2018 IL App (2d) 170676-U
No. 2-17-0676
Order filed November 20, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PMT NPL FINANCING 2015-1,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 16-LM-2688
	)	
JOSEPH VARAN; UNKNOWN OCCUPANT—DIMITRY LIVSHIS,	)	
	)	
Defendants-Appellants,	)	
	)	
A LLC AND WITHOUT RECOURSE,	)	Honorable
	)	Brian Diamond,
Intervenors-Appellants.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Motion to dismiss forcible detainer action properly denied where posting security for costs was not a condition precedent to out-of-state entity's filing suit in Illinois; summary judgment improperly entered where motion not served on all parties; dismissal of party defendant improperly entered where defendant given only perfunctory opportunity to object at hearing and trial court's order granting dismissal did not require plaintiff to pay costs; petition to intervene in forcible detainer action properly denied where intervenors raised title dispute and collaterally attacked preceding foreclosure judgment.

¶ 2 This appeal arises from orders entered in a forcible entry and detainer action brought by plaintiff, PMT NPL Financing 2015-1 (PMT), which was preceded by a mortgage foreclosure action. Defendant Dimitry Livshis challenges the denial of his motion to dismiss the forcible detainer action, which was based on PMT's failure, as an out-of-state plaintiff, to post security for costs; he also challenges the entry of summary judgment in PMT's favor on the ground that he did not receive notice of PMT's motion. Defendant Joseph Varan challenges his dismissal from the forcible detainer action on the grounds, *inter alia*, that he was not provided proper notice and his costs were not paid. Intervenors, A LLC and Without Recourse, argue that because they were necessary parties, the trial court erred in not permitting them to intervene in the forcible detainer action. For the reasons that follow, we affirm in part, vacate in part, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In 2006, the Bagbys executed a mortgage on 430 Woodland Park Court in Hinsdale, Illinois (the property). In May 2014, the Bagbys recorded a quitclaim deed, purporting to convey an eighty percent interest in the property to, pertinently, A LLC and Without Recourse.

¶ 5 In January 2015, PennyMac Corporation initiated a foreclosure action, in which PMT later substituted as party plaintiff. In October 2015, an order of default was entered against several defendants, including the Bagbys, A LLC, and Without Recourse, and a judgment of foreclosure and sale was entered in favor of PMT. On April 19, 2016, the foreclosure court entered an order approving sale and distribution, confirming sale, granting possession to PMT, and entering a personal deficiency. No appeal of the foreclosure action was filed.

¶ 6 On October 14, 2016, PMT filed a forcible detainer action, naming Joseph Varan and Unknown Occupants as defendants. Dimitri Livshis identified himself as an unknown occupant

and moved to dismiss the action on the grounds that PMT, an out-of-state entity, did not file a security for costs and, as a trust, lacked standing to bring the action. The trial court denied Livshis's motion on March 21, 2017.

¶ 7 On March 31, 2017, A LLC and Without Recourse (intervenors) filed a joint petition to intervene on the basis that they owned eighty percent of the property by virtue of the quitclaim deed. The intervenors argued that they retained a possessory interest in the property because they were never made parties to the foreclosure. The petition to intervene attached a motion to dismiss the forcible detainer action, in which the intervenors asserted that they did not want to terminate Livshis's or Varan's possession of the property.

¶ 8 On July 11, 2017, PMT filed a motion for summary judgment. PMT also moved to dismiss Varan as a party defendant on the basis that Varan was no longer in actual possession of the property. The notice of filing of the motions indicated that both motions were mailed to Varan and Unknown Occupants. PMT also sent a notice of motion to Varan and Unknown Occupants advising that the motion for summary judgment was to be heard on July 26, 2017. The notice of motion did not indicate that it was sent to counsel for Livshis. Varan was present in court at the July 26, 2017, hearing; Livshis and his counsel were not present.

¶ 9 The trial court granted summary judgment in favor of PMT. The trial court also granted PMT's motion to dismiss Varan without prejudice. After identifying himself to the court, Varan was given the following opportunity to object:

"THE COURT: Okay. Do you have any objection to being dismissed from the –

MR. VARAN: I do, Your Honor.

THE COURT: What's your objection to being dismissed?

MR. VARAN: I have possession of the property.

THE COURT: Okay.

