

No. 1-19-0512

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 DISTRICT

BLANCA HINOJOSA and ALBERTO HINOJOSA,)	Appeal from the
)	Circuit Court of
Plaintiffs-Appellants,)	Cook County.
)	
v.)	
)	No. 18 M1 500013
EVERGREEN PARK POLICE DEPARTMENT,)	
VILLAGE OF EVERGREEN, and MICHAEL)	
SAUNDERS, as Chief of Police of the Evergreen)	
Park Police Department,)	Honorable
)	Patrick J. Heneghan,
Defendants-Appellees.)	Judge, presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the dismissal of this replevin action where plaintiffs sought the return of firearms, ammunition, and gun paraphernalia seized and retained by law enforcement pursuant to search warrants.

¶ 2 Plaintiffs-Appellants, Alberto and Blanca Hinojosa, husband and wife, appeal the dismissal of their replevin action seeking the return of firearms, ammunition, and gun

paraphernalia seized by law enforcement, pursuant to two search warrants, and retained, pursuant to a court order, by defendant-appellee, the Evergreen Park Police Department. We affirm.¹

¶ 3

I. BACKGROUND

¶ 4 The following facts relevant to the disposition of this appeal were derived from the various pleadings, exhibits, and orders contained in the record.

¶ 5

A. Related Criminal Proceedings

¶ 6 Defendant Evergreen Park Police Department (Police Department) has in its possession 48 firearms, ammunition, and gun paraphernalia (the property) which had been seized by law enforcement in January 2011 pursuant to two search warrants. The first search warrant was issued by the Circuit Court of Cook County, Illinois for the search of the person of Alberto Hinojosa and the premises at 1648 Highland Avenue, Berwyn, Cook County (the Berwyn address), and the second was issued by the Circuit Court of the Twelfth Judicial Circuit Will County, Illinois, for the search of a storage unit at the U-Haul Storage Facility at 240 North Frontage Road, Bollingbrook, Illinois (together referred to as the search warrants). The search warrants allowed a search of Alberto and the premises and the seizure of items including cannabis, cocaine, and firearms, which may have been used in the commission of the offense of possession of controlled substances and unlawful use of weapons. Other contraband (including a large amount of cocaine and \$280,000 in cash) was seized but only the property is at issue. At the time of the seizure, Alberto possessed a valid Firearm Owner's Identification Card (FOID card), which was revoked by the Illinois State Police on January 24, 2011. Alberto was

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

subsequently charged with possession of cocaine with intent to deliver. *People v. Alberto Hinojosa*, No. 11-CR-2575 (Cir. Ct. Cook County) (criminal case). The Police Department has retained custody of the property in accordance with an order entered in the criminal case.

¶ 7 On January 19, 2017, Alberto only filed a motion in the criminal case for return of the property under various statutory and constitutional provisions including section 5/108 of the Code of Criminal Procedure (Criminal Code) (735 ILCS 5/108 (West 2016)). In the motion, Alberto asserted that he and Blanca were the owners of the property and asked that the property be returned to both of them. However, during these proceedings, Alberto later claimed to have transferred ownership of the property to Blanca, who possessed a valid FOID card.

¶ 8 On April 7, 2017, a hearing on the motion proceeded before the presiding judge of the Criminal Division of the Circuit Court of Cook County. The criminal court voiced hesitation to return the firearms to Alberto as he did not have a valid FOID card. The court suggested that if Blanca did have a FOID card, and she now owns the property, she should “go and get the weapons” from the Police Department and if the Police Department does not return the property, “[m]aybe she would have to do a replevin.” The court believed that Blanca’s right to recover was not before the court as she had not requested that the Police Department return the property to her. On the same day, the criminal court entered an order denying the motion for return of the property holding that it would not enter an order requiring the Police Department to turn over the property to Alberto without a valid FOID card. The order further stated that because Alberto “claim[ed] to have transferred ownership of the property, [the criminal court] no longer ha[d] jurisdiction over the property.”

¶ 9

B. Replevin Action

¶ 10 On January 9, 2018, plaintiffs filed this replevin action for return of the property against the Police Department, the Village of Evergreen Park, and Michael Saunders, individually and as the Chief of Police.² The form complaint alleged that plaintiffs were the lawful owners of the property which was wrongfully detained by defendants and that the property had not been “seized under any lawful process.” The complaint valued the property at \$75,000. Plaintiffs sought an order of replevin and a judgment against defendants for possession of the property, the value of any of the property not delivered, and damages for its detention. The complaint in the record did not include a signed and sworn affidavit verifying that the allegations were true as required by the Illinois Replevin Act (Act) (735 ILCS 5/19-104 (West 2016)). An inventory list was attached to the complaint which described the property and the specific items being retained by the Police Department.

