2018 IL App (1st) 163395-U

No. 1-16-3395

August 14, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BARBARA A. NELSON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 14 L 66035
	)	
ARBORETUM IN PARK FOREST, INC.,	)	Honorable
	)	Robert J. Clifford and
Defendant-Appellee.	)	Christopher E. Lawler,
	)	Judges, presiding.

JUSTICE WALKER delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The dismissal of plaintiff's third amended complaint against condominium association for damage to her unit is affirmed where that complaint failed to state a cause of action and did not incorporate allegations from prior complaints.

¶ 2 Between 2014 and 2016, plaintiff, Barbara A. Nelson (Nelson) filed a series of complaints against defendant, Arboretum in Park Forest, Inc. (Arboretum), a condominium property in Park Forest, Illinois, in which Nelson is an owner, alleging Arboretum failed to make

numerous repairs and was liable for damage to her unit from a sewer backup. The circuit court dismissed each of Nelson's complaints and ultimately entered a judgment against Nelson of $14,580.82 for attorney's fees, finding her complaints were not well-grounded in law and fact. On appeal, Nelson contends the circuit court erred in dismissing her third amended complaint.

¶ 3 BACKGROUND

¶ 4 On September 12, 2014, Nelson filed a *pro se* complaint against Arboretum, the Village of Park Forest (Village) and various Village employees. Nelson's initial complaint alleged she purchased her unit in 1999 and soon thereafter experienced a sewer system backup in her unit's lower level. The complaint alleged the Village and its employees were aware of the problem and were responsible for the damage to her unit and for its lowered market value. The complaint alleged Arboretum did not repair the steps, porches, sidewalk and plumbing connected to her unit, despite making those repairs to other units when asked. Nelson argues Arboretum discriminated against her based on her race, sex and marital status. The circuit court allowed Nelson to amend the complaint.

¶ 5 Nelson filed a first amended complaint which restated counts against the Village and its employees. The complaint also included two counts against Arboretum, alleging Arboretum breached its fiduciary duty to her by failing to employ a plumber to inspect the source of the water in her unit and "make necessary changes to the sewage and drainage piped in the Condominium." In addition, Nelson alleged Arboretum "fail[ed] to address known defects in common areas of the Condominium." That complaint also sought a declaratory judgment requiring Arboretum to take steps to "permanently remedy the ongoing flooding issues in her unit." The circuit court dismissed those counts against Arboretum without prejudice. The court

dismissed with prejudice the remaining counts against the Village employees on immunity grounds.

¶ 6 Shortly thereafter, Nelson filed a second amended *pro se* complaint alleging Arboretum was a condominium association formed pursuant to and subject to the Illinois Condominium Property Act (765 ILCS 605/1 *et seq*. (West 2014)). The complaint alleged a breach of fiduciary duty by Arboretum by failing to repair 16 defects in the common areas in and around her unit that caused the sewer backup and the damage to her unit. The complaint asserted Arboretum failed to make repairs to the common areas "as described in its Declaration of Condominium Ownership" resulting in the lowered market value of her unit.

¶ 7 Arboretum moved to dismiss Nelson's second amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), asserting that the complaint failed to state a claim for breach of fiduciary duty because it did not provide factual support for Nelson's assertions that it was aware of her complaints, was required to make repairs and failed to do so. In addition, Arboretum argued Nelson should not be granted leave to replead because she already filed three complaints that failed to state a cause of action. Arboretum further asserted sanctions should be imposed against Nelson because she has "affirmatively acknowledged [] that she was aware that the Board had no duty or responsibility as to the Village sewer system."

¶ 8 The circuit court granted Arboretum's motion to dismiss Nelson's second amended complaint and allowed Nelson leave to file a third and final amended complaint against Arboretum. The order stated the complaint was "plaintiff's final opportunity to file an amended complaint against defendant."

¶ 9 On November 10, 2015, Nelson, represented by counsel, filed a third amended complaint alleging Arboretum was "the Condominium Association" and was "responsible for the repair and upkeep of the common areas." The complaint alleged that on July 30, 2014, Arboretum "was aware of defects in and around the property" including the entry of sewage into the lower level of her unit. The complaint stated Arboretum reimbursed her for damages to "her basement and personal items" but Arboretum did not repair "the problem which caused the flooding issues." The complaint alleged Nelson "had several individuals look at the flooding issues in her home and all were of the opinion that the Condominium Association was responsible for the repairs."

¶ 10 Arboretum moved to dismiss Nelson's third amended complaint, asserting the complaint failed to allege specific facts as to the cause of the damage to Nelson's unit or that Arboretum had any duty to "repair a village-owned sewer system." In addition, Arboretum sought sanctions pursuant to Illinois Supreme Court Rule 137 (Ill. S. Ct. R. 137 (eff. July 1, 2013)), asserting Nelson's complaint was brought in bad faith because she continued to name Arboretum as a defendant knowing it had no duty relating to the sewer system servicing her unit.

