2013 IL App (1st) 130443-U

FIFTH DIVISION
September 30, 2013

No. 1-13-0443

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JACQUELINE N. MALONE,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	13 M1 167107
	)	
MB FINANCIAL BANK, N.A.,	)	Honorable
	)	Cynthia Y. Cobbs,
Defendant-Appellee.	)	Judge Presiding

JUSTICE McBRIDE delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Presiding Justice R. Gordon dissented.

O R D E R

HELD: Dismissal of complaint is affirmed where granddaughter who was co-tenant of safe deposit box with grandfather who was declared incompetent failed to raise any question of material fact in claims against bank regarding plenary guardian's access to and withdrawal of contents of box on grandfather's behalf.

¶ 1 Jacqueline N. Malone filed a first amended verified complaint against a bank in South Holland, Illinois, alleging that without prior notice to Malone or a court order, the bank drilled open a safe deposit box that Malone shared with her grandfather and allowed the grandfather's plenary guardian to take the contents of the box. The bank, MB Financial Bank,

N.A., filed a motion to dismiss the pleading with prejudice pursuant to section 2-619(a)(9) of the Illinois Code of Procedure (735 ILCS 5/2-619(a)(9) (West 2010)), on grounds that the guardian provided proper documentation of her appointment and office and that the lease agreement entitled each joint box holder to open and remove the contents of the box. The circuit court of Cook County granted the dismissal, from which Malone appeals. She contends questions of material fact precluded the dismissal.

¶ 2 The pleading at issue indicates that on January 27, 2005, plaintiff Malone and her grandfather, Soloan Johnson, rented a safe deposit box that was approximately 3" high, 5" wide, and 20" deep at the defendant's branch bank located at 473 East 162nd Street, South Holland, Illinois, 60473. The written lease stated that Malone and Mr. Johnson were joint tenants. The lease also specified:

> "ACCESS –
>
> * * *
>
> We may also refuse you access (to the extent permitted by law) into this safe deposit box on the death, incapacity, or bankruptcy of any renter, unless we
>
> (1) open it to search for testamentary documents, to lists its contents for tax purposes, or to accomplish any other purpose required or permitted by law;
>
> (2) are satisfied that you or a legal representative of you or your estate is qualified and authorized to enter the safe deposit box and remove its contents; and
>
> (3) receive satisfactory evidence that all federal, state or local

requirements about notice, access into this safe deposit box, or withdrawing its contents have been met.

* * *

NOTICES – We will mail any notice to you to your latest address as shown on our safe deposit records. ***

* * *

TERMINATION – We may end this lease by giving you a written notice 30 days before the lease ends. ***

You may end this lease by giving us written notice, and simultaneously removing all the contents from this safe deposit box, and returning to us its keys or combination. ***

JOINT OWNERS – If this safe deposit box is leased by more than one person, then you have a joint tenancy with the right of survivorship in the safe deposit box and the lease. The ownership of the lease will not affect the title to any contents fo the safe deposit box. Each of you may enter into the safe deposit box, amend or cancel this lease, exchange or surrender the safe deposit box, or do anything else involving this safe deposit box."

¶ 3 About seven years later, the circuit court of Cook Count declared 85-year-old Mr. Johnson to be a disabled person suffering from dementia and severe short term memory loss and on April 24, 2012, the court appointed Mr. Johnson's wife, Lela Johnson, to be his plenary guardian. Relying on the order appointing her plenary guardian and the corresponding letters of

office, Mrs. Johnson had the bank drill open the box on June 1, 2012, and she retrieved its contents – $45,000 in cash, which she deposited into her husband's account at the same bank. That same day, Mrs. Johnson also had the bank open a safe deposit box which is not at issue here. That box had been rented by Mr. Johnson and Jessey Burton Garrett, and its inventory included "List of bond redemptions & copies of cashiers checks from the redemptions," "Ford Motor Co. Stock papers," and a car title. The record indicates that Mr. Johnson had been a long-term employee of the car manufacturer and was receiving monthly pension or annuity payments from his former employer.