¶ 11 Defendants in their answer to the complaint denied that plaintiffs were the owners and lawfully entitled to possession of the property, that the property was being wrongfully detained, and that the property had not been seized under any lawful process. Defendants asserted an affirmative defense that plaintiffs’ complaint was barred by *res judicata* and collateral estoppel.

¶ 12 On May 7, 2018, defendants filed a motion to dismiss the complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-619(a)(9) (West 2016)). In their motion, defendants stated that the property was seized pursuant to search warrants and retained as required by a court order. Defendants attached an affidavit of Chief Saunders

² The caption of the complaint names the defendants as “Evergreen Park Police Department, *et al.*,” but later alleges that “[t]he property is wrongfully detained by the defendant [*sic*] “the Evergreen Park Police Department, the Village of Evergreen, and Michael Saunders, individually and as Chief of Police.” On November 28, 2018, the circuit court granted “defendant’s motion to amend its 2-619 motion to include all listed defendants in the case: Evergreen Park Police Department, Village of Evergreen Park, and Michael Saunders.”

averring to those facts; specifically he stated the property was seized pursuant to the search warrants and that the property remained in the custody of the Police Department pursuant to an order entered by the criminal court. The affidavit included copies of the search warrants as exhibits. Defendants argued that the remedy of replevin was not available to plaintiffs, but instead, section 5/108 of the Criminal Code provided the only mechanism by which plaintiffs could seek the return of the property. Defendants also asserted that the plaintiffs' action was barred by the prior proceeding in the criminal case.

¶ 13 Plaintiffs responded by arguing that defendants' motion was unsupported by the facts and they were involved in "a never-ending game of jurisdictional hot-potato." In their motion, plaintiffs asserted that the property lawfully belonged to Blanca, but also described the property as "marital property." (As stated, the replevin complaint alleged that *both* Alberto and Blanca owned the property.) Plaintiffs contended that the Police Department had no legitimate purpose or legal basis to continue to retain the property. Further, according to plaintiffs, the criminal court ceded its jurisdiction in the matter to the civil court and ordered plaintiffs to pursue the matter in replevin.

¶ 14 Plaintiffs attached multiple documents in support of their arguments including: an abstract issued by the Illinois State Police showing the revoked status of Alberto's FOID card (Ex. 1); a scanned copy of the front of Blanca's Indiana driver's license (showing a Whiting, Indiana address) along with a scanned copy of the front of her Illinois FOID card (showing the Berwyn address)—expiring on March 1, 2023 (Ex. 2); an affidavit of Blanca which attached a "Record of Firearms Transfer Between Unlicensed Persons" purporting to transfer the property from Alberto to Blanca at the Whiting, Indiana address in March 2017 (Ex. 3); Alberto's motion

for return of the property in the criminal case (Ex. 4); and the April 7, 2017 transcript of the hearing and the criminal court's order on the motion for return of the property (Exs. 5 and 6). Plaintiffs, however, did not produce evidence to contradict the affidavit of Chief Saunders.

¶ 15 Beginning on June 26, 2018, the replevin court entered and continued defendants' motion to dismiss for plaintiffs to file a motion in the criminal court to reconsider its April 7, 2017 order. On August 23, 2018, Alberto filed a motion to reconsider in the criminal court, which was denied.³

¶ 16 On November 28, 2018, the replevin court granted defendants' motion to dismiss, finding that the property was seized pursuant to the search warrants and plaintiffs' sole remedy was under the Criminal Code. The replevin court denied plaintiffs' motion for reconsideration on February 11, 2019. Plaintiffs filed this appeal on March 8, 2019.

¶ 17 II. Analysis

¶ 18 On appeal, plaintiffs challenge the replevin court's dismissal of their complaint pursuant to section 2-619(a)(9) of the Civil Code. Plaintiffs claim that the replevin court erred in finding that plaintiffs' sole remedy for the return of the property was under the Criminal Code. Defendants respond that when items are seized pursuant to a warrant, replevin is not available because the Criminal Code is the only mechanism for the return of the property. See 725 ILCS 5/108-11 (West 2016) (“[t]he court before which the instruments, articles or things are returned shall enter an order providing for their custody pending further proceedings”).

³ Plaintiffs assert in their appellants' brief that they filed an amended motion to reconsider before the criminal court on March 11, 2019, which was denied after a hearing on May 30, 2019. Nothing in the record shows an appeal from this order was ever filed.