¶ 11 On February 23, 2016, the circuit court granted Arboretum's motion to dismiss the third amended complaint with prejudice. The court allowed Arboretum leave to file a petition for fees and/or sanctions. Arboretum filed a petition for sanctions against Nelson for filing multiple complaints that failed to allege valid causes of action. Nelson filed a motion to reconsider the dismissal of her lawsuit, which the court denied.

¶ 12 On June 23, 2016, the circuit court granted Arboretum's petition for fees and entered a judgment against Nelson in the amount of $14,580.82. On June 27, 2016, Nelson filed a *pro se* motion to vacate the court's June 23, 2016, order "and all prior orders instanter." In that motion,

Nelson argued the attorney who filed her third amended complaint informed her, on June 23, 2016, he was not authorized to practice law. She asserted "the outcome of her case [was] worsened by the ineffectiveness of her attorney" who did not properly prepare her pleadings.

¶ 13 On November 17, 2016, the circuit court denied Nelson's motion to vacate the June 23, 2016, order. That same day, Nelson appealed to this court.

¶ 14 ANALYSIS

¶ 15 In this *pro se* appeal, Nelson contends the circuit court erred in dismissing her third amended complaint and the complaint stated a cause of action against Arboretum. Nelson asserts she "properly alleged all the elements of breach of fiduciary duties" and sufficiently alleged Arboretum "breached its fiduciary duty by not making repairs to her unit" and "continues to allow raw sewerage [*sic*] to back up into her home."

¶ 16 Before addressing the substance of Nelson's appeal, we consider her assertion that her *pro se* status excuses her from the pleading standards to which attorneys are held. Nelson cites a federal rule of procedure and federal case law to argue that she is "not required to plead any legal theories." *Fed. Rules Civ. Proc. Rule8(a) 28 USCA*: *In re Marriage of Ostrander*, 2015 IL App (3d) 130755, 27 N.E.3d 698, 704.

¶ 17 Contrary to the federal authority cited by Nelson, Illinois courts have "strictly adhered" to the tenet that *pro se* litigants are not entitled to more favorable treatment than attorneys. *Holrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78. "In Illinois, parties choosing to represent themselves without a lawyer are 'presumed to have full knowledge of applicable court rules and procedures and must comply with the same rules and procedures as would be required of litigants represented by attorneys.' " *U.S. Bank Trust National Ass'n v. Junior*, 2016 IL App (1st)

152109, ¶ 16 (quoting *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1067 (2009)). Although Nelson invokes the standard for *pro se* pleadings, she retained an attorney to draft and file the third amended complaint. As to her earlier *pro se* complaints and her *pro se* status in this appeal, Nelson is not entitled to a more lenient standard because she is acting as her own legal counsel.

¶ 18 Having held that Nelson must adhere to the requirements applicable to attorneys, we next consider Arboretum's assertion that Nelson's *pro se* brief to this court should be stricken and this appeal dismissed because her filing does not comply with various court rules. Arboretum argues Nelson's filing violates Illinois Supreme Court Rules 341(h) and 342, which set out requirements for the content and format of an appellant's brief. See Ill. S. Ct. R. 341(h)(1)-(9) (eff. Nov. 1, 2017); Ill. S. Ct. R. 342 (eff. July 1, 2017). Specifically, Arboretum points out that Nelson's brief is devoid of an introductory paragraph (as required by Rule 341(h)(2)), a statement of the standard of review to be applied with a citation to authority (Rule 341(h)(3)) or a statement of jurisdiction with reference to authority (Rule 341(h)(4)(ii)). Arboretum also asserts the brief's statement of the case, statement of facts and argument sections lack any citation to the record on appeal and include statements that are not supported by the record (Rule 341(h)(6)). Finally, Arboretum notes Nelson's filing does not include an appendix, a copy of the judgment appealed from, the notice of appeal, or a table of contents (as required by Rule 342).

¶ 19 Our review of Nelson's brief confirms Arboretum's representations. Supreme court rules are not merely advisory suggestions but, are rules to be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. Nevertheless, even though the failure to comply with Supreme Court Rules 341 and 342 would allow this court to strike portions of Nelson's brief (see *Fender v. Town of Cicero*, 347 Ill. App. 3d 46, 51 (2004)), the omissions and violations do not prevent us

from addressing the substance of her claim. See *Venturella v. Dreyfuss*, 2017 IL App (1st) 160565, ¶ 23.