¶ 4 On August 24, 2012, Malone filed a claim within the existing probate action and specified, "The nature of the claim is $45,000 in U.S. Currency wrongfully withdrawn from Claimant's Safe Deposit Box by the Plenary Guardian of the Estate." (This was the full extent of her allegations.) On September 5, 2012, during a status call for the probate proceedings, Malone's attorney informed the judge there was "an issue about who owned the contents of the safe deposit box." The judge responded, "We should probably freeze those assets pending the outcome of the claim," but also said, "I'm looking at the documents which created the joint tenancy box. It's clearly marked joint tenancy for the box." The judge then asked why the collection of $45,000 was not reflected in the estate's inventory and Mrs. Johnson's attorney responded that he learned about the $45,000 only after preparing the inventory. Counsel also explained, "one day Mr. Johnson had a clear moment and told his wife that he made a mistake and told her about these bonds that he had cashed and put in a safe deposit bank" and that Mrs. Johnson had gone to the bank to retrieve the bond proceeds. The judge responded, "That is a

substantial increase in our inventory," that Mrs. Johnson would have to secure a bond that same day, and that when the parties returned for the next status date, they should submit an amended inventory reflecting the addition of $45,000. The record does not reveal the status of the estate or the disposition of Malone's claim against it.

¶ 5 At a status hearing on October 19, 2012, Malone's attorney told the judge that Mrs. Johnson used part of the $45,000 "to pay the ward's credit card debts" and the judge responded that Mrs. Johnson had no authority to disperse funds from an account that had been frozen by the court. Then, "Based on that last revelation, have you looked into whether or not there should be a citation for removal or whether or not there should be a successor guardian[?], also "I have an ineffective guardian." Malone's attorney said, "My request to the Court at this time is to bring in the Cook County Public Guardian's office as guardian" and the judge responded that this would require a citation for removal and a petition for successor guardian." After further discussion with the attorneys, the judge said it appeared Mr. Johnson had children who were not notified about the guardianship proceedings, and Mrs. Johnson's attorney responded there could be a dispute as to whether "these are his children or not," but the attorney did not know the details and had been unable to talk with his client when she was busy "running Mr. Soloan [Johnson] back and forth to the hospital." In fact, she was not in the courtroom because she was taking her husband "to the VA today." The judge instructed counsel to file a supplemental inventory and petition for judicial ratification of the guardian's dispersal of funds purportedly for the benefit of the disabled ward.

¶ 6 On November 12, 2013, Malone initiated the instant suit against the bank. In a first

amended complaint filed in the circuit court's Municipal Division, Malone asserted claims of breach of contract, constructive fraud, unjust enrichment, and negligence and she attached to this pleading a bank receipt issued in 2005 to her for paying the rent and a key deposit on the newly-rented box, a bank receipt issued in 2012 indicating Mr. Johnson paid a late fee and rent, and an inventory of the box as of June 1, 2012 at 9:30 a.m. The inventory indicated that when the box was drilled open in the presence of Mrs. Johnson and bank employees Robin James and Jill Kiser, it contained six $50 bills and 447 $100 bills. Another attachment was a copy of the court order appointing Mrs. Johnson as the plenary guardian of Mr. Johnson's estate and person. This order indicated the factual basis for the disability finding was a physician's report and an evaluation by a guardian *ad litem*; and that a budget and statutorily-required inventory of the estate were to be presented to the court on June 14, 2012, and an annual status report was to be presented on May 23, 2013. *See* 755 ILCS 5/14-1 (West 2010) (section of probate statute requiring estate representative to file inventory of real and personal estate within 60 days of issuance of letters of office); 755 ILCS 5/11a-17 (West 2010) (specifying duties of personal guardian). Based on her allegations and exhibits, Malone sought compensatory and punitive damages, pre- and post-judgment interest, and her costs.