¶ 19 A section 6-219 motion admits the legal sufficiency of a plaintiff’s complaint. *Smith v. Waukegan Park District* 231 Ill. 2d 111, 120 (2008). When ruling on the motion, the court construes the pleadings and supporting documents in a light most favorable to the nonmoving party, and accepts as true all well-pleaded facts in the complaint. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

¶ 20 Under section 2-619(a)(9) of the Civil Code, a defendant may move to dismiss a complaint on the grounds “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). “An ‘[a]ffirmative matter’ is something in the nature of a defense that completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint.’ ” *Piser v. State Farm Mut. Auto. Ins. Co.*, 405 Ill. App. 3d 341, 345 (2010).

¶ 21 On a section 2-619 motion, the defendant has the burden of proof of going forward and, if the motion is “based on facts not apparent from the face of the complaint, the movant must support its motion with affidavits or other evidence.” *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659, ¶ 22 (quoting *City of Springfield v. West Koke Mill Development Corp.*, 312 Ill. App. 3d 900, 908 (2000); *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1993)). If the defendant meets its burden, “the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is ‘unfounded or requires the resolution of an essential element of material fact before it is proven.’ ” *Philadelphia Indemnity*, 2016 IL App (1st) 151659, ¶ 22 (quoting *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370 (1997) (quoting *Kedzie & 103rd Currency Exchange*, 156

Ill. 2d at 116). Failure to submit a counteraffidavit may be fatal to a plaintiff's cause of action "as the failure to challenge or contradict supporting affidavits filed with a section 2-619 motion results in an admission of the fact stated therein." *Philadelphia Indemnity*, 2016 IL App (1st) 151659, ¶ 22 (citing *Fayezi v. Illinois Casualty Co.*, 2016 IL App (1st) 150873, ¶ 44).

¶ 22 We review a dismissal pursuant to section 2-619 *de novo*. *Smith*, 231 Ill. 2d at 115. "[B]ecause we review the trial court's judgment, not its rationale, we may affirm for any reason supported by the record regardless of the basis cited by the trial court." *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659, ¶ 21 (citing *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 30).

¶ 23 In determining whether the circuit court erred in dismissing the complaint, we must consider the nature of plaintiffs' suit.

¶ 24 Replevin is a statutory proceeding and must be strictly followed. *Carroll v. Curry*, 392 Ill. App. 3d 511, 513 (2009). The Act is found in Article 5 of the Civil Code. 735 ILCS 5/19-101, *et seq.* (West 2016). A replevin action may be brought "[w]hensoever any goods or chattels have been wrongfully distrained, or otherwise wrongfully taken or wrongfully detained." *Id.* § 19-101. Under the Act, an action in replevin is "commenced by the filing of a verified complaint which describes the property to be replevied and states that the plaintiff in such action is the owner of the property so described, or that he or she is then lawfully entitled to the possession thereof, and that the property is wrongfully detained by the defendant, and that the same has not been taken for any tax, assessment, or fine levied by virtue of any law of this State, against the property of such plaintiff, or against him or her individually, nor seized under any lawful process against the goods and chattels of such plaintiff subject to such lawful process, nor held by virtue of any

order for replevin against such plaintiff.” *Id.* § 19-104. To succeed on a replevin case, a plaintiff must not only plead but “prove that he [or she] is lawfully entitled to possession of the property, that the defendant wrongfully detains the property and refuses to deliver the possession of the property to the plaintiff.” *Carroll v. Curry*, 392 Ill. App. 3d 511, 514 (2009) (quoting *International Harvester Credit Corp. v. Helland*, 130 Ill. App. 3d 836, 838 (1985)).

¶ 25 In defending this action, defendants maintained that the property was lawfully seized and retained. We look to the Criminal Code in evaluating this assertion.

¶ 26 The Criminal Code authorizes the issuance of a search warrant under certain circumstances in compliance with procedural requirements. 725 ILCS 5/108-4. Where a judge issues a search warrant, the person directed to execute the warrant is authorized to search the place or person particularly described in the warrant and to seize the items particularly described in the warrant. *Id.* §§ 108-3, 108-7. A search warrant may issue for the seizure of any “instruments, articles, or things designed or intended for use or which are or have been used in the commission of, or which may constitute evidence of, the offense in connection with which the warrant is issued; or contraband, the fruits of crime, or things otherwise criminally possessed.” *Id.* § 108-3(a)(1). Once any items are seized, they are to be returned to the judge who issued the warrant, a judge named on the warrant, or another judge of competent jurisdiction. *Id.* 108-10. The court before which the items are returned “shall” enter an order providing for their custody pending further proceedings. *Id.* § 108-11.

