2018 IL App (1st) 170992-U

FOURTH DIVISION
March 8, 2018

No. 1-17-0992

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

MEREDITH ONION, Trustee of the Meredith L. Onion Living Trust, Dated April 1, 2017,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 16 CH 6367
BARTLOMIEJ L NERZWICKI, EWA NIERZWICKA, and STANDARD BANK AND TRUST COMPANY,	)	Honorable Anna Helen Demacopoulos, Judge Presiding.
Defendants-Appellees.	)	

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

ORDER

Held: We reverse the circuit court's decision to grant defendants' motion to dismiss pursuant to section 2-619(a)(9) as defendants failed to assert an affirmative matter defeating plaintiff's claims. We affirm the circuit court's decisions as to plaintiff's Rule 191 motions.

¶ 1 Plaintiff Meredith Onion appeals following the circuit court's order granting defendants' motion to dismiss with prejudice under section 2-619(a)(9) of the Code of Civil Procedure (the

Code) (735 ILCS 5/2-619(a)(9) (West 2014)) against plaintiff's first amended complaint, in which she claimed ownership, under adverse possession and similar theories, of a four-foot strip of property adjoining the parties' residential lots. Plaintiff also appeals the circuit court's denials of her several motions to strike defendants' affidavits and for limited discovery.

¶ 2 I. BACKGROUND

¶ 3 Plaintiff is trustee of the Meredith L. Onion Living Trust, one asset of which is the single family residence and property located at 143 S. Ashland Avenue, La Grange, Illinois. She and her husband David Onion purchased the property in 1993 and have continuously resided there since that date. In her amended complaint, plaintiff alleged that, beginning in 1993, the Trust continuously possessed, maintained, and improved a 4-feet-by-125-feet strip of land ("the Strip") along the southern edge of the adjacent property, 133 S. Ashland Avenue, La Grange, Illinois. The adjacent property belongs to defendants Bartlomiej L. Nierzwicki and Ewa Nierzwicka, who purchased the lot from the First Presbyterian Church of La Grange in 2015.

¶ 4 Plaintiff alleged that the Trust maintained actual, continuous possession of the Strip starting in 1993 for the statutory 20 years; that such use and possession was open, notorious, exclusive, and hostile and adverse to defendants' interests and their predecessor's interests. Plaintiff alleged that the Onions cleaned brush, landscaped, made improvements, and installed an invisible dog fence on the Strip. Additionally, plaintiff alleged that in 2016, defendants constructed a chain-link fence which extended onto the Strip, and a few months later constructed a permanent wood fence to replace it, which damaged and cut off access to the Strip and the improvements and invisible fence the Onions had installed.

¶ 5 Premised on these allegations, plaintiff filed her complaint against defendants on May 6, 2016. In her subsequent first amended complaint, she alleged six counts: count I alleged adverse

possession of the Strip; count II alleged easement by prescription; count III prayed for injunctive relief in the form of an order quieting title of the Strip and enjoining defendants from any activity thereon; count IV alleged property damage to the Strip from defendants' installation of the fence and requested damages; count V alleged trespass; and count VI advanced an action to quiet title and remove the fence.

¶ 6 On January 3, 2017, defendants filed a motion to dismiss pursuant to section 2-615 and 2-619 of the Code. They asserted that the quiet title claim failed under section 2-615 as the complaint contained only generalizations and did not allege sufficient facts to support its claim. Under section 2-619(a)(9), defendants asserted that all of plaintiff's claims must fail because the Onions conceded that the Trust does not own the Strip. In support of this argument, defendants provided the affidavit of Greg Teegen, President of First Presbyterian Church of La Grange. Defendants argued that (1) in 2002, the Onions acquiesced to the removal of a tree that was situated on the boundary line of the two properties and within the Strip; (2) the church paid the Onions for damages to landscaping on their property caused by the tree removal; and (3) the Onions contacted Teegen regarding purchasing the southern 25 feet of 133 S. Ashland Avenue, which encompassed the Strip, and David submitted a letter of intent to purchase the entire property in December 2014. Defendants argued that this evidence raised an affirmative matter in that it demonstrated that plaintiff failed to exercise dominion or control over the property and failed to show exclusive or hostile use or possession of the property for the statutory period.

¶ 7 In support of their motion, defendants attached Teegen's affidavit, which contained several exhibits. Teegen averred that as president of the church, he has personal knowledge of its business, operations, and record keeping system; he has access to its business records related to 133 S. Ashland Avenue which are maintained in the regular course of business, he has personal

knowledge of the instant property dispute; and he could testify at trial competently in that regard. Teegen averred that he executed the deed on behalf of the church transferring the property to defendants on February 11, 2015. Prior to that, the church owned and maintained 133 S. Ashland Avenue and had a caretaker continually residing on the property. Teegen averred that in October 2002, a tree was situated on the boundary line of the church's property and plaintiff's property and within the Strip. He averred that the church retained a tree service company to remove the tree, it paid for the tree removal and also for repairs to landscaping on plaintiff's property caused by the tree, and the Onions did not question or complain about the church's removal of the tree. Teegen further averred that Meredith sought to purchase the southern 25 feet of the church's property, which encompassed the Strip, after the church decided to sell its property. Teegen also averred that he received a letter of intent from David dated December 14, 2014, regarding plaintiff's offer to purchase the property, but the church declined to sell. Teegen averred that plaintiff never maintained or controlled the Strip to the exclusion of the church during the church's ownership of 133 S. Ashland Avenue.

