2014 IL App (1st) 130494-U

SECOND DIVISION
March 17, 2015

No. 1-13-0494

DOROTHY PARKER and CHRISTINA TURNAGE, individually and as a parent of ALIYAHNA TURNAGE CEDENCE TURNAGE, JAYDA TURNAGE, JAYDEN TURNAGE, and NEIL TURNAGE, all minors,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 10 M1 134559
SERGEANT MORRISSEY, Star No. 2236, POLICE OFFICER EDWARD WINSTEAD, Star No. 19661, POLICE OFFICER ERIC TAYLOR, Star No. 6191, and THE CITY OF CHICAGO,	)	Honorable James E. Snyder,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing plaintiffs' eighth amended complaint.

¶ 2 Plaintiffs Dorothy Parker and Christina Turnage, individually, and as a parent of Aliyahna Turnage, Cedence Turnage, Jayda Turnage, Jayden Turnage, and Neil Turnage, minors, appeal from an order of the circuit court granting defendants Sergeant Morrissey, Officer Edward Winstead, Officer Taylor and the City of Chicago's (City) motion to dismiss plaintiffs'

eighth amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)). On appeal, plaintiffs argue that the trial court erred when it granted defendants' motion to dismiss where: (1) §5-12-160 of the Chicago Residential Landlord Tenant Ordinance (RLTO) (Chicago Municipal Code §5-12-160) prohibits the eviction of a tenant without the authority of law; (2) plaintiffs clearly have a common law action against defendants for wrongful eviction; and (3) the officers were not protected by qualified immunity. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 For purposes of this appeal we recite and accept as true all well-pleaded facts in the complaint and draw all reasonable inferences from these facts in favor of plaintiffs. *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003). As alleged, plaintiffs were tenants at the property located at 6209 S. Walcott, Chicago, Illinois, owned by Latrina Wiggins and Chimel Howard[1]. Plaintiffs entered into a lease agreement with Wiggins and Howard on or about August 1, 2009. The lease term extended through October 31, 2009. Plaintiffs continued to live in the property past the expiration of their lease. Wiggins and Howard filed an eviction action against the plaintiffs and obtained a court order for possession that was stayed until December 31, 2009.

¶ 5 On or around January 2, 2010, Wiggins and Howard contacted the Chicago police department for assistance in evicting plaintiffs. Sergeant Morrissey and Officers Winstead and Taylor arrived at the scene and approached the premises along with Howard. At Howard's request, Sergeant Morrissey allowed Howard's cousin to kick the front door open. Under the

[1] Latrina Wiggins and Chimel Howard are not parties to this appeal.

officers' supervision, Howard and two associates removed the children and plaintiffs' property. Additionally, Sergeant Morrissey clothed Neil Turnage, who was an infant at the time. Sergeant Morrissey told the other children that they could not live in the premises anymore.

¶ 6 When Parker then arrived at the scene, Sergeant Morrissey threatened to arrest her for trespassing if she did not leave the property with her grandchildren. Howard's employees locked the windows, boarded the back door and changed the locks. Parker asked Sergeant Morrissey if she could enter the dwelling to retrieve her possessions. Howard denied the request.

¶ 7 After the circuit court dismissed plaintiffs' claims on six different occasions, and allowed them to plead facts supporting their claims, plaintiffs filed an eighth amended complaint against Sergeant Morrissey and Officers Winstead and Taylor. The eighth amended complaint alleged five counts: common-law wrongful eviction against the City; a violation of the RLTO against the City; a violation of §1983 (42 U.S.C §1983) against Sergeant Morrissey and Officers Winstead and Taylor; and two counts by the children against the police officers for common-law wrongful eviction and violation of the RLTO. Plaintiffs sought compensation for the loss of their personal property and for becoming homeless for a period of time after the eviction. Plaintiffs also sought punitive damages against the police officers.

¶ 8 Pursuant to section 2-619.1, the City moved to dismiss the first two counts. 735 ILCS 5/2-619.1 (West 2010). The individual defendants moved to dismiss counts three through five under the same provisions. Plaintiffs generally opposed defendants' motions, but agreed with defendants that the §1983 claims were time-barred.

¶ 9 After a hearing, the circuit court dismissed plaintiffs' eighth amended complaint with prejudice. The court determined that the common-law wrongful eviction claims could not stand

since defendants did not own the property and did not possess the dwelling. The circuit court dismissed the RLTO claims because plaintiffs did not sufficiently plead that defendants fell within the common-law definition of an agent. Finally, the court found that the officers were entitled to qualified immunity. It is from this order that plaintiffs now appeal.