¶ 7 The bank filed a section 2-619 motion to dismiss (735 ILCS 5/2-619(a) (West 2010)) in which it argued that the plenary guardian was legally entitled to access the safe deposit box and its contents. The exhibits attached to this motion included the court order appointing a plenary guardian, the guardian's letters of office, the box lease, an affidavit completed by Jill Kiser, and a bank receipt for the deposit of $45,000 cash in June 2012. In her sworn statement,

Kiser said she was a safe deposit box teller at the bank's South Holland branch. Kiser recounted that Mrs. Johnson first requested access to the box on March 20, 2012, but Kiser denied the request because Mrs. Johnson had only an estate representative's "Oath and Bond." Mrs. Johnson returned the next day with documentation of her husband's dementia and other health issues and his inability to mange his personal affairs, but Kiser said the bank would have to see a court order and letters of office confirming Mrs. Johnson's status as plenary guardian. Mrs. Johnson returned two months later on May 21, 2012, this time with the court order, but not the letters of office. At this point, Kiser said the bank would still need to receive and review letters of office, but Kiser went ahead and scheduled an appointment to drill open the box on June 1, 2012. After the box was opened and inventoried on June 1st, the bank retained the contents for safekeeping. When Mrs. Johnson returned with her letters of office on June 7, 2012, Kiser gave her the currency and Mrs. Johnson deposited all of the money into Mr. Johnson's MB Bank account. Based on these facts, the bank argued there was nothing untoward about Mrs. Johnson's access to the box and that the court should dismiss Malone's pleading with prejudice.

¶ 8 Malone replied in opposition to the motion to dismiss that it was immaterial whether Mrs. Johnson was the plenary guardian. Malone contended the bank's "position in this case is without precedent, it was improper for the bank to have unilaterally decided to "award[] title of the safe deposit box contents to the Plenary Guardian" based solely on the bank's own interpretation of the lease, court orders and state statutes, and the bank had never sought a court order allowing it to open the box, nor had it "consult[ed]" with Mrs. Johnson's attorney in the estate proceedings, or the guardian *ad litem*, or the joint tenant of the box.

¶ 9 As we indicated above, the court granted the dismissal with prejudice on February 8, 2013, and Malone has taken this appeal.

¶ 10 A section 2–619 motion is similar to a motion for a summary judgment and allows a complaint to be dismissed early in the litigation on the basis of issues of law or easily proven facts. *Diederich Insurance Agency, LLC v. Smith*, 2011 IL App (5th) 100048, ¶9, 952 N.E.2d 165, 167. By moving for a dismissal under section 2–619, the defendant is conceding for the purposes of argument that the plaintiff's allegations are legally sufficient to state a claim, but is arguing that defects or affirmative defenses defeat the claim. *Van Meter v. Darien Park District,* 207 Ill.2d 359, 367, 799 N.E.2d 273, 278 (2003). The affirmative matter relied upon by the defendant bank in its motion to dismiss was Mrs. Johnson's legal status as the plenary guardian of Mr. Johnson. An "affirmative matter" within the meaning section 2-619 is something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint. *Poulet v. H.F.O., L.L.C.*, 353 Ill. App. 3d 82, 89-90, 817 N.E.2d 1054, 1060 (2004); *Van Meter*, 207 Ill. 2d at 367, 799 N.E.2d at 278. If the affirmative matter is not apparent on the face of the complaint, then "the motion must be must be supported by affidavits or certain other evidentiary materials." *Van Meter,* 207 Ill.2d at 377, 799 N.E.2d 273. The trial court must construe the pleadings and any supporting documents in the light most favorable to the party opposing the motion. *Van Meter,* 207 Ill.2d at 367–68, 799 N.E.2d 273. On appeal, we address the issues *de novo*. *Diederich Insurance Agency*, 2011 IL App (5th) 100048, ¶9, 952 N.E.2d at 168.

¶ 11 In our opinion, Malone's complaint and appeal are based on the incorrect premise

that the bank should not have allowed the plenary guardian to access the safe deposit box that Mr. Johnson jointly held with another tenant. As Mr. Johnson's plenary guardian, Mrs. Johnson stepped into her husband's shoes and could act in his stead, and thus, whatever Mr. Johnson was entitled to do, Mrs. Johnson could do as his legal representative. *See generally* 755 ILCS 5/11a-18 (duties of the estate guardian) (West 2010). The safe deposit box lease at issue granted each of the joint tenants the right to enter and remove the entire contents of the box, and the court's appointment of a guardian to represent one of joint tenants did not diminish the terms of the lease.