¶ 8 Pertinent to this appeal, the following exhibits were attached to Teegen's affidavit: group exhibit B—a proposal/contract and invoice from Bluder's Tree Service for tree removal; exhibit C—a copy of the church's "list of checks" showing a check for $1,100 to Bluder's Tree Service for "removal of tree at 133 S. Ashland" dated October 16, 2002; exhibit D—a copy of the 2016 site plan for the wood fence on 133 S. Ashland, which allegedly showed the location of the tree stump from the tree which the church had cut down in 2002; exhibit E—a copy of the church's "list of checks" showing a check for $466.90 to Meredith Onion for "replacing damaged plants due to tree falling"; exhibit F—the December 14, 2014, letter of intent signed by David. It

proposed basic terms and conditions for the proposed purchase of the property "located at 133 S Ashland Ave" for the amount of $375,000.

¶ 9 On January 26, 2017, plaintiff filed a motion to strike Teegen's affidavit under Supreme Court Rule 191(a) (eff. Jan. 4, 2013), challenging the personal knowledge for his assertions and the admissibility of exhibits B, C, D, E, and F on various grounds. Plaintiff also filed a motion for limited discovery pursuant to Supreme Court Rule 191(b) (eff. Jan. 4, 2013) with respect to Teegen and the same exhibits, arguing that additional discovery was necessary to establish the location of the tree cut down in 2002 and the ascertain whether the documents were properly admissible. Plaintiff provided an affidavit in support of the motion. The circuit court denied both motions in a written order on February 7, 2017.

¶ 10 On February 23, 2017, plaintiff filed a response brief to the motion to dismiss, asserting that defendants failed to raise an affirmative matter under section 2-619(a)(9) that would defeat any of her claims. In support, plaintiff attached her own affidavit and an affidavit from David. In her attached affidavit, plaintiff averred that defendants' exhibits did not correctly identify the location of the tree that was removed in 2002, that she observed the damaged tree which was removed in 2002, that it was located on defendant's property but not on the Strip, that a representative from the tree service requested permission from the Onions to enter the Strip to remove pieces of the tree that had broken off, that the company also ground the stump in 2002, and that the church paid plaintiff for damage to the Strip caused by the tree. Plaintiff averred that in 2014, she engaged the same tree service company to remove a different tree, which was located on the Strip, and the Onions did not request permission from defendants or the church. She averred that the tree stump from the tree removed by the Onions in 2014 was never ground up and this was the stump which appeared in defendants' exhibit D site plan. She further averred

that the December 2014 letter of intent was an offer to purchase 133 S Ashland, not inclusive of the Strip. She averred that the Trust exercised full control and exclusivity over the Strip and the Onions did not need to make an offer on property the Trust already owned. David made the same averments in his affidavit, except he averred that they hired the tree removal service in 2014 to remove two trees.

¶ 11 Based on these affidavits, plaintiff argued in her response that, in addition to defendants' failure to raise an affirmative matter, the affidavits raised disputed factual issues and contentions regarding whether plaintiff could show exclusivity and hostility, and this precluded granting defendants' section 2-619(a)(9) motion. Plaintiff disputed the location of the tree removed in 2002, whether the stump was ground, whether the church's payment to plaintiff was for damage to 143 S. Ashland or the Strip, whether the 2016 site plan showed the stump of the tree cut in 2002, and whether the December 2014, letter of intent included the Strip. Plaintiff also argued that the letter did not specify whether the offer included the Strip, Teegen's affidavit did not specify whether the letter included the Strip or otherwise set out the boundaries of the property to be purchased, and the Onions averred that the letter of intent did not include the Strip, they informed the church that the offer was to purchase property not already owned or controlled by plaintiff, *i.e.*, excluding the Strip. Alternatively, plaintiff argued that the letter of intent was irrelevant as it occurred after the 20-year statutory period had run (1993 to 2013). She also reiterated her arguments against Teegen's affidavit and attached exhibits that she pursued in her motion to strike. Plaintiff asserted that she need not plead possession of the property because she contended that the Strip was vacant.

¶ 12 Defendants filed a reply on March 13, 2017, arguing that plaintiff failed to raise an issue of fact as the Onions' affidavits were inconsistent, unsupported, and false. Defendants offered

the affidavit of Troy Kimberling, former moderator of the church's property committee from 2002 through 2007. Kimberling averred that (1) the church's caretaker continually resided at 133 S. Ashland for years prior to transferring the property to defendants; (2) in October 2002, a tree situated on the boundary line of 133 and 143 S. Ashland, and within the Strip, was removed by a tree service company hired by the church; (3) the tree was only taken down to the stump and the receipt from the company shows this; (4) the church paid the tree service company to take the tree down to its stump; and (5) the church paid for damage to plaintiff's property caused by tree branches falling when the tree was taken down. Defendants asserted that this interrupted the hostility and exclusivity elements for adverse possession or prescriptive easement. Kimberling also averred that plaintiff discussed purchasing the southern 25 feet of 133 S. Ashland numerous times from 2002 thereafter, which encompassed the Strip, and plaintiff never stated that the Strip was not included in the southern 25 feet. Kimberling averred that plaintiff's position was that even if plaintiff purchased the southern 25 feet, there would still be a 50-foot lot remaining to comprise the property at 133 S. Ashland. Kimberling averred that plaintiff never maintained or controlled the Strip. Defendants attached to Kimberling's affidavit the same exhibits that were attached to Teegen's affidavit, *i.e.*, proposed contract and invoice from Bluder's Tree Service, two lists of check ledgers for checks paid to Bluder's Tree Service and Meredith, and the 2016 site plan for the wood fence.

¶ 13 On March 17, 2017, defendants filed a motion to file the additional affidavit of Herbert Bluder, Jr., president of Bluder's Tree Service. Bluder averred that his company removed the tree on behalf of the church in 2002, but only down to the stump, the stump was not ground up, and this was reflected in the company's contract and invoice to the church. Bluder averred that the

stump was still visible today. Bluder also averred that he did not remember performing any work for the Onions and reviewed his paperwork but found none for the Onions.