¶ 10 ANALYSIS

¶ 11 Section 2-619.1 permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2010)) motion to dismiss based on a plaintiff's substantially insufficient pleadings with a section 2-619 (735 ILCS 5/2-619 (West 2010)) motion to dismiss based on certain defects or defenses. A motion to dismiss under section 2–615 attacks only the legal sufficiency of a complaint and does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). In comparison, a section 2–619 motion to dismiss allows for an involuntary dismissal of a claim based on certain defects or defenses. The basis of the 2-619 motion must go to an entire claim or demand. *Id*. Section 2–619(a) additionally provides that if the grounds for the motion do not appear on the face of the pleading attacked, the motion must be supported by affidavit. *Id*. Normally, the motion is required to be made within the time for pleading. *Id*. In practice, however, our courts have not limited section 2–619 motions, and such motions are normally allowed even though a defect on the face of the pleadings might be the only ground for dismissal. *Id*. "It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,]to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party." *Edelman, Combs and Latturner v. Hinshaw and Culbertson*, 338 Ill. App. 3d 156, 164 (2003), (citing *Lykowski v. Bergman*, 299 Ill. App. 3d 157, 162

(1998)). "Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619." *Edelman*, 338 Ill. App. 3d at 164.

¶ 12 Plaintiffs first claim that the trial court erred when it granted defendants' motions to dismiss their claims under §5-12-160 of the RLTO that specifically prohibits the eviction of a tenant without the authority of law and allows for civil damages against those acting on the landlord's behalf. Defendants disagree and argue that plaintiffs do not have a claim for a violation of RLTO because the ordinance does not provide plaintiffs a civil action against the city or its police officers because defendants were not plaintiffs' landlord or their landlord's agent.

¶ 13 Section 5-12-160 of the RLTO states:

> "§ 5-12-160 Prohibition on interruption of tenant occupancy by landlord.
>
> It is unlawful for any landlord or any person acting at his direction knowingly to oust or dispossess or threaten or attempt to oust or dispossess any tenant from a dwelling unit without authority of law * * *. The foregoing shall not apply where:
>
> (a) A landlord acts in compliance with the laws of Illinois pertaining to forcible entry and detainer and engages the sheriff of Cook County to forcibly evict a tenant or his personal property; or
>
> (b) A landlord acts in compliance with the laws of Illinois pertaining to distress for rent; or
>
> (c) A landlord interferes temporarily with possession only as necessary to make needed repairs or inspection and only as provided by law; or

(d) The tenant has abandoned the dwelling unit, as defined in Section 5-12-130(e).

Whenever a complaint of violation of this provision is received by the Chicago Police Department, the department shall investigate and determine whether a violation has occurred. Any person found guilty of violating this section shall be fined not less than $200.00 nor more than $500.00, and each day that such violation shall occur or continue shall constitute a separate and distinct offense for which a fine as herein provided shall be imposed. If a tenant in a civil legal proceeding against his landlord establishes that a violation of this section has occurred he shall be entitled to recover possession of his dwelling unit or personal property and shall recover an amount equal to not more than two months' rent or twice the actual damages sustained by him, whichever is greater. A tenant may pursue any civil remedy for violation of this section regardless of whether a fine has been entered against the landlord pursuant to this section." Chicago Municipal Code § 5-12-160.

¶ 14 Plaintiffs' claim, that the trial court erred when it granted defendants' motions to dismiss because §5-12-60 prohibits the eviction of a tenant without the authority of law, is without merit. The record establishes that landlords Wiggins and Howard filed an eviction action against the plaintiffs and obtained a court order for possession that was stayed until December 31, 2009. Plaintiffs continued to remain in the property beyond that date and were removed by the landlord pursuant to the order for possession. Plaintiffs have not alleged any facts that contest the validity or force of the court order so any acts by the landlord or his agents were *with* the authority of law

not "without authority of law" as required by the ordinance. Thus, the complaint alleges that the landlord and their "agents" took action while in possession of a court order for possession. Their occupancy was not unlawfully interrupted as contemplated by the RLTO.

