on behalf of all similarly situated persons,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	
	)	No. 15 CH 05330
v.	)	
YMCA OF METROPOLITAN CHICAGO, LLC,	)	Honorable David B. Atkins,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justice Lampkin and Presiding Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where plaintiff failed to attach a written agreement upon which his claims are founded in violation of section 2-606 of the Code of Civil Procedure.

¶ 2 Plaintiff, Sopuruchi Okeke Ewo, appeals an order of the circuit court of Cook County granting defendant, YMCA of Metropolitan Chicago, LLC's (YMCA), motion to dismiss his amended class action complaint pursuant to section 2-615 of the Code of Civil Procedure (Code)

(735 ILCS 5/2-615 (West 2014)). On appeal, plaintiff claims the circuit court erred by failing to accept as true the well-pleaded facts in his amended complaint and in ruling he was not a tenant for purposes of the Chicago Residential Landlord and Tenant Ordinance (Ordinance) (Chicago Municipal Code § 5-12-010 *et seq*. (amended Mar. 31, 2004)). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In his initial class action complaint, plaintiff alleged he was homeless when he was accepted into the Independent Living Program (program) administered by the City of Chicago Department of Family and Support Services (Department). Through the program, plaintiff allegedly rented a unit from YMCA for six months and the Department paid his rent. According to plaintiff, his tenancy was pursuant to a written "Independent Living Program Agreement" he entered into with the City of Chicago (City) and YMCA. Plaintiff also asserted he entered into a lease, but did not make clear whether or not the lease and program agreement were one and the same. Plaintiff asserted that after his lease ended, he scheduled a meeting with a YMCA employee to renew the lease, but the meeting ultimately did not occur. One week after the scheduled meeting—and eighteen days after his lease ended—plaintiff returned to his unit to find the lock had been changed. Plaintiff was denied access to the unit except to retrieve some of his belongings.

¶ 5 Plaintiff's complaint contained six counts. Counts I, II, and V alleged violations of the Ordinance for (1) YMCA's failure to provide plaintiff, as its tenant, with a summary of the Ordinance, (2) YMCA's failure to provide plaintiff with the name and telephone number of the owner of the premises, and (3) YMCA's wrongful eviction of plaintiff by changing the lock to his unit. Counts III and IV alleged violations of the Illinois Bill of Rights for the Homeless Act

(Homeless Act) (775 ILCS 45/1 *et seq*. (West 2014)) and are not subject to this appeal.[1] Finally, count VI alleged a claim for wrongful eviction based on YMCA's failure to follow the statutory procedures for evicting a tenant as set forth in the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq*. (West 2014)).

¶ 6 Plaintiff attached to his complaint the purported "Independent Living Program Agreement," which he identified as "Exhibit A." "Exhibit A" consisted of three documents, none of which were titled "Independent Living Program Agreement," and none of which disclosed the terms of plaintiff's rental of a unit from YMCA. They did not reference a lease, plaintiff's rent, or a unit to which plaintiff was to be assigned. No other documents were attached to the complaint.

¶ 7 The first document was entitled "ILP Participant Personal Property Policy," which stated that program participants' personal belongings are their full responsibility, and any belongings that remained in a participant's room 24 hours after he exits the program would be discarded. This document was authored by the Department and was signed solely by plaintiff and a Department staff member. A signature line for YMCA was not included. The second document was entitled "DFSS Guidelines for Irving Park YMCA Independent Living Program Clients" and was signed solely by plaintiff and a Department staff member. This document included a signature line for a YMCA staff member, but the line was left blank. The third document was entitled "Rules and Regulations for Irving Park YMCA Independent Living Program Clients" and was signed solely by plaintiff and a Department staff member. This document also included a signature line for a YMCA staff member which was left blank.