¶ 12 A case that illustrates these principles is *Manta*, which concerned a savings account that a Chicago woman opened subject to the terms of bank-drafted contract that expressly provided that the account holders intended to "'create a joint tenancy in this account and all deposits herein,' " that "all deposits or any part thereof *** may be paid to us jointly or severally," and that the bank " 'may honor and act upon the instructions of either or both of us in the transaction of any and all business relating to this account, withdrawals therefrom, [and] deposits therein.' " *Manta v. Kahl*, 348 Ill. App. 373, 375, 108 N.E.2d 781, 782 (1952). The woman designated herself and the plaintiff as joint tenants of her account. *Manta*, 348 Ill. App. 3d at 377, 108 N.E.2d at 782. About a year later, she was rendered incompetent by a stroke, her attorney was appointed conservator of her estate, and the conservator withdrew the entire balance of the account. *Manta*, 348 Ill. App. at 376, 108 N.E.2d at 783. The woman died a few weeks after that. *Manta*, 348 Ill. App. at 376, 108 N.E.2d at 783. The joint tenant sued the bank to recover the amount of funds that had been withdrawn by the conservator, alleging that the bank

had negligently handled the account of someone known to be incompetent, and that as surviving owner, he was entitled to the funds. *Manta*, 348 Ill. App. 3d 376-77, 108 N.E.2d at 783. The trial court found, and the appellate court affirmed, that the bank had not breached any duty to the joint account holder. *Manta*, 348 Ill. App. at 377, 108 N.E.2d at 783. Under Illinois law, when the attorney was appointed conservator, he "succeeded to the identical rights of [the woman] under the *** deposit agreement [with the bank]." *Manta*, 348 Ill. App. 3d at 377, 108 N.E.2d at 783. Also, "The relationship of the parties and the bank was a contractual one, and the parties were bound by the terms of that contract." *Manta*, 348 Ill. App. at 377, 108 N.E.2d at 783. Therefore, the conservator had the right to access the joint account and withdraw any or all of the funds. *Manta*, 348 Ill. App. 3d at 377, 108 N.E.2d at 783. Accordingly, the appellate court held that the trial judge "was justified in dismissing the [joint account holder's] complaint." *Manta*, 348 Ill. App. 3d at 373, 108 N.E.2d at 783.

¶ 13 The analysis and decision in *Manta* support the dismissal of Malone's complaint against the bank. Malone has failed to cite any fact or authority that supports her contention that the bank should not have allowed Mr. Johnson's plenary guardian to access his safe deposit box. Most of Malone's appellate brief is an outline of the factual and procedural history that led to this appeal. She cites a handful of cases concerning the standards that Illinois courts must follow when addressing a section 2-619 motion to dismiss. 735 ILCS 5/2-619 (West 2010). She summarizes the bank's argument for dismissal. Then she states, "To the contrary, Appellant argues that questions of breach of contract, constructive fraud and negligence present material factual issues to be decided by the trier of fact." However, this statement is the full extent of her

"argument" and Malone does not identify any actual questions or issues that would have precluded the dismissal of her pleading. Under the heading "Conclusion," Malone criticizes the bank's reliance on Kriser's affidavit and states that the document is "largely comprised of hearsay, personal conjecture, subjective observations, innuendo and self-serving narrations," but Malone fails to identify any actual defect in the affidavit and in our opinion her criticism is baseless. Malone concludes her brief with lengthy quotes from the unpublished opinion of a New York trial court judge. The only similarity between the New York case and this case is that they involve safe deposit boxes. Because the New York case is so factually different from this one and is an unpublished foreign decision, it has no precedential value here. *Sexton v. Brach*, 124 Ill. App. 3d 202, 206, 464 N.E.2d 284, 286 (1984) (unpublished decisions are not precedential). It does not, in any way, lead us to conclude that Malone's pleading against the bank was viable despite the section 2-619 motion and should be reinstated by this court.