¶ 14 In response, plaintiff filed several motions in March 2017: (1) a motion to strike Kimberling's affidavit as untimely; (2) a motion to strike Kimberling's affidavit under Rule 191(a); (3) a motion for discovery as to Kimberling pursuant to Supreme Court Rule 191(b); (4) a motion to strike Bluder's affidavit as untimely; (5) a motion to strike Bluder's affidavit under Rule 191(a); (6) a motion for discovery on Bluder under Rule 191(b). Plaintiff also requested that all new factual matters raised in defendants' reply be stricken and argued that the additional affidavits were untimely.

¶ 15 Following oral arguments regarding the motions, the circuit court denied all of the motions to strike defendants' affidavits and motions for limited discovery. The court found that the affidavits did not contain new matters or new factual disputes, but merely rebutted and contradicted the affidavits of Meredith and David which plaintiff submitted with the response to defendants' motion to dismiss. The circuit court also found that plaintiff was not prejudiced. The court observed that plaintiff was free to interview Bluder, but did not do so, and Bluder's affidavit was based on personal knowledge in accordance with Rule 191(a), and he laid a proper foundation for the attached business records.

¶ 16 Plaintiff filed a motion for leave to file an additional affidavit and tendered documents the Onions had recently discovered from Bluder's Tree Service dated 2014 which showed that Bluder removed a tree for the Onions in 2014. Meredith averred that in April 2014, the Trust engaged Bluder Tree Service to remove a tree from the Strip, conduct trimming and debris hauling for trees within the Strip, and trim a large tree within the Strip. She averred that she observed Bluder perform this service, the Trust paid for it, and no other person or entity directed

or paid Bluder's. The court allowed the additional affidavit and documents and considered them in conjunction with the motion to dismiss.

¶ 17 Turning to the motion to dismiss, defendants argued that the affidavits they filed satisfied their initial burden under section 2-619(a)(9) of establishing an affirmative matter defeating plaintiff's claims, thus shifting the burden to plaintiff, which plaintiff failed to sustain. Plaintiff asserted that it refuted every material argument and factual assertion made by defendants in the counteraffidavits of the Onions and there were questions of fact which must be resolved at trial.

¶ 18 The circuit court granted the motion to dismiss with prejudice pursuant to section 2-619(a)(9) as to counts I to V. The court found that defendants' affidavits were sufficient to establish that the tree was removed in 2002, the tree stump still existed, and it bordered the properties and was on the Strip. It held that the Onions' affidavits, at most, showed that there was joint use of the strip, which was insufficient. The court found dismissal under section 2-619(a)(9) was appropriate as there was an easily discernible question of fact which could be resolved and plaintiff would not be able to sustain its burden on adverse possession. As the adverse possession claim failed on an affirmative matter, the circuit court held that all other claims also failed. It also dismissed count VI pursuant to section 2-615 on grounds that plaintiff could not file an action to quiet title because there was no title that plaintiff alleged.

The circuit court entered a written order to that effect on March 23, 2017. Plaintiff filed a timely notice of appeal from the March 23, 2017, order and the February 7, 2017, order.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiff contends that the circuit court (1) misapplied section 2-619(a)(9) and decided the motion on contested facts; (2) erred in denying plaintiff's motions to strike defendants' affidavits; and (3) erred in denying plaintiff's motions for limited discovery.

¶ 21 A. Motion to Dismiss Pursuant to Section 2-619(a)(9)

¶ 22 i. Standard of Review

¶ 23 Under section 2-619(a)(9) of the Code, a defendant may file a motion to dismiss on grounds that "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) (West 2012). A motion to dismiss under section 2-619(a) is designed to dispose of issues of law and easily proved issues of fact at the beginning of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). "A motion for involuntary dismissal under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint[.]" *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31 (citing *Kean v. Wal–Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009); *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120 (2008); *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8). The movant asserts that an "affirmative matter outside the complaint bars or defeats the cause of action." *Id.*

¶ 24 In ruling on a section 2-619(a)(9) motion, the court views the pleadings and supporting documentation in the light most favorable to the nonmoving party. *Van Meter*, 207 Ill. 2d at 368. The court also accepts as true all well-pleaded facts in the complaint and draws all reasonable inferences in plaintiff's favor. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. We review a circuit court's decision on a motion to dismiss pursuant to section 2-619 of the Code *de novo* on appeal. *Van Meter*, 207 Ill. 2d at 368.

¶ 25 ii. Affirmative Matter Under Section 2-619(a)(9)

¶ 26 Plaintiff contends that defendants failed to raise an "affirmative matter" as required by section 2-619(a)(9). Rather, plaintiff contends that defendants merely attempt to negate the essential factual allegations of plaintiff's complaint, which is insufficient to prevail in a section

2-619(a)(9) motion. Plaintiffs further assert that, even if defendants met this initial burden, plaintiff's counteraffidavits refute defendants' allegations.

¶ 27 An "affirmative matter" is described as:

> " '[A] type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained or inferred from the complaint *** [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the complaint.' " *Smith*, 231 Ill. 2d at 120-21 (quoting 4 R. Michael, Illinois Practice § 41.7 at 332 (1989)).

¶ 28 Stated another way, an affirmative matter is a defense " 'other than a negation of the essential allegations of the plaintiff's cause of action.' " *Smith*, 231 Ill. 2d at 120-21 (quoting *Kedzie and 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). It is "something more than evidence offered to refute a well-pleaded fact in the complaint." (Internal quotation marks omitted.) *Zahl v. Krupa*, 365 Ill. App. 3d 653, 659 (2006). "[A] section 2-619 motion admits both the truth of the facts alleged in support of *the claim* and the legal sufficiency of *the claim*, but it raises affirmative matters which it asserts defeat the claim, and as to those affirmative matters, there is no admission of either truth or sufficiency." (Emphasis added in original.) *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1075 (1992).