¶ 8 YMCA moved to dismiss plaintiff's claims under the Ordinance (counts I, II, and V),

[1] Plaintiff failed to include in his opening or reply brief any arguments regarding his claims under the Homeless Act, thereby forfeiting the issue pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Nov. 1, 2017). See *Wynn v. Illinois Department of Human Services*, 2017 IL App (1st) 160344, ¶ 78.

arguing in part that plaintiff failed to attach his alleged written agreement with YMCA, upon which his claims were founded, in violation of section 2-606 of the Code (735 ILCS 5/2-606 (West 2014)). YMCA contended plaintiff failed to attach the written agreement because no such document existed, and merely alleging the existence of a written agreement is insufficient. Moreover, YMCA observed the only written documents plaintiff attached to his complaint were program rules signed solely by the Department and not YMCA. YMCA maintained plaintiff only entered into an agreement with the City, which controlled the rooms dedicated to the program. YMCA argued the Ordinance therefore did not apply to it because plaintiff did not have a lease with YMCA and therefore was not YMCA's "tenant" as defined by the Ordinance.[2]

¶ 9 In support of its motion to dismiss, YMCA attached the affidavit of its resident manager, Itely Rideout (Rideout), who was responsible for overseeing YMCA's compliance with the program. Rideout averred that the program assists men who are homeless or at risk of being homeless in finding permanent housing, and participation in the program is limited to six months. According to Rideout, pursuant to the program, YMCA receives a block grant from the City for the dedication of eleven rooms for program participants. Rideout averred the City controls and directs participation in the program and the assignment of the eleven rooms. She further stated that during the course of participating in the program, a participant is given an "exit date" determined exclusively by the City. When the City determines a participant's exit date, it communicates that date to the participant directly through the participant's case manager.

¶ 10 Rideout further averred that several weeks prior to plaintiff's exit date, plaintiff

[2] YMCA also moved to dismiss plaintiff's claim under the Act (count VI), arguing the Act did not provide for the recovery sought by plaintiff (money damages and costs) and instead provided only for an equitable remedy of possession when a landlord failed to follow the statutory procedures for evicting a tenant as set forth in the Act. YMCA further argued wrongful eviction is not a recognized common law tort in Illinois. The circuit court ordered the parties to brief the issue. After the issue was fully briefed, the circuit court determined plaintiff could bring a negligence cause of action based on YMCA's alleged violation of the Act.

communicated that he intended to apply for a tenancy with YMCA. When plaintiff failed to apply for a tenancy by the time of his exit date, YMCA agreed to a one-day extension to apply and allowed plaintiff to remain in his unit for an extra day because the City had not assigned a new program participant. Thereafter, plaintiff failed to apply for a tenancy, and instead vacated the premises for "an extended period of days." When plaintiff returned, he requested another one-day extension to apply for a tenancy with YMCA which YMCA agreed to, again because the City had not assigned a new program participant. Plaintiff never applied for a tenancy with YMCA. The City assigned a new program participant and directed YMCA to have the designated room available to that participant. When plaintiff refused to vacate that room, the City of Chicago police were called at the direction of the City to escort plaintiff off the premises.

¶ 11 In response, plaintiff argued, in pertinent part, that the circuit court must accept as true his allegation that a written agreement with YMCA existed, and he therefore was a "tenant" under the Ordinance. Plaintiff attached to the response his own affidavit in which he described his residence at YMCA as "participation in the program." Plaintiff did not aver he had a separate agreement with YMCA.

¶ 12 Relying on section 2-606 of the Code, and finding that counts I, II, V, and VI (pursuant to the Ordinance and the Act) were founded upon the existence of the alleged written agreement between the parties, which was not attached to the complaint, the circuit court dismissed those counts without prejudice.[3] The circuit court further found plaintiff failed to plead any other facts indicating he was a tenant of YMCA independent of the written lease. The circuit court granted plaintiff leave to re-plead, but with instructions that any claims which relied on a written agreement between the parties were required to be supported by a copy of the agreement.

[3] We observe that while the parties' arguments concerning plaintiff's claim under the Act (count VI) were limited to whether or not such a cause of action existed, the circuit court dismissed this claim for the reason stated above. We further acknowledge that the circuit court also dismissed counts III and IV pursuant to the Homeless Act.