¶ 14 Although we are not obligated to do so, we will address the allegations and arguments Malone presented in the trial court. Count I of Malone's pleading was captioned "Breach of Contract." Malone contended she was contractually entitled to written notice that Mrs. Johnson was opening the box and then closing the account. Malone based this argument on a clause in the agreement indicating, "We [the bank] may end this lease by giving you a written notice 30 days before the lease ends." This provision plainly applies where the bank, on its own and without instruction from either lessee, decides to end the lease. Here, Mr. Johnson's plenary guardian decided to terminate the lease and there was no contractual requirement for the bank to notify Malone of this fact.

¶ 15 Malone also contended she was contractually entitled to written notice because the agreement stated, "You may end this lease by giving us written notice, and simultaneously removing all of the contents from the safe deposit bank, and returning to us its keys or combination." Again, Malone misconstrues the obvious significance of this contract clause. This provision states the manner in which a lessee may terminate the box rental. The notice is to be sent to the bank, not to the lessee. This provision did not require the bank to inform Malone that another account holder had decided to access or close the box.

¶ 16 Malone also contended the bank "took possession of the contents" of the box and "never relinquished actual possession of those contents to the Lessee(s)." This allegation is not an indication that the bank breached a contractual obligation. Furthermore, it is undisputed that the bank only briefly retained the contents of the box while reviewing the legal papers Mrs. Johnson tendered to the bank, and that approximately one week later, Mrs. Johnson, as plenary guardian, took possession of the $45,000 and deposited the funds into her husband's bank account. The record also indicates that the court froze those assets and has required Mrs. Johnson to secure a bond and provide an accounting, and that Malone filed a claim within the probate proceedings and thus her rights to some or all of the $45,000 are protected by a bond and will be adjudicated in the probate court. Thus, Malone's allegation that the bank has "possession" of the box contents is simply incorrect.

¶ 17 Malone also complained that the bank "made its decisions to forcibly open, inventory, remove, possess and store the contents" of the box without "consulting" the probate judge, the guardian *ad litem*, Mrs. Johnson's attorney, or the joint tenant. Again, these are not

allegations of a contractual breach and they are factually incorrect. The record indicates that Mrs. Johnson, in her capacity as plenary guardian, "decided" to have the box drilled open. Also, Malone has never cited any statute, legal principal, or case law that obligates the bank to "consult" with any person or entity before following the directions of a plenary guardian.

¶ 18 Finally, Malone cited the contract clause stating, "We [the bank] will use reasonable and ordinary care and diligence to prevent anyone other than you from opening your safe deposit box, amending or cancelling this lease, or surrendering and exchanging your safe deposit box." Malone alleged this contractual obligation was breached when the bank did not obtain a court order authorizing it to open and take other actions with the jointly-held box. Malone has never cited any authority indicating it would have been reasonable for the bank to take the extraordinary steps of intervening in the guardianship action and advocating for a court order regarding access and control over the box.

¶ 19 Malone recast these allegations in Count II as negligence, in Count III as constructive fraud, and in Count IV as unjust enrichment. Without belaboring the point, we note that Malone failed to support these additional counts with actual fact or authority indicating the bank's conduct was improper.

¶ 20 In her reply brief, Malone argues for the first time that the plenary guardian exceeded the terms of the guardianship order and Malone cites *Estate of Hirsh*, 27 Ill. App. 2d 228, 169 N.E.2d 591 (1960), in which a conservator sold some of the disabled ward's government bonds even though it was not necessary to cash them for the ward's maintenance or support, and *In re Estate of Wilson*, 404 Ill. 207, 88 N.E.2d 662 (1949), which indicates an