¶ 15 We also reject plaintiffs' argument that the trial court erred in granting defendants' motions to dismiss on the grounds that plaintiffs could not pursue civil damages from anyone other than the landlord. Municipal ordinances are interpreted under the general rules of statutory construction and interpretation. *LeCompte v. Zoning Board of Appeals,* 2011 IL App (1st) 100423, ¶ 22. The primary goal of statutory interpretation is to determine legislative intent, which is best indicated by the statutory language, given its plain and ordinary meaning. *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 11. Where statutory language is clear and unambiguous, we enforce it as written without reading into it exceptions, conditions, or limitations not expressed by the legislature. *Martin v. Office of State's Attorney*, 2011 IL App (1st) 102718, ¶ 10. "A statute is ambiguous if its meaning cannot be interpreted from its plain language or if it is capable of being understood by reasonably well informed persons in more than one manner." *Commonwealth Edison Co. v. Illinois Commerce Comm'n,* 2014 IL App (1st) 132011, ¶ 21. An ordinance is not ambiguous simply because the parties disagree as to its meaning. *Id*.

¶ 16 Here, the ordinance is unambiguous and clearly governs the permissible actions that can be taken by landlords with respect to tenants. The ordinance clearly states that a disgruntled tenant can recover damages for a landlord's violation of the ordinance by way of a civil action against the landlord. Under the ordinance, "[i]f a tenant in a civil legal proceeding against his landlord establishes that a violation of this section has occurred," the tenant can recover twice

her actual damages or two months' rent, whichever is more. Chicago Municipal Code, §5-12-160. "Landlord" is defined under the RLTO as "the owner, agent, lessor or sublessor, or the successor in interest of any of them, of a dwelling unit or the building of which it is part." Chicago Municipal Code, §5-12-030(b). There is nothing in the ordinance that allows a tenant to sue law enforcement personnel who aid a landlord in evicting that tenant pursuant to a valid court order.

¶ 17 Plaintiffs also argue that a question of material fact exists as to whether the officers acted as agents of the landlord when they responded to the call to enforce the order for possession and therefore the defendants' motion to dismiss was improperly granted. According to plaintiffs, defendants in this case could be categorized as "landlords" under the definition provided in §5-12-030(b), because the officers were acting as agents of the landlord

¶ 18 A mere allegation of agency is insufficient to establish actual agency. *Connick v. Suzuki Motor Co*., 174 Ill. 2d 482, 198 (1996). While the existence of an agency relationship is generally a question reserved to the trier of fact, a plaintiff must still plead facts, which, if proved, could establish the existence of an agency relationship. *Knapp v. Hill*, 276 Ill. App. 3d 376, 382 (1995). When the principal has the right to control the manner in which the agent performs his work, and the agent has the ability to subject the principal to liability, a principal-agent relationship exists. *Lang v. Silva*, 306 Ill. App. 3d 960, 972 (1999). The existence of an agency relationship may be demonstrated by circumstantial evidence, including the situation of the parties, their acts, and other relevant circumstances. *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 724–25 (2003).

¶ 19 Plaintiffs here have done nothing but made bald allegations that an agency relationship existed between the landlord and the officers. Defendant police officers were acting in their official capacity as officers of the Chicago police department. When called by the landlord in this case to assist in enforcing the order for possession, the officers responded and stood by while the landlord and his associates kicked in the door. According to the complaint, pursuant to the court order, the officers watched as the landlord and his associates removed plaintiffs' property from the premises and locked the windows and boarded the back door. The court order of possession allowed this. According to the complaint, Sergeant Morrissey threatened to arrest plaintiffs for trespassing if they did not leave the premises. The court order of possession justified Sergeant Morrissey's statement. There is no indication from the record before us that any agency relationship existed between defendants and the landlord, however, even if an agency relationship existed, a lawfully issued and enforceable court order of possession takes these acts outside the application of the RLTO. Therefore we find plaintiffs' argument that defendants fell within the definition of "landlord" under §5-12-030(b) to be without merit. Therefore, plaintiffs cannot sue defendants for damages under RLTO.

¶ 20 Next, plaintiffs argue that the trial court erred when it granted defendants' motions to dismiss on the basis that the police officers were protected by qualified immunity at the time they evicted plaintiffs and therefore were not liable pursuant to §1983 (42 U.S.C. §1983). Plaintiffs argue that defendants are not entitled to qualified immunity because their actions were in violation of plaintiffs' fourth amendment right to be free from unreasonable search and seizure. Plaintiffs claim that defendants violated their fourth amendment rights by interfering with their possessory interest in their property and refusing to allow them to stay on the premises or reenter

to retrieve personal property. We note that plaintiffs do not dispute that they were not in lawful possession of the property or that the officers acted pursuant to a valid order of possession.