¶ 13 Plaintiff filed the instant amended complaint alleging the same basic set of facts. Plaintiff, however, alleged additional facts that YMCA had entered into independent living contracts with the City, and plaintiff had entered into a written agreement with the City pursuant to the program (program agreement). Plaintiff alleged that pursuant to the program agreement, he was to rent a unit from YMCA via a separate lease agreement between himself and YMCA, and the Department was to pay his rent. Plaintiff failed to attach the program agreement (which he had identified as "Exhibit A") to his amended complaint. In addition, despite previously asserting a written lease agreement between himself and YMCA existed, plaintiff now alleged he entered into an oral, month-to-month lease agreement with YMCA, as required by the program and set forth in the program agreement. In contradiction to this allegation, however, plaintiff also asserted that his oral lease had a term of six months rather than being a month-to-month agreement. Plaintiff realleged his original six causes of action in the amended complaint, but elected to stand on counts II (pursuant to the Ordinance), III and IV (pursuant to the Homeless Act) as originally pleaded to preserve the issues for appeal.[4]

¶ 14 Plaintiff failed to attach any of his named exhibits or other supporting documents to the amended complaint, including the program agreement, documents regarding the program, agreements between the City and YMCA, or the documents plaintiff had attached to the original complaint.

¶ 15 YMCA moved to dismiss the amended complaint pursuant to section 2-615 of the Code, arguing plaintiff failed to plead facts supporting the existence of a leasehold agreement with YMCA, and the Ordinance and Act were therefore inapplicable.[5] YMCA maintained the only

[4] We observe that by electing to stand on count II as originally pleaded, plaintiff premised count II on the existence of a written agreement with YMCA.

[5] Despite making arguments regarding the legal and factual sufficiency of the pleadings, YMCA labeled its motion as being brought under section 2-619 rather than section 2-615 of the Code because it attached, but did not

agreement plaintiff entered into was with the City.

¶ 16 After the matter was fully briefed and argued, the circuit court granted YMCA's motion to dismiss counts I, V and VI without prejudice, finding plaintiff failed to plead any facts indicating he entered into a lease with YMCA. The circuit court again referenced plaintiff's failure to attach a document outlining his purported lease with YMCA, this time the program agreement. The circuit court, however, granted plaintiff leave to file a second amended complaint. Instead, plaintiff moved to stand on his amended complaint as pleaded and requested the case as a whole be dismissed with prejudice. The circuit court granted plaintiff's request. This appeal followed.

¶ 17 ANALYSIS

¶ 18 On appeal, plaintiff argues that the circuit court erred in finding he was not a "tenant" of the YMCA and in dismissing the amended complaint. He contends in pertinent part that he entered into both a written program agreement with the City and, as required by the program agreement, a separate oral lease with YMCA. Plaintiff further maintains the circuit court failed to accept all well-pleaded facts in his amended complaint as true, including that he entered into an oral lease with YMCA.

¶ 19 Although YMCA labeled its motion a section 2-619 motion to dismiss, its arguments were based on the legal and factual insufficiency of plaintiff's pleadings and the motion was therefore substantively brought under section 2-615 of the Code. See 735 ILCS 5/2-615 (West 2014). The circuit court recognized that a motion's substance, not its label, determines the Code section under which it is to be analyzed, and therefore reviewed the motion pursuant to the appropriate standards of a section 2-615 motion. We agree with the circuit court's analysis. See *Winters v. Wangler*, 386 Ill. App. 3d 788, 792-93 (2008); *Loman v. Freeman*, 375 Ill. App. 3d

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rely on, the affidavit of Rideout.

445, 448 (2006). We therefore review YMCA's motion to dismiss, and the circuit court's order granting the motion, under section 2-615 of the Code. 735 ILCS 5/2-615 (West 2014); see *Winters*, 386 Ill. App. 3d at 792-93; *Loman*, 375 Ill. App. 3d at 448.

¶ 20 A motion to dismiss pursuant to section 2-615 of the Code attacks the legal sufficiency of a complaint by alleging defects on the face of the complaint. 735 ILCS 5/2-615 (West 2014); *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004). When ruling on a section 2-615 motion, the relevant question is whether the allegations in the complaint, construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004). Exhibits attached to a complaint become part of the pleading for a motion to dismiss. *Gagnon v. Schickel*, 2012 IL App (1st) 120645, ¶ 18. A motion to dismiss should not be granted with prejudice "unless it is clear that no set of facts can be proved under the pleading which would entitle the plaintiff to relief." *Smith v. Central Illinois Regional Airport*, 207 Ill. 2d 578, 584-85 (2003). Illinois is a fact-pleading state; conclusions of law and conclusory allegations unsupported by specific facts are not sufficient to survive dismissal. *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 408 (1996).