¶ 27 In support of their motion to dismiss, defendants attached the affidavit of Chief Saunders which established that the property was seized by law enforcement pursuant to two search warrants and remained in the custody of the Police Department pursuant to an order entered by

the criminal court. The search warrants were attached as exhibits to the affidavit. Each of the warrants was signed by a judge, asserted that it was being issued pursuant to a sworn complaint, and that there was probable cause for the issuance of the search warrant. The search warrants allowed for the search and seizure of items relating to the commission of various drug and unlawful use of weapons offenses and specifically authorized the seizure of firearms. The affidavit and the exhibits established that the property was properly seized and retained under section 5/108 of the Criminal Code. Defendants therefore presented affirmative matter which defeated plaintiffs' claim under the Act.

¶ 28 Plaintiffs in their complaint did allege that the property was not seized under any lawful process and was wrongfully retained by the Police Department. These bare allegations, although unverified, otherwise met the minimum pleading requirements of section 19-104 of the Act. However, defendants produced Chief Saunders's affidavit and the search warrants, which refuted these crucial conclusory allegations as may be done under section 2-619(a)(9). *Piser v. State Farm Mutual Auto. Ins. Co.*, 405 Ill. App. 3d 341, 349 (2010). Plaintiffs did not bring forth evidence to contradict or challenge this evidence and therefore, the facts contained in the affidavit are deemed admitted. *Id.* at 352-353. In fact, plaintiffs have not challenged the validity of the search warrants or the court order remanding custody of the property to the Police Department below or in this court. And the evidence plaintiffs produced in response to the motion to dismiss establishes that the criminal court in denying Alberto's request to recover the property did not vacate the order requiring the Police Department to keep possession of the property.

¶ 29 We also note that plaintiffs produced other evidence in response to the motion to dismiss that serves to defeat their right to relief under the Act. In the replevin complaint, plaintiffs alleged the property belonged to both of them and plaintiffs requested that the property be returned to *both* of them under an order of replevin. However, plaintiffs produced evidence which establishes that Alberto's FOID card was revoked in 2011 which refutes plaintiffs' claim under the Act that they would *both* be lawfully entitled to possession of the property even in the absence of the order placing the property with the Police Department. See 430 ILCS 65/2 (West 2018); *People v. Fowler*, 222 Ill. App. 3d 157, 166 (1991) (noting possession of a firearm absent a valid FOID card is a criminal offense). And without a valid FOID card to possess the property and the property legally in the possession of the Police Department, we question whether Alberto could validly transfer ownership of the property to Blanca in March 2017.

¶ 30 Further, plaintiffs included in the appendix to their appellate brief, the State's response to their amended motion to reconsider in the criminal case. In its response, the State maintained that 27 of the 48 seized firearms listed in the inventory attached to the replevin complaint are illegal under the Cook County Blair Holt Assault Weapon Ban Ordinance (Cook County Ordinance No. 13-O-32 (adopted July 17, 2013)) and that a federal law enforcement agency was investigating the ownership of two of the rifles as illegal under both state and federal law. Although we cannot consider pleadings or exhibits contained in an appendix which are not part of the record on appeal (see *People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994) ("evidence which is not part of the record on appeal is not to be considered by a reviewing court ***.")), we can consider that the inventory list does indeed include assault weapons covered by the Cook County Ordinance,

which prohibits ownership, possession, *and* transfer of such weapons. Cook County Ordinance No. 13-O-31, § 54-212 (a).⁴

¶ 31 As stated above, we may affirm the order dismissing the replevin action for any reason supported by the record. Defendants' evidence produced in support of their motion to dismiss established that the property was seized and retained under a lawful process and therefore plaintiffs did not have a right to replevin regardless of whether their only avenue of relief may have been under the Criminal Code. Therefore, the motion to dismiss was properly granted.

¶ 32 Having found that defendants established that plaintiffs were not entitled to relief under the Act, we need not reach the other issues raised by the parties on appeal.

¶ 33 Affirmed.

⁴ For example, the Cook County Ordinance includes a list of firearm models that are specifically prohibited, such as Smith & Wesson M&P15, Barret M107A1, all Thompson rifles including Thompson 1927, Fabrique National FN/FAL, FN/LAR, or FNC (Cook County Ordinance No. 13-O-31, § 54-212 (a)), all of which are included in the inventory list. This is not an exhaustive examination of which of the many firearms listed in the inventory list are prohibited by the ordinance.