¶ 29 Initially, a defendant moving for dismissal under section 2-619(a)(9) "has the burden of proof on the motion, and the concomitant burden of going forward." 4 Richard A. Michael, Illinois Practice § 41:8, at 481 (2d ed.2011). If the motion is based on facts not apparent from the face of the complaint, then the defendant "must support its motion with affidavits or other

evidence." *City of Springfield v. West Koke Mill Development Corp.*, 312 Ill. App. 3d 900, 908 (2000); *Hodge,* 156 Ill. 2d at 116.

¶ 30 If the defendant meets this initial burden, "the burden then shifts to the plaintiff, who must establish that the affirmative defense is 'unfounded or requires the resolution of an essential element of material fact before it is proven.' " *Epstein v. Chicago Board of Education,* 178 Ill. 2d 370, 383 (1997) (quoting *Hodge*, 156 Ill. 2d at 116). The plaintiff may establish this by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2014).

¶ 31 We note that, in order to establish a claim of adverse possession, the party must show that it possessed the property for 20 years, and also establish that the possession was "(1) continuous; (2) hostile or adverse; (3) actual; (4) open, notorious and exclusive; and (5) under a claim of title inconsistent with that of the true owner." (Internal quotation marks omitted.) *In re Estate of Cargola*, 2017 IL App (1st) 151823, ¶ 18.

¶ 32 Defendants maintain that they raised three affirmative matters each separately warranting dismissal under section 2-619(a)(9): (1) the affidavits of Teegen and Kimberling established that a church caretaker continuously resided on and maintained the property, including the Strip, and plaintiff failed to contest this; (2) the affidavits of Teegen, Kimberling, and Bluder, and the attached exhibits, showed that the church hired a tree removal service in 2002 to remove a tree that was located on the Strip; (3) the affidavits of Teegen and Kimberling established that plaintiff, through its agents, attempted to purchase the Strip from the church on multiple occasions starting in 2002. Defendants assert that these matters defeat any assertion that plaintiff had exclusive possession of the property during the 20-year period for adverse possession and that plaintiff failed to rebut them.

¶ 33 However, we find that defendants failed to raise an affirmative matter. *Smith*, 231 Ill. 2d at 121. Defendants essentially attempt to negate plaintiff's causes of action by refuting the essential elements of adverse possession. That is, the focus of their arguments, affidavits, and other materials was to show that plaintiff could not establish the elements of adverse possession because plaintiff's possession was not exclusive or hostile for the statutory period. But in order to prevail, they must concede the legal sufficiency of plaintiff's adverse possession claim and other related claims and raise an affirmative matter that is "any defense other than a negation of the essential allegations of the plaintiff's cause of action." *Hodge*, 156 Ill. 2d at 115; *Smith*, 231 Ill. 2d at 121.

¶ 34 As such, defendants were required to provide "something more than evidence offered to refute a well-pleaded fact in the complaint," because well-pleaded facts "must be taken as true for the purposes of a motion to dismiss under section 2-619(a)(9)." (Internal quotation marks omitted.) *Zahl*, 365 Ill. App. 3d at 659. As this court has explained, "[a]n affirmative matter for a 2-619(a)(9) motion cannot merely refute well-pleaded facts—it must assert a completely new matter not present in the complaint." *Gajda v. Steel Solutions Firm, Inc.*, 2015 IL App (1st) 142219, ¶ 30. "[A]n affirmative matter is not the defendant's version of the facts as such a basis merely tends to negate the essential allegations of the plaintiff's cause of action." (Internal quotation marks omitted.) *Id.* Defendants' affirmative matter "must assert something more than the evidence that the defendant expects to provide to refute an ultimate fact." *Id.* See, *e.g.*, *Smith*, 231 Ill. 2d at 121 (immunity); *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997) (immunity); *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999) (lack of standing); *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003) (privilege).

¶ 35 Indeed, "[s]ection 2-619(a)(9) is not a proper vehicle to contest factual allegations; nor does it authorize a fact-based 'mini-trial' on whether plaintiff can support his allegations." *Reynolds*, 2013 IL App (4th) 120139, ¶ 42. Defendants were not authorized under section 2-619(a)(9) to "submit affidavits or evidentiary matter for the purpose of contesting the plaintiff's factual allegations and presenting its version of the facts." *Id.* Instead, this would be more properly addressed in a motion for summary judgment. *Id.* ¶ 34.

¶ 36 As this court has explained:

> "This court has described the difference between proper section 2-619 motions and improper ones as the difference between 'yes but' motions and 'not true' motions. [Citations.] A proper section 2-619 motion is a 'yes but' motion that admits both that the complaint's allegations are true and that the complaint states a cause of action, but argues that some other defense exists that defeats the claim nevertheless. [Citations.] That defense may be one of the enumerated bases contained within section 2-619—such as the running of a limitations period or the existence of a prior pending action—or it may fall within the catch-all of 'other affirmative matter,' such as immunity from suit or plaintiff's lack of standing, under subsection (a)(9). [Citations.]
>
> On the other hand, a motion that attempts to merely refute a well-pleaded allegation in the complaint is a 'not true' motion that is inappropriate for section 2-619. [Citations.] A 'not true' motion at the pleading stage, in essence, serves as nothing more than an answer that denies a factual allegation and is not a basis for dismissal. [Citation.] Such a fact-based motion is

appropriate for a summary judgment motion or for resolution at trial." *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶¶ 40-41.

¶ 37 Although section 2-619(a)(9) allows for resolution of "easily proven issues of fact," such factual issues and any supporting evidentiary material must relate to the affirmative matter. *Reynolds*, 2013 IL App (4th) 120139, ¶ 53. Here, in contrast, defendants used their evidentiary material "to support its version of the facts, point out the factual deficiencies in plaintiff's case, or allege plaintiff cannot prove his case," and therefore defendants are "merely challenging the truthfulness of the plaintiff's factual allegations and a fact-based motion such as a section 2-1005 motion should be used." *Id.*

¶ 38 As a consequence of defendants' failure to assert an affirmative matter, we therefore conclude that the burden-shifting provision in section 2-619(a)(9) is not triggered here. "When the defendant submits a 'not true' motion, defendant's burden of production has not been met—there is no affirmative matter—and the burden does not shift to the plaintiff to refute the defendant's factual allegations contained in the motion." *Reynolds*, 2013 IL App (4th) 120139, ¶ 53 (citing *Smith*, 231 Ill. 2d at 121-22; *Van Meter*, 207 Ill. 2d at 379-80).

¶ 39 Moreover, even if we were to agree with defendants that they raised an affirmative matter under section 2-619(a)(9) and thus the burden shifted to plaintiff, we would find that plaintiff adequately rebutted defendants' assertions and raised factual issues. Defendants raised three main contentions. First, defendants alleged that a caretaker resided at 133 S. Ashland and that this included the Strip. However, plaintiff alleged that the Strip was vacant and also that the Onions maintained the Strip, installed an invisible dog fence, and made improvements and took care of landscaping on the Strip. The caretaker presumably resided in a residence at 133 S. Ashland and not on the actual 4-foot Strip; defendants presented no evidence that the caretaker

occupied the Strip or otherwise took any actions with regard to the Strip, in contrast to plaintiffs' asserted maintenance of and activity upon the Strip.

¶ 40 Second, with respect to the tree removal in 2002, it is readily apparent from the record that this was a hotly contested factual issue in the circuit court. Indeed, defendants submitted three affidavits and numerous exhibits in order to support their assertions. In response, plaintiff offered Meredith's and David's affidavits refuting defendants' assertions, and also moved for additional discovery with respect to defendants' allegations. Based on this evidence, plaintiff asserted that the tree that was removed in 2002 was not located on the Strip, that the stump was ground, and that the church's payment to plaintiff was for damage to the Strip, not 143 S. Ashland, and that the 2016 site plan showed the stump of the different tree that had been cut and not the tree from 2002.

¶ 41 Third, regarding offers to purchase the Strip, we note that Kimberling averred that starting in 2002, when he was moderator of the church's property committee, plaintiff, "through its trustee," discussed purchasing the south 25 feet of the property, and at no time did plaintiff indicate that the Strip was not included in the south 25 feet, but "Plaintiff's position was that even if it purchased the south 25 feet, there would still be a 50-foot lot remaining to comprise the Property." However, plaintiff contends that this excluded the 4-foot Strip as the Onions already believed they owned it, and this was supported by affidavits. We will not read plaintiff's apparent failure to specify whether the alleged offer included the Strip as an admission that the alleged offer affirmatively *did* include the Strip and constituted a concession that plaintiff did not own the property. Moreover, Kimberling's affidavit did not provide any dates or other specifics or supporting documentation regarding the alleged offers.

¶ 42 Similarly, although Teegen averred that the Onions offered to purchase the Strip in 2014, the parties disputed whether the offer included the disputed Strip, as plaintiff and David averred that it was their understanding that they already owned the Strip and thus would have no reason to offer to purchase it. Plaintiff disputed whether the December 2014 letter of intent included the Strip and asserted that neither the letter nor Teegen's affidavit specified whether the offer included the Strip and Teegen's affidavit did not set out the boundaries of the property to be purchased. Further, the Onions averred that the letter of intent did not include the Strip and that they informed the church that the offer was to purchase property not already owned or controlled by plaintiff, *i.e.*, excluding the Strip. Moreover, the 2014 letter was outside the relevant 20-year statutory period for adverse possession and is of no moment to plaintiff's claim.

¶ 43 In the present case, the circuit court found that defendants' affidavits proved that the tree which was removed in 2002 was located on the disputed Strip and thus plaintiff could not establish adverse possession. However, the parties' affidavits and exhibits clearly demonstrate that material issues of disputed facts have arisen in this case which directly relate to plaintiff's cause of actions and the elements of her claims. As such, they are not properly resolved in a section 2-619(a)(9) motion to dismiss. Defendants' motion and supporting affidavits and exhibits failed to raise an affirmative matter under section 2-619(a)(9) and instead essentially attacked plaintiff's factual allegations supporting its claims. We thus conclude that the circuit court erroneously engaged in fact-finding regarding these contested issues and erred in granting defendants' motion.

¶ 44 Plaintiff also argues that the circuit court erred in granting the motion to dismiss because she had previously filed a jury demand. Section 2-619(c) provides:

> "(c) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one in which a party is entitled to a trial by jury and a jury demand has been filed by the opposite party in apt time." 735 ILCS 5/2-619(c) (West 2014).

¶ 45 See also *Lefkowitz v. Skokie Hospital*, 2014 IL App (1st) 133056, ¶ 22 (where plaintiff submitted a jury demand, circuit court "may not resolve any general issue of material fact, but must deny the motion to dismiss without prejudice to a defendant's right to raise the affirmative matter in its answer to the complaint").

¶ 46 Defendants concede that it is improper for a court to determine disputed factual issues in a section 2-619 motion where the non-movant has made a jury demand. Although they contend that plaintiff's affidavits failed to create any disputed factual issues, we disagree.