MR. VARAN: So if they want to dismiss me with prejudice, I don't have a problem with that.

THE COURT: Okay. Well, I'm going to dismiss over your objection.

¶ 10 Varan and Livshis filed motions to reconsider, which were denied. The court also denied the intervenors' petition to intervene. The sheriff of Du Page County was directed to immediately proceed with the eviction. Varan, Livshis, and the intervenors filed timely notices of appeal.

¶ 11 II. ANALYSIS

¶ 12 We begin by considering Livshis's contention that the trial court improperly entered summary judgment in favor of PMT because Livshis's counsel was not given notice of the summary judgment motion. Our review is *de novo*. *Hilgart v. 210 Mittel Drive Partnership*, 2012 Il App (2d) 110943, ¶ 19.

¶ 13 PMT filed a motion to dismiss the appeal in this court, which we ordered taken with the case. In the motion, PMT concedes that Livshis's counsel was not given proper notice of PMT's motion for summary judgment. On appeal, PMT states that its motion would more properly have been titled a "motion for summary reversal" and asks this court to remand the matter to the trial court so that Livshis may have the opportunity to respond to the motion for summary judgment. We agree that Livshis should have the opportunity to respond to PMT's motion for summary judgment; accordingly, we vacate the entry of summary judgment in favor of PMT and remand for further proceedings. The motion to dismiss the appeal is denied.

¶ 14 Livshis also contends that the trial court incorrectly denied his motion to dismiss the forcible detainer action. In the trial court, Livshis argued that the trial court erred in denying his

motion because PMT is an out-of-state entity and failed to post security for costs in accordance with 735 ILCS 5/5-101 and 5-103 (West 2017). On appeal, Livshis maintains for the first time that the trial court should have continued the motion to dismiss and allowed PMT a set amount of time to post security; because this was not done, Livshis argues, the motion to dismiss was improperly denied. Livshis has forfeited this point on appeal. *K&K Iron Works, Inc. v. Marc Realty, LLC*, 2014 IL App (1st) 133688, ¶ 25 ("If an argument was not raised to the trial court, that issue is forfeited and cannot be introduced on appeal.").

¶ 15 Responding to Livshis's appeal argument, PMT asserts that Livshis was not prejudiced because no award was "entered against PMT for which the security costs would become relevant." PMT also requests that, if the case is remanded for renewed judgment proceedings against Livshis, the trial court be instructed "to enter an order requiring PMT to enter a security for costs within twenty-one days of the entry of that order by the trial court."

¶ 16 Again, our review is *do novo*. *Krilich v. Am. Nat. Bank & Tr. Co. of Chicago*, 334 Ill. App. 3d 563, 569 (our standard of review of a motion to dismiss under section 2–619 of the Code is *de novo*).

¶ 17 Section 5-101 provides that a "plaintiff *** shall, before he or she institutes [an] action, file, or cause to be filed, with the clerk of the court in which the action is to be commenced, security for costs." 735 ILCS 5/5-101 (West 2017). Section 5-103 provides that if an action is commenced without filing a security for costs, "the court, on motion, shall dismiss the same, and the attorney of the plaintiff shall pay all costs accruing thereon, unless the security for costs is filed within such time as is allowed by the court, and when so filed it shall relate back to the commencement of the action." 735 ILCS 5/5-103 (West 2017). Section 5-103 has been held to mean that a "court should not dismiss the suit until a rule is taken on the plaintiff to file security

for costs within such time as may be fixed by the court." *Lee v. Waller*, 13 Ill. App. 403, 406 (1883); see also *Lease Partners Corp. v. R & J Pharmacies Inc.*, 329 Ill. App. 3d 69, 76 (2002) (the language of section 5-103 "prohibits dismissal if security for costs 'is filed within such time as is allowed by the court' "). Accordingly, security for costs is not a condition precedent to filing suit, and the trial court did not err in rejecting Livshis's argument that PMT's action was fatally defective because no security had been posted prior to commencing the action.