¶ 20 The crux of Nelson's legal argument on appeal is that the circuit court erred in dismissing her third amended complaint because she sufficiently alleged Arboretum breached its fiduciary duty to her as a unit owner.[1] In response, Arboretum asserts Nelson repeatedly amended her complaints without reference to the allegations in each prior complaint and the contentions she now makes to this court are based on her earlier filings and not on her third amended complaint. Arboretum further contends the third amended complaint does not state a claim on which relief could be granted.

¶ 21 A motion to dismiss under section 2-615 of the Code attacks the legal sufficiency of a complaint based on defects apparent on its face. *Kopnick v. JL Woode Management Co., LLC*, 2017 IL App (1st) 152054, ¶ 21. The relevant inquiry is whether the facts alleged by the plaintiff, viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Id*. Illinois is a fact-pleading state and conclusions of law and conclusory factual allegations that are unsupported by specific facts are not deemed admitted. *Raines v. Illinois Bell Telephone Co.*, 2012 IL App (1st) 113679, ¶ 17. "A pleading that merely paraphrases the elements of a cause of action in conclusory terms is insufficient." *Id*.

[1] This court has an independent duty to verify our jurisdiction (*In re Marriage of Knoerr*, 377 Ill. App. 3d 1042, 1043 (2007)), particularly in cases involving *pro se* appellants. The dismissal of Nelson's third amended complaint in February 2016 was followed by proceedings under Supreme Court Rule 137, which concluded with the entry of a judgment against Nelson on June 23, 2016. See Illinois Supreme Court Rule 303(a)(1) (eff. Jan. 1, 2015) (a judgment is not final and appealable while a Rule 137 claim remains pending). Nelson's June 27, 2016, motion to vacate that judgment was timely filed within 30 days of the court's ruling. Nelson's notice of appeal to this court was filed on November 17, 2016, the same day the circuit court denied her motion to vacate the dismissal order. Thus, this court has jurisdiction to consider the dismissal of Nelson's third amended complaint.

¶ 22 A complaint should be dismissed with prejudice under section 2-615 only if it is apparent that the plaintiff can prove no set of facts that would entitle her to recovery. *Kopnick*, 2017 IL App (1st) 152054, ¶ 21. While a dismissal pursuant to section 2-615 is generally reviewed *de novo*, the circuit court's decision to dismiss a complaint with prejudice is reviewed for an abuse of discretion. *Kopnick*, 2017 IL App (1st) 152054, ¶ 21; *Bocock v. McGuire*, 2017 IL App (3d) 150860, ¶ 26. An abuse of direction standard is highly deferential to the circuit court, and the court is found to have abused its discretion only when its ruling is arbitrary, fanciful or unreasonable or where no reasonable person would adopt the court's view. *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23.

¶ 23 Nelson cannot base her appeal on the dismissal of the accumulated claims in all of her complaints. An amended pleading, complete in itself, supersedes the pleading it replaces, and a party who files an amended pleading waives any objections to the trial court's ruling on the party's prior complaints. *Morrow v. Pappas*, 2017 IL App (3d) 160393, ¶ 42*; Tunca v. Painter*, 2012 IL App (1st) 093384, ¶ 29 (citing *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 153 (1983)). The supreme court explained in *Foxcroft* when an amended pleading "does not refer to or adopt the prior pleading," the earlier proceeding is effectively "abandoned and withdrawn." *Foxcroft*, 96 Ill. 2d at 154. This rule promotes "the interest in the efficient and orderly administration of justice." *Id.* It ensures the court and the defendant know with certainty the claims being pursued by the plaintiff and should the cause proceed to trial, it would proceed "only on the claims contained in the final amended complaint." *Bonhomme v. St. James*, 2012 IL 112393, ¶ 29.

¶ 24 Accordingly, appellate review of a claim is forfeited if a party fails to refer to, adopt, or otherwise incorporate a prior pleading in an amended complaint. *Wade v. Stewart Title Guaranty Co.*, 2017 IL App (1st) 161765, ¶ 70. In addition to filing an amended pleading that realleges, incorporates by reference, or refers to the dismissed counts, a party can employ one of two other methods to avoid waiver: (1) stand on the counts at issue, take a voluntary dismissal of the remaining counts, and argue the matter at the appellate level; or (2) perfect an appeal from the dismissal order prior to filing an amended pleading that does not refer to or adopt the dismissed counts. *Gaylor v. Campion, Curran, Rausch, Gummerson and Dunlop, P.C.*, 2012 IL App (2d) 110718, ¶ 36.