¶ 47 B. Motions to Strike Defendants' Affidavits

¶ 48 As noted, plaintiff also challenges on appeal the circuit court's denial of her motions to strike defendants' affidavits. Although we conclude that the dismissal under section 2-619 was improper, we address plaintiff's argument as it relates to whether the 2-619(a)(9) motion was supported by proper affidavits. We review *de novo* a circuit court's ruling on a motion to strike an affidavit submitted in support of a section 2-619 motion to dismiss. See *Van Meter*, 207 Ill. 2d

at 368; *Madden v. Paschen*, 395 Ill. App. 3d 362, 386 (2009) (employing *de novo* standard of review to a motion to strike an affidavit that was filed in conjunction with a motion for summary judgment).

¶ 49 Pursuant to Rule 191(a), affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code:

> "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 50 Rule 191(a) is satisfied if the affidavit as a whole "is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial." *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 71. Where an affidavit fails to comply with Rule 191, the court need not strike the entire affidavit, but may disregard only those portions it finds offensive. *Cincinnati Companies v. West American Insurance Co.*, 287 Ill. App. 3d 505, 514 (1998). "Strict compliance with Rule 191(a) is required to insure the trial court is presented with valid evidentiary facts on which to base a decision. [Citation.] Basic rules of evidence require a party to lay the proper foundation for the introduction of documentary evidence, including its authenticity." *Clemons v. Nissan North America, Inc.*, 2013 IL App (4th) 120943, ¶ 36. In evaluating the motion, the court "may not consider evidentiary matter that would be inadmissible upon a trial of the issue ***." *LaMonte v. City of Belleville*, 41 Ill. App.

3d 697, 701 (1976). However, "[w]here it affirmatively appears from the whole of the document that the affiant could competently testify to the contents of the affidavit at trial, then technical insufficiencies in the affidavit should be disregarded." *Kirby v. Jarrett*, 190 Ill. App. 3d 8, 15 (1989).

¶ 51 i. Affidavits of Greg Teegen and Troy Kimberling

¶ 52 Plaintiff raises several challenges to Teegen's affidavit and the attached exhibits in asserting that the circuit court erred in denying her motion to strike. Because plaintiff raises many of the same arguments with respect to the circuit court's denial of her motion to strike Kimberling's affidavit, we address these issues together.

¶ 53 Plaintiff challenges exhibits C, D, and E based on lack of proper foundation as business records because they were not collected near the time of the event. Plaintiff argues that defendants alleged that the Onions acquiesced in the removal of a tree in 2002, but time stamps on the documents allegedly indicate they were created in 2015 and 2016, long after the occurrence or transaction. Plaintiff further contends that exhibits C and E are inadmissible under the computer-generated business records exception to the general exclusionary rule against hearsay.

¶ 54 Under Illinois Supreme Court Rule 236, the proponent of business records must establish that the records were made in the regular course of business at or near the time of the transaction. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 42. See Ill. S. Ct. R. 236(a) (eff. Aug. 1, 1992); Ill. R. Evid. 803(6) (eff. Apr. 26, 2012). The proponent may lay this foundation through testimony of a records custodian or other person "familiar with the business and its mode of operation." *Bank of America, N.A. v. Land*, 2013 IL App (5th) 120283, ¶ 13. "Rule 236 expressly provides that lack of personal knowledge by the maker may affect the

weight of the evidence but not its admissibility." *In re Estate of Weiland*, 338 Ill. App. 3d 585, 601 (2003). Additionally, the proponent of computer-generated records must show that:

> " 'the equipment which produced the record is recognized as standard, the entries were made in the regular course of business at or reasonably near the happening of the event recorded and the sources of information, method and time of preparation were such as to indicate their trustworthiness and to justify their admission.' " *US Bank, National Association v. Avdic*, 2014 IL App (1st) 121759, ¶ 24 (quoting *Riley v. Jones Brothers Construction Co.*, 198 Ill. App. 3d 822, 829 (1990))

¶ 55 Whether records are admissible as business records rests within the sound discretion of the circuit court. *Avdic*, 2014 IL App (1st) 121759, ¶ 24.

¶ 56 We reject defendant's arguments as to all three exhibits and Teegen's and Kimberling's affidavits. The lists of checks in exhibits C and E fell within the business records exception. The exhibits show the date the checks were actually issued, to whom, and for what purpose. As defendants point out, the time-stamped date of November 3, 2015, in the upper corners of the documents does not reflect the date the church actually issued the checks for the tree removal, but when the lists were created or printed off. Exhibit C lists check number 4803, dated October 16, 2002, for $1,100 for "Removal of tree at 133 S. Ashland." Exhibit E lists check number 5386 dated April 15, 2003, for $466.90, for "replacing damaged plants due to tree falling." This established that they were created around the date of the occurrence (removal of the tree in 2002). Teegen's and Kimberling's affidavits further supported that they had personal knowledge regarding the church's business affairs and records and that the checks were issued in 2002 in relation to the tree removal.

¶ 57 Similarly, although exhibit D, the site plan, was dated in 2016, 14 years after the alleged acquiescence to the 2002 stump removal, this exhibit was not used to establish that the tree was removed in 2002. Rather, the point of this exhibit was to show the location of the stump *as it exists today* from the prior tree removal. The exhibit was created around the time of the wood fence installation in 2016, and was thus created within a reasonable timeframe. Further, we reject plaintiff's contention that exhibit D was inadmissible because it did not identify the stump on the Strip as cut in 2002 and that both Kimberling and Teegen lacked personal knowledge regarding the stump. Both Kimberling and Teegen's affidavits identified the stump depicted in the site plan as the remnant of the tree cut down in 2002. It was clear that they had personal knowledge of the location of the tree stump, in addition to their positions with the church, involvement in its affairs, and familiarity with the dispute, the church's property, business records, and transactions.