¶ 18 We next consider Varan's contention that the trial court erred in dismissing him as a party defendant because he was not given proper notice of the dismissal motion. Varan argues that he was present on July 26, 2017, because he had been given notice that PMT's motion for summary judgment would be heard that day; he was not, however, given notice that PMT's motion to dismiss him from the action would also be heard that day. Accordingly, Varan asserts, he was deprived of his due process rights, citing *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Il. 2d 218, 244 (2006), for the proposition that due process requires that a person be served with notice and have an opportunity to be heard in order to enforce and protect his rights. Varan further notes that PMT did not pay his costs, as required under section 2-1009(a) of the Code of Civil Procedure. 735 ILCS 5//2-1009(a) (West 2017).

¶ 19 PMT acknowledges that its hearing notice did not mention the motion to dismiss Varan but asserts that Varan's due process rights were not violated because Varan knew there was a motion to dismiss pending, attended the hearing, and voiced his objection to the motion to dismiss. PMT does not address the issue of Varan's costs.

¶ 20 Section 2-1009(a) provides that a plaintiff "may, at any time before trial or hearing begins, upon notice to each party who has appeared or each such party's attorney, and upon payment of costs, dismiss his or her action or any part thereof as to any defendant, without

prejudice, by order filed in the cause." We review for an abuse of discretion. *Carolina Cas. Ins. Co. v. Estate of Sperl*, 2015 IL App (3d) 130294, ¶ 18 (appellate court "will *** apply an abuse of discretion standard to the trial court's ruling on [a plaintiff's] motion to voluntarily dismiss"). "The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court." *Id.*

¶ 21 The record shows that Varan did not receive notice that the motion to dismiss him as a party defendant was to be heard on July 26, 2017. Moreover, the trial court dismissed him from the case without ordering that costs be paid. We note that, in *Mizell v. Passo*, 147 Ill.2d 420, 428–29 (1992), the supreme court affirmed voluntary dismissal without prejudice even though the plaintiff had not given notice or tendered costs. The court concluded that, where the defendant was given an opportunity to present argument on the motion after briefly reviewing it, and the trial court's order granting the dismissal required the plaintiff to pay costs, no prejudice had resulted. *Id.* See also *Valdovinos v. Luna-Manalac Med. Ctr., Ltd.*, 328 Ill. App. 3d 255, 267-68 (2002) (same conclusion based on similar facts).

¶ 22 Here, Varan was served with the motion to dismiss but did not receive notice of the hearing; he was given only a perfunctory opportunity to respond to the motion; and the trial court's order granting the dismissal with prejudice did not mention costs. The failure to comply with the requirements of section 2-1009(a) can deprive the plaintiff of its right to voluntarily dismiss its case. *Valdovinos*, 328 Ill. App. 3d at 267. Accordingly, we vacate the trial court's order granting the motion to dismiss Varan and remand for further proceedings.

¶ 23 Finally, we consider the intervenors' contention that the trial court improperly denied their petition to intervene because they were necessary parties to the forcible detainer action. We

review for an abuse of discretion. *In re County Collector*, 2017 IL App (2d) 160483, ¶ 31. "A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court, or where its ruling rests on an error of law." [Citations omitted.] *Peeples v. Village of Johnsburg*, 403 Ill. App. 3d 333, 339 (2010).

¶ 24 Intervenors' argument that they should have been allowed to intervene is based upon an assertion of ownership of the property. According to intervenors, PMT acquired only a twenty percent possessory interest in the property—the amount retained by the Bagbys in their quitclaim deed—because the remaining eighty percent interest was conveyed to intervenors via the quitclaim deed. Intervenors further argue that because PMT did not make them properly named parties and serve them notice in the mortgage foreclosure action, the disposition of the property in the foreclosure action was subject to their interests.

¶ 25 Intervenors raise a title dispute, which cannot be determined in a forcible detainer action. See *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 15 ("Serious title disputes *** may not be determined in a forcible entry and detainer action."); *Continental Illinois Nat. Bank & Trust Co. of Chicago v. Wilson*, 103 Ill. App. 3d 357, 360 (1982) (same). Intervenors also mount a collateral attack on the foreclosure judgment, based on defective service of process. Intervening in the forcible detainer action is not the appropriate procedure for challenging the foreclosure order; the proper remedy is to file a section 2-1401 petition in the foreclosure court. 735 ILCS 5/2-1401 (West 2018). We conclude that the trial court did not abuse its discretion in denying the petition to intervene.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm in part, vacate in part, and remand for further proceedings.

¶ 28 Affirmed in part, vacated in part, and remanded