¶ 21 We review the dismissal of a complaint pursuant to section 2-615 *de novo*. *Mauvais-Jarvis v. Wong*, 2013 IL App (1st) 120070, ¶ 64. *De novo* consideration means we perform the same analysis that a trial court would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). "[A] decision to grant a motion to dismiss that should have been brought under section 2-615 but was instead brought pursuant to section 2-619 may nonetheless be upheld by a reviewing court 'on any grounds which are called for by the record regardless of whether the [trial] court relied on those grounds or whether the [trial] court's reasoning was correct.' " *Morris ex rel. Morris v. Williams,* 359 Ill. App. 3d 383, 386-87 (2005) (quoting *Caruth v.*

Quinley, 333 Ill. App. 3d 94, 97 (2002)).

¶ 22 Here, the claims at issue on appeal were pursuant to the Ordinance and the Act. Chicago Municipal Code § 5-12-010 *et seq*. (amended Mar. 31, 2004); 735 ILCS 5/9-101 *et seq*. (West 2014). On appeal, plaintiff argues the Ordinance and the Act apply to YMCA because plaintiff was YMCA's tenant pursuant to the oral lease he entered into with YMCA. Plaintiff does not argue the Ordinance or the Act apply in any other way. Further, plaintiff observes the Ordinance defines "tenant" as "a person entitled by *written or oral agreement*, subtenancy approved by the landlord or by sufferance, to occupy a dwelling unit to the exclusion of others" (Chicago Municipal Code § 5-12-030(i) (amended May 12, 2010)) and the Act defines "lease" as "every letting, *whether by verbal or written agreement*" (Emphases added.) (735 ILCS 5/9-214 (West 2014)). Plaintiff contends his oral lease with YMCA thus subjected YMCA to the Ordinance and the Act. Accordingly, plaintiff, in his amended complaint, was required to allege sufficient facts demonstrating the existence of an oral lease with YMCA in order to bring his claims under the Ordinance and the Act.

¶ 23 We initially observe that while plaintiff makes arguments which may apply to counts I, II, V, and VI of the amended complaint, he declined to amend count II of his original complaint, which alleged that YMCA failed to identify its owners and agents as required by the Ordinance. Instead, plaintiff elected to "stand[] on this cause of action as pleaded and repleads the same here to preserve the issue for future appeal." Count II of the original complaint, however, was founded upon plaintiff's allegation of a written lease with YMCA. The claim was dismissed from plaintiff's original complaint because plaintiff failed to attach to the complaint his alleged written lease with YMCA in violation of section 2-606 of the Code. 735 ILCS 5/2-606 (West 2014). Section 2-606 provides, "[i]f a claim or defense is founded upon a written instrument, a

copy thereof, or of so much of the same as is relevant, must be attached to the pleading as an exhibit or recited therein, unless the pleader attaches to his or her pleading an affidavit stating facts showing that the instrument is not accessible to him or her." *Id*. Because count II was founded upon the existence of a written lease agreement with YMCA, and plaintiff failed to attach to his complaint the lease agreement or an affidavit stating the agreement was not accessible to him, this count was properly dismissed from the original complaint. *Id*.; see *Sherman v. Ryan*, 392 Ill. App. 3d 712, 733 (2009) (failure to attach a written document upon which a claim is founded is grounds for dismissal); *Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 100 (1992).

¶ 24 Moreover, for the reasons set forth in more detail below, we find counts I, V, and VI of plaintiff's amended complaint were properly dismissed where (1) the claims were founded upon plaintiff's written program agreement with the City and (2) plaintiff failed to attach the program agreement or any other supporting documents to his amended complaint. 735 ILCS 5/2-606 (West 2014); see *Sherman*, 392 Ill. App. 3d at 733.

¶ 25 When plaintiff filed his amended complaint, he changed the basis of his claim for recovery. Whereas plaintiff's original complaint was founded upon the existence of a *written* lease with YMCA, plaintiff's amended complaint was founded upon the existence of an *oral* lease with YMCA. According to plaintiff, the alleged oral lease was not made independently, but rather it was purportedly required by the written program agreement. Moreover, plaintiff alleged in his amended complaint that this written program agreement set forth several terms of the purported oral lease. Specifically, plaintiff alleged in his amended complaint,

> "[p]ursuant to the [program agreement] and [program], [the Department] placed Plaintiff in the subject matter property.