¶ 58 Plaintiff next argues that group exhibit B, the proposal/contract and invoice from Bluder's Tree Service to the church for removal of the tree in 2002, and Teegen's and Kimberling's averments related to it, should have been stricken because they are conclusory and do not locate the removed tree within the Strip. We disagree. Again, Teegen and Kimberling averred that they could testify from their personal knowledge of the church, its business transactions, and records. They further averred that in October 2002, a tree was situated on the boundary line of the church's property and the Onions' property and within the Strip, and that the church retained Bluder's Tree Service to remove the tree and repair landscaping. We do not find these assertions to be conclusory and plaintiff has not demonstrated how Teegen or Kimberling lacked personal knowledge. Although exhibit B does not, standing alone, show the location of the tree, this does not render it inadmissible evidence. It is relevant to support

defendants' contention that a tree existed on the Strip in 2002, that the church hired a tree service to remove it, and that plaintiff acquiesced to its removal.

¶ 59 Plaintiff next challenges exhibit F, David's December 14, 2014 letter of intent, and Teegen's related averments on grounds that they are conclusory and fail to show nonexclusivity or that the tree was located on the Strip. Plaintiff asserts that Teegen did not state that the letter of intent addressed or identified the Strip. We disagree. Teegen averred that when the church decided to sell its property, plaintiff contacted him to discuss purchasing the south 25 feet of it, which Teegen averred included the Strip, but the church rejected the idea. The letter of intent states that it is a proposal to purchase the property "located at 133 S Ashland Ave." The letter of intent does not specifically clarify whether it is an offer to purchase the entire property, the entire property exclusive of the Strip, or just the south 25 feet of 133 S. Ashland. However, that does not render it conclusory or inadmissible. Indeed, it merely highlights the questions of fact that have been raised in this case.

¶ 60 Plaintiff also asserts that exhibit F was inadmissible because it related to an allegation occurring after the 20-year statutory period for adverse possession. Plaintiff's alleged period of adverse possession was from 1993 to 2013, and the letter of intent was from 2014. Defendants contend that the letter's offer to purchase 133 S. Ashland reflects plaintiff's awareness or concession that the Trust did not have title to the Strip. Thus, we reject plaintiff's challenge.

¶ 61 Plaintiff argues solely with regard to Kimberling's affidavit that his averments regarding discussions with plaintiff constituted inadmissible hearsay. Kimberling averred that plaintiff offered multiple times to purchase the southern 25 feet of the church's property starting in 2002, but never stated that the Strip was not included in the southern 25 feet. These statements did not constitute hearsay. "[S]tatements made by a party's agent about a matter within the scope of his

or her agency and made by virtue of the agent's authority are party-opponent admissions." *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 185. See Ill. R. Evid. 801(d)(2)(D) (eff. Jan. 1, 2011) (a statement is not hearsay if "[t]he statement is offered against a party and is *** a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship").

¶ 62 ii. Affidavit of Herbert Bluder

¶ 63 Plaintiff next challenges the circuit court's decision to deny her motion to strike Bluder's affidavit and attached exhibits.

¶ 64 Specifically, plaintiff contends that Bluder's statement that he "did not remember" the Onions engaging his tree service to perform any work showed lack of personal knowledge. We disagree. Bluder merely averred that, to his recollection and based on his review of his company's records, he had not performed work for the Onions.

¶ 65 Next, plaintiff argues that Bluder's affidavit included several hearsay statements from the church regarding removal of the tree. Bluder averred that the tree removal "did not include or involve removing or grounding the stump of the tree. That was an additional charge, which FPC did not want to pay for. I distinctly remember FPC asking me not to grind the stump, but rather just to cut it down to the stump." Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). Bluder's statement largely concerned his own actions regarding the tree removal and did not constitute hearsay. Bluder's statement that the church asked him to cut the tree down to the stump was not used for the truth of the matter asserted—that is, whether the church hired him to remove the stump. Rather, defendants used the

statements to support their argument that the tree was located on the Strip and the stump was shown in the 2016 site plan. Even if we were to conclude that this portion of Bluder's affidavit constituted hearsay, this single statement may be stricken and the affidavit, including exhibits, may be considered without it. *Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp.*, 336 Ill. App. 3d 572, 579 (2002).

¶ 66 Plaintiff further asserts Bluder's affidavit should have been stricken because Bluder's statements misidentified the properties and were confusing. We disagree. Bluder clarified in his affidavit that he would refer to 133 S. Ashland Avenue as "the Property," and this is indeed how he referred to that property throughout his affidavit. Although not specifically stated, it is clear from the context, then, that "the Adjacent Property" referred to the Onion property at 143 S. Ashland Avenue.

¶ 67 iii. New Factual Matters and Late Filed Affidavits

¶ 68 Plaintiff also contends that the circuit court should have granted her motion to strike Kimberling's and Bluder's affidavits on grounds they were untimely, prejudicial, and included new factual matters and arguments beyond the scope of defendants' original motion to dismiss.

¶ 69 We find no error in the circuit court's decision. In response to the motion to dismiss, plaintiff and David averred that the tree cut down in 2002 was not on the Strip, that the church paid for damage to the Strip caused by a tree located on the church's property, that defendants' exhibits did not show the correct location of the tree, that the stump was ground in 2002, that plaintiff hired a tree service to remove trees from the Strip in 2014 without requesting the church's approval and this was the stump shown in defendants' exhibit D, and that the letter of intent was an offer to purchase 133 S. Ashland, not inclusive of the Strip. As the circuit court found, defendants' arguments and the affidavits of Bluder and Kimberling that they submitted in

the reply brief were responsive to and contradicted the arguments and factual matters raised in plaintiff's response brief and affidavits. See *In re Estate of Krpan*, 2013 IL App (2d) 121424, ¶ 10 (considering affidavit submitted with party's reply in conjunction with its motion to dismiss); *L.D.S., LLC v. S. Cross Food, Ltd.*, 2011 IL App (1st) 102379, ¶ 28 (finding party had not waived, and circuit court properly considered, argument that was raised for the first time in party's reply brief in support of its motion to dismiss). We decline plaintiff's invitation to apply appellate court rules at the trial level. See Ill. S. Ct. R. 341(j) (eff. Nov. 1, 2017).