¶ 21 The fourth amendment to the United States Constitution protects people from unreasonable searches and seizures of their persons, houses, papers, and effects. U.S. Const., amend. IV. *People v. Gott*, 346 Ill. App. 3d 236, 241 (2004). The fourth amendment seeks to balance the interests of citizens in being free from unreasonable interferences with privacy and the interests of fair law enforcement in protecting the community. *Id* at 242. Neither the United States nor the Illinois constitution forbids all searches and seizures, but the prohibition is only against unreasonable searches. *People v. McCracken*, 30 Ill. 2d 425, 429 (1964).

¶ 22 Defendants argue qualified immunity protects public officials from liability for damages if their actions do not violate a clearly established right of which a reasonable person would have known. *Wilson v. Layne*, 526 U.S. 603, 614–15 (1999). Police officers performing discretionary functions are entitled to qualified immunity and are shielded from civil liability for their actions unless the facts, taken in the light most favorable to the plaintiff, show that the officer's conduct violated a constitutional right that was clearly established at the time of the alleged violation. *Pearson v. Callahan*, 555 U.S. 223, 240-43 (2009). Plaintiffs have the burden of showing the constitutional right was clearly established. *Id*. "Clearly established for purposes of qualified immunity means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Wilson*, 526 U.S. 603, at 614–15. In other words, an officer is entitled to qualified

immunity if it was objectively reasonable under the specific set of circumstances for the officer to believe that his actions were lawful. *Phelan v. Village of Lyons*, 531 F.3d 484, 488 (7th Cir. 2008). The doctrine of qualified immunity leaves "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008).

¶ 23 Viewed as a whole, the doctrine of qualified immunity erects a substantial barrier for plaintiffs, and appropriately so because qualified immunity is "designed to shield from civil immunity all but the plainly incompetent or those who knowingly violate the law. *Kernats v. O'Sullivan*, 35 F.3d 1171, 1177 (7th Cir. 1994). The right to be free from unreasonable searches and seizures and the right to due process before the taking of property are clearly established, but those are too general for purposes of qualified immunity analysis. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In discussing a governmental official's qualified immunity, the Supreme Court has said:

> "The right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id*.

The question of whether an official's conduct was objectively reasonable so that he may receive qualified immunity is a question of law, which we review *de novo*. *Schlicher v. Bd. of Fire & Police Comm'rs of Village of Westmont*, 363 Ill. App. 3d 869, 879 (2006).

¶ 24 Normally, the question of whether a person has been unlawfully seized is answered by looking at whether, under the circumstances, "a reasonable person would have believed he is not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). However, such an inquiry in eviction cases, where a tenant is told he must leave, is nonsensical. In a scenario where an officer tells a tenant that he must leave, one must consider an "inversion" of the traditional test. *White v. City of Markham*, 310 F. 3d 989, 993 (7th Cir. 2002).

¶ 25 Cases with similar facts have failed to shed light on the issue of whether a seizure occurs when individuals are ordered to leave the premises under a threat of arrest. In *Kernats*, 35 F.3d 1171, tenants of a leased home sued a police officer who told the tenants to leave by the end of the day or face arrest but was acting on a court order. *Id*. at 1173-74. The tenants complied, apparently fearing arrest, and subsequently filed a § 1983 suit alleging the officer unreasonably seized them when he ordered them to leave. *Id*. The district court found no seizure and dismissed the suit. *Id*. at 1183–86. On appeal, the court did articulate the unusual nature of the Kernats' claim, that they were seized not because they were not free to *leave* their home, but rather because they were not free to *remain* there, but gave the claim no further consideration in view of the Kernats' failure to cite any case law in support of their novel theory. *Id* at 1177.

¶ 26 In *Spiegel v. City of Chicago*, 106 F.3d 209 (7th Cir.1997), Spiegel returned to his apartment after being evicted by court order and was ordered by police not to enter under threat of immediate arrest. *Id*. at 210. The Court did not decide whether a seizure had occurred, but found that qualified immunity applied because the tenant's “right not to have the police prevent him from entering an apartment that was in the possession of the landlord was not clearly established at the time the police blocked his attempt to enter.” *Id*. at 212.