widow/executrix should have listed the contents of safety deposit boxes in the inventory of her deceased husband's estate because the contents did not automatically become her property as the surviving tenant. Malone then contends it "plainly follows" that Mrs. Johnson's status as plenary guardian did not justify the dismissal of Malone's claims against the bank. We disagree with this conclusion. For one thing, it is inappropriate to introduce a new argument so late in the proceedings. *Liberty Mutual Fire Insurance Co. v. Woodfield Mall, L.L.C.*, 407 Ill. App. 3d 372, 395, 941 N.E.2d 209, 228 (2010) (points not argued in an opening brief are waived and shall not be raised on reply); *Sylvester v. Chicago Park District*, 179 Ill. 2d 500, 507, 689 N.E.2d 1119, 1123 (1997) (arguments raised in a reply brief are waived). Another problem is that Malone is now arguing the guardian erred, but the current lawsuit is not against the guardian. We have no opinion about the viability of the claim Malone filed in the probate court – that issue is not before us. The principles and authority Malone has introduced in her reply brief do not indicate Malone has a viable cause of action against the current defendant. Malone failed to establish a contested issue of fact that would have precluded dismissal of her claims and the trial judge correctly granted the bank's motion to dismiss pursuant to section 2–619(a)(9).

¶ 21 For the reasons expressed above, we hold that the trial court did not err in granting the dismissal with prejudice of Malone's pleading against MB Financial Bank, N.A., and we affirm that ruling.

¶ 22 Affirmed.

¶ 23 PRESIDING JUSTICE GORDON, DISSENTING

¶ 24 I must respectfully dissent because I am troubled about a bank allowing a plenary

guardian of a disabled person to drill open a safe-deposit box held in joint tenancy with another person without giving the other person notice, and without the plenary guardian obtaining permission from the probate court.

¶ 25 Paragraph 14 of the majority order states:

> "Count I of Malone's pleading was captioned 'Breach of Contract.' Malone contended she was contractually entitled to written notice that Mrs. Johnson was opening the box and then closing the account. Malone based this argument on a clause in the agreement indicating 'We [the bank] may end this lease by giving you a written notice 30 days before the lease ends.' This provision plainly applies where the bank, on its own and without instruction from either lessee, decides to end the lease. Here, Mr. Johnson's plenary guardian decided to terminate the lease and there was no contractual requirement for the bank to notify Malone of this fact."

¶ 26 The majority provides no authority when it says "there was no contractual requirement for the bank to notify Malone of this fact." *Supra*, ¶ 14. The provision in the agreement with the bank that states, " 'We, [the bank] may end this lease by giving you a written notice 30 days before the lease ends' " certainly applies where the bank, on its own, decides to end the lease, but there is nothing in the record that shows who terminated the lease. *Supra*, ¶ 14. The provision may also apply where the bank allows a plenary guardian to drill open a box held in joint tenancy with another. There is an ambiguity here that may require parol evidence.

A. Epstein & Sons International, Inc. v. Eppstein Uhen Architects, Inc., 408 Ill. App. 3d 714, 720 (2011).

¶ 27 The safe-deposit agreement states:

> "[The bank] may also refuse you access (to the extent permitted by law) into this safe deposit box on the death, incapacity, or bankruptcy of any renter, unless we:
>
> ***
>
> (2) are satisfied that you or a legal representative of you or your estate is qualified and authorized to enter this safe deposit box and remove its contents."

Our courts appoint a guardian of the estate when a disabled person is unable to make or communicate responsible decisions regarding the management of his estate or finances. The guardian will, subject to court supervision, make decisions about the ward's funds and the safeguarding of the ward's income or other assets. 755 ILCS 5/11a-18 (West 2010) ("the court may approve the making on behalf of the ward of such agreements as the court determines to be for the ward's best interests"). Here, there was no court supervision or authority given to the plenary guardian to drill open this safe deposit box.

¶ 28 In the one appellate case cited by the majority, *Manta v. Kahl*, 348 Ill. App. 373, 375 (1952), the conservator withdrew all the funds from a bank account. There was no drilling of a safe deposit box and no obligation for the bank to notify the other joint tenant pursuant to the agreement with the bank under the circumstances. If the parties leased a parcel of real estate

and one joint tenant terminated the lease, the other joint tenant living on the premises would be entitled to notice prior to eviction by statute. Even if there was no statute, I would be troubled if the joint tenant in possession received no notice. The safe deposit contract here is ambiguous concerning the rights of a joint tenant when the other joint tenant is declared to be a disabled person. Under the facts of this case, I believe the complaint should not be dismissed under a 2-619 motion.