* * *

> Plaintiff also entered into an oral, month-to-month Lease agreement *** with [YMCA] for the subject matter property, as required by the [program].
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> * * *
>
> Pursuant to Plaintiff's [program] Agreement with [the Department], Plaintiff was to rent the subject matter property from [YMCA] via a separate Lease agreement between Plaintiff and [YMCA], and [the Department] was to pay Plaintiff's complete rent to [YMCA].
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> * * *
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> Plaintiff's agreements with [the Department] [(the program agreement)] and [YMCA] required that [the Department] pay $394.00 per month to [YMCA] in rent on behalf of Plaintiff.
>
> * * *
>
> On or about [the final day of the lease], Plaintiff was required by his [program agreement] to reapply to renew his oral Lease with [YMCA], or move out."

Plaintiff never alleged he entered into an oral lease with YMCA independent of the written program agreement. Rather, each portion of the oral lease described by plaintiff in his amended complaint was pursuant to the program agreement. Accordingly, these allegations demonstrate plaintiff's purported oral lease was actually founded upon the written program agreement and therefore plaintiff's claims relating to an oral lease were also founded upon the written program agreement. Plaintiff was required to attach the program agreement to his amended complaint under section 2-606. 735 ILCS 5/2-606 (West 2014); see *Sherman*, 392 Ill. App. 3d at 733.

¶ 26 Illinois' fact pleading requirements further support the conclusions that plaintiff's claims

were founded upon the written program agreement and that the agreement was required to be submitted with the amended complaint. In Illinois, a pleader is required to set out ultimate facts that support his or her cause of action. *Johnson v. Matrix Financial Services Corp.*, 354 Ill. App. 3d 684, 696 (2004). Here, because plaintiff alleged he was a tenant under the Ordinance and the Act, he was required to plead the essential elements of a lease. See *Anderson*, 172 Ill. 2d at 408; *Johnson*, 354 Ill. App. 3d at 696. The essential elements of a lease include (1) the extent and bounds of the property, (2) the term of the lease, (3) the amount of rent, and (4) the time and manner of payment. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 310 (2010). As plaintiff alleged in his amended complaint, several of the essential elements of his oral lease with YMCA were set forth in and required by the written program agreement. These include the extent and bounds of the property (plaintiff was to rent the "subject matter property," defined in the amended complaint as unit number 308), the term of the lease (month-to-month), the amount of rent ($394), and a portion of the manner of payment (the Department was to pay plaintiff's complete rent to YMCA). Thus, according to the allegations of the amended complaint, the written program agreement would have demonstrated the existence of an oral lease with YMCA and substantiated the essential elements of the lease.

¶ 27 We further observe that the program agreement may have resolved the inconsistencies in plaintiff's amended complaint regarding the term of his lease. See *McCready v. Illinois Secretary of State*, 382 Ill. App. 3d 789, 794 (2008) ("[i]f there is a conflict between a written exhibit and the allegations of a pleading, the exhibit controls"). Plaintiff alleged in one portion of his amended complaint that his lease agreement with YMCA was month-to-month as required by the program, but alleged in another portion of the amended complaint that the lease agreement had a term of six months. If the program agreement required a month-to-month tenancy, a copy of the

agreement would have been dispositive. See *id*.

¶ 28 Because plaintiff's claims were founded upon the written program agreement, plaintiff was required to attach the agreement to his amended complaint. 735 ILCS 5/2-606 (West 2014). Plaintiff failed to do so, and therefore his claims under the Ordinance and Act were properly dismissed. *Id.*; see *Sherman*, 392 Ill. App. 3d at 733.

¶ 29 Finally, we observe plaintiff's amended complaint was initially dismissed without prejudice and plaintiff was granted leave to replead. Plaintiff was provided the opportunity to describe his oral lease with more specificity and attach the program agreement upon which his claims were founded. Instead, plaintiff chose to stand on his amended complaint as pleaded, which was properly dismissed. Accordingly, we must affirm the circuit court's dismissal of the amended complaint with prejudice. See *Sherman*, 392 Ill. App. 3d at 733.

¶ 30 CONCLUSION

¶ 31 For the reasons stated above, we affirm the circuit court's order dismissing plaintiff's amended complaint.

¶ 32 Affirmed.