¶ 27 In *White v. City of Markham*, 310 F. 3d 989 (7th Cir.2002), a case with similar facts, the court commented that "under [a] factual scenario, when the plaintiffs were free to leave and thereby terminate the encounter at any time it is unclear whether a seizure occurred." *Id*. at 995. The court ultimately declined to resolve the question of seizure and instead examined the reasonableness of the officers' conduct in that case and found that, even if a seizure had occurred, it was reasonable. *Id.* at 995.

¶ 28 Plaintiffs rely primarily on *Soldal v. Cook County, Ill*., 506 U.S. 56 (1992), in support of their position that an unreasonable seizure occurred in this case. In *Soldal*, prior to obtaining an order for possession, the defendants, owners of a trailer park, asked the Cook County Sheriff's Department to come to the trailer park to assist in preventing the plaintiff from interfering with the owners removing the plaintiff's trailer home from the park for failure to pay rent. The park owner had brought an order of eviction but decided to remove the plaintiffs from the trailer park before the hearing on the order occurred. The deputy sheriffs were aware that defendants did not have an order for possession while the defendants were removing the trailer. The plaintiff told the deputy sheriffs that he wanted to file a complaint for criminal trespass based on the park owner's removal of his trailer and the deputy sheriffs did not allow him to do so. The plaintiffs filed a §1983 claim against the deputy sheriffs for unlawful seizure of their property. The Seventh Circuit decided that the deputy sheriffs did not violate the plaintiff's fourth amendment rights. *Id*. at 68.

¶ 29 The Supreme Court found that the complaint alleged that defendants, acting under the color of state law, "dispossessed the Soldals of their trailer home by physically tearing it from its foundation and towing it to another lot. Taking these allegations as true, this was no 'garden-

variety' landlord-tenant or commercial dispute. The facts alleged suffice to constitute a 'seizure' within the meaning of the Fourth Amendment, for they plainly implicate the interests protected by that provision." *Id* at. 72. The court reasoned that although a seizure of property occurs and the fourth amendment is implicated when there is "some meaningful interference with an individual's possessory interest in that property, a determination of whether fourth amendment rights were violated is dependent on the reasonableness of the seizure. *Id*. Recognizing that "reasonableness is still the ultimate standard" under the Fourth Amendment, the court acknowledged that "numerous seizures of this type will survive constitutional scrutiny," including seizures in which "the officer was acting pursuant to a court order" because a showing of unreasonableness on these facts would be a laborious task indeed." (Citations omitted). *Id*. at 60, 71.

¶ 30 *Soldal* is not dispositive of the issue before us as plaintiffs suggest for the primary reason that a valid and enforceable court order of possession existed in this case. *Soldal* does not clearly establish that the officers' conduct constituted an unreasonable seizure of the property where no valid court order existed at the time in question. Like *Kernats*, *Spiegel* and *White*, we find that even if a seizure did occur here, it was lawful and not unreasonable. The record in this case undisputedly shows that the officers were acting on an order of possession that had been stayed until December 31, 2009. The eviction took place two days later, on January 2, 2010. Furthermore, while defendants did threaten to arrest plaintiffs for trespass, there is no evidence that displayed a weapon or handcuffs, or that the officers otherwise acted on that threat. Plaintiffs have failed to provide support for their assertions that the officers knew they were violating a constitutionally protected right, that a seizure occurred, or if a seizure did occur, that

it was unreasonable. Therefore, this court finds that defendants cannot be held civilly liable for the eviction due to their qualified immunity.

¶ 31 Plaintiffs argue that any seizure that occurred in this case was in fact unreasonable because of a Chicago police department policy that sets forth the procedure for landlord/tenant disputes. Chicago Police Special Order S04-01-03. According to plaintiffs, this special order sets forth the procedure for landlord/tenant disputes and requires that "in order for a landlord to lock a tenant out, he must have a court order for possession and engage the Sheriff of Cook County to forcibly evict the tenant." Consequently, plaintiffs suggest that defendants' actions were unreasonable in that they were contrary to Chicago police department rules because the sheriff was not on the scene.

¶ 32 Contrary to plaintiffs' argument, nothing in this special order prevents Chicago police officers from enforcing an order for possession without the presence of a deputy sheriff. It simply refers to the exemptions outlined in § 5-12-160 of the Code. (Chicago Municipal Code § 5-12-160). We also fail to see any connection between the injury alleged and the defendants' failure to engage the county sheriff's office during the landlords' enforcement of the court order of possession.

¶ 33 Based on the foregoing, we affirm the order of the trial court dismissing plaintiffs' eighth amended complaint.

¶ 34 Affirmed.