¶ 25 Here, although Nelson's second amended complaint contained a count purporting to allege a breach of fiduciary duty against Arboretum, the circuit court dismissed that complaint and allowed Nelson to refile her complaint. However, the third amended complaint did not reallege or incorporate that fiduciary duty count (or any other count) by reference. Nelson also did not preserve her claim by taking either of the steps set out above to avoid waiver, as she did not take a voluntary dismissal and file an appeal, nor did she appeal the dismissal order before filing her third amended complaint. See *Gaylor*, 2012 IL App (2d) 110718, ¶ 36. Therefore, Nelson waived the ability to challenge the dismissal of her breach of fiduciary duty count in her second amended complaint. See *Wade*, 2017 IL App (1st) 161765, ¶ 70.

¶ 26 Furthermore, the circuit court did not abuse its discretion in dismissing with prejudice Nelson's third amended complaint. When considered on its own, as we are required to do under the authority set out above, Nelson's third amended complaint does not sufficiently allege a claim for breach of fiduciary duty by Arboretum.

¶ 27 To claim a breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused by the breach. *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 17 (citing *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000)). Even if the existence of a fiduciary duty to Nelson is presumed *arguendo*, Nelson's third amended complaint must also allege sufficient facts as to Arboretum's breach of that duty and as to damages as a proximate result of the breach.

¶ 28 Nelson's third amended complaint does not sufficiently plead Arboretum breached its duty to her or that she sustained damages as a proximate result of the breach. Nelson's third amended complaint alleged, on July 30, 2014, Arboretum "was aware of defects in and around the property" including the entry of sewage into the lower level of her unit. The complaint's allegation that Arboretum was "aware of defects," but did not conduct repairs does not specify in what way Arboretum breached its duty to her. See *In re Beatty*, 118 Ill. 2d 489, 499 (1987) (a pleading must contain sufficient facts as will reasonably inform a defendant of what it is necessary to defend against). Similarly, the complaint's allegation that Arboretum did not repair "the problem which caused the flooding issues" does not explain how Arboretum's failure to repair the sewer system constituted a breach of its duty that was the proximate cause of the damage to her unit.

¶ 29 The complaint in *Duffy* provides an example of an adequate pleading of this cause of action. In *Duffy*, this court found the plaintiff unit owner sufficiently alleged a breach of fiduciary duty by the defendant condominium owners' association and individual board members so as to survive the defendants' motion to dismiss under section 2-615. *Duffy*, 2012 IL App (1st) 113577, ¶ 27.

¶ 30 The plaintiff's complaint alleged the defendant condominium association was governed by a set of declarations. *Id*. ¶ 8. Because the defendants conceded on appeal they owed a fiduciary duty to the plaintiff, this court's analysis of the complaint in *Duffy* focused on the plaintiff's allegation concerning the breach of that duty. *Id*. ¶ 19.

¶ 31 The plaintiff's complaint in *Duffy* alleged she informed the defendants of damage to her unit caused by settlement of the soil beneath and around it, causing "settlement of the slab and failure of the walls." *Id*. ¶ 9. The complaint further alleged the defendants delayed or completed only "minimal cosmetic repairs" to an area that was solely in their "control and obligation to repair." *Id*. ¶ 20. The complaint listed eight acts of omissions by the defendants, including the delay of the bidding for repair work on her unit, the restriction of the bid to cosmetic work and the acceptance of a bid "did not address common element repairs." *Id*. The complaint alleged the failure to make the repairs that were described in her complaint resulted in damage to her unit. *Id*. ¶ 20.

¶ 32 Reversing the circuit court's dismissal of that portion of the plaintiff's complaint, this court concluded she sufficiently alleged the existence of damages proximately caused by the defendant's breach. *Id*. ¶ 26. Here, Nelson's complaint did not specify the acts or omissions of Arboretum that constituted a breach of their duty.

¶ 33 CONCLUSION

¶ 34 Nelson did not preserve the breach of fiduciary duty count from her second amended complaint. Moreover, Nelson did not plead sufficient facts in her third amended complaint to state that cause of action against Arboretum. Accordingly, the circuit court did not abuse its discretion by dismissing her third amended complaint with prejudice.

¶ 35 In Nelson's motion to vacate the dismissal of her third amended complaint, she asserted that "the outcome of her case [was] worsened by the ineffectiveness of her attorney." The record is replete with Nelson's complaints of the performance of the legal counsel that she retained for a portion of these proceedings. However, litigants in civil proceedings generally lack a right to the effective assistance of counsel comparable to that afforded to criminal defendants pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). *Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 829 (2010); *Kalabogias v. Georgou*, 254 Ill. App. 3d 740, 750 (1993). Thus, Nelson's complaints as to her counsel's performance are without merit.

¶ 36 Nelson, although she is acting *pro se*, is held to the same standard as an attorney. Nelson has not established that the circuit court abused its discretion in dismissing her third amended complaint against Arboretum with prejudice. Accordingly, the judgment of the circuit court is affirmed.

¶ 37 Affirmed.