¶ 70 C. Motions for Limited Discovery

¶ 71 Plaintiff next argues that the circuit court erred in denying her motions for limited discovery under Supreme Court Rule 191(b). Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013). We note that plaintiff advances similar arguments with regard to all three of her motions for limited discovery (upon Teegen, Kimberling, and Bluder). We therefore address them jointly.

¶ 72 Supreme Court Rule 191(b) provides the circuit court with discretion to permit additional time or discovery in conjunction with responding to a section 2-619 motion to dismiss:

> "[i]f the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief ***." Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013).

¶ 73 "A trial court is afforded considerable discretion in ruling on matters pertaining to discovery, and thus its rulings on discovery matters will not be reversed absent an abuse of that discretion." *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill.

App. 3d 1, 11 (2009). The circuit court does not abuse this discretion in denying a plaintiff's Rule 191(b) request and granting a defendant's motion to dismiss if the plaintiff's Rule 191(b) affidavit is "facially defective and fails to contain the necessary disclosures required by the rule." *Id*. at 12.

¶ 74 In her first claim, plaintiff complains that she was entitled to discovery from Teegen, Kimberling, the drafter of the exhibit D site plan, or Bluder because the site plan did not specify that the stump depicted in the site plan was the one cut in 2002. We find the circuit court did not abuse its discretion in denying the motions for additional discovery in that regard. *Kensington's*, 392 Ill. App. 3d at 11. As previously stated, Teegen and Kimberling averred that the site plan accurately depicted the location of the stump as it existed currently and that it was the stump which remained from the tree that was cut down in 2002. Bluder averred that the tree stump is still visible today. There is no indication that the individual who drafted the site plan, whoever that may be, would know when the stump was cut, as it was created for a different purpose many years later—the construction of the wood fence in 2016. The site plan was merely depicting existing structures on the property at 133 S. Ashland Avenue, one of which was allegedly the stump. "Merely alleging that certain discovery matter may shed light on [an] issue is a general assertion, not a fact. Rule 191(b) requires facts, not conclusions." *Giannoble v. P & M Heating & Air Conditioning, Inc.*, 233 Ill. App. 3d 1051, 1065 (1992).

¶ 75 Plaintiff next asserts that she was entitled to further discovery from Teegen and Kimberling regarding the lists of check payments in exhibits C and E to determine reliability, timeliness, and how the records were created.

¶ 76 We find no abuse of discretion in the circuit court's denial of the motions as to these exhibits. As previously discussed, the affidavits of Teegen and Kimberling provided sufficient

foundation for these exhibits. Plaintiff's focus on the date stamp on the lists overlooks the fact that the lists also show the date the checks were actually issued. Plaintiff's bald assertion that Teegen and Kimberling would provide further testimony about these records is insufficient to establish that the trial court abused its discretion here. *Giannoble*, 233 Ill. App. 3d at 1065; *Kensington's*, 392 Ill. App. 3d at 11.

¶ 77 Next, plaintiff argues that she needed additional discovery from Teegen, Kimberling, and Bluder regarding group exhibit B, the documents from Bluder's Tree Service, as the exhibits do not indicate the location of the tree.

¶ 78 However, information regarding the creation of the documents and the location of the tree was already provided in the existing affidavits. Plaintiff fails to specify what further details she requires. *Giannoble*, 233 Ill. App. 3d at 1065. Teegen and Kimberling identified the documents in exhibit B as true and accurate copies of the contract and invoice. They averred that the church hired Bluder's to remove the tree in 2002, paid Bluder's $1,100, and the tree was located on the Strip. Bluder averred that he has personal knowledge of the company's operations, he personally reviewed the records relating 133 S. Ashland Avenue, the church hired him to remove a tree from the church's property in October 2002, but not the stump, and the stump was still visible today. Thus, plaintiff's assertion that she believed Bluder would testify that he did not know where the tree was located is unsupported. Moreover, there is no indication, and plaintiff provides no reason to believe, that Bluder possesses additional documentation regarding the exact location of the stump. *Id.* Accordingly, we find no abuse of discretion in denying the Rule 191(b) discovery motions in relation to this exhibit. *Kensington's*, 392 Ill. App. 3d at 11.

¶ 79 Plaintiff further contends that discovery was necessary because Bluder averred that he did not remember doing any work at the Onions' request and that he reviewed his company's records

and found none relating to 143 S. Ashland Avenue. However, we find no abuse of discretion in denying discovery in that regard. Moreover, plaintiff subsequently provided her own additional affidavit along with a copy of two invoices from Bluder's Tree Service for work performed in 2014 for the Onions. The circuit court allowed plaintiff to submit this evidence for its consideration. In any case, as it was from 2014, it was past the time period for establishing adverse possession.

¶ 80 In conjunction with determining that the circuit court did not abuse its discretion in denying all of plaintiff's motions for discovery, we note that, despite plaintiff's contention that discovery was necessary, she has not asserted or shown that she attempted to, but was "unable to procure," additional affidavits from Teegen, Kimberling, Bluder, or other third parties due to "hostility or otherwise," as required by the rule. None of these individuals are parties to the instant case.

¶ 81 III. Conclusion

¶ 82 For the reasons stated above, we reverse the circuit court's decision to grant defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Code. We affirm the circuit court's decisions as to the motions to strike and for limited discovery.

¶ 83 Reversed and remanded.