

No. 1-10-1292

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DIVISION
June 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|-----------------------------------|---|------------------|
| CHRISTOPHER HARLIN, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Cook County. |
| |) | |
| v. |) | No. 09 M1 191118 |
| |) | |
| CHICAGO RESIDENTIAL, INC., an |) | |
| Illinois Corporation, and GREATER |) | |
| ILLINOIS TITLE COMPANY, |) | Honorable |
| |) | Pamela H. Veal, |
| Defendants-Appellees. |) | Judge Presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein
concur in the judgment.

O R D E R

Held: the trial court did not deny plaintiff's procedural due process rights by granting defendant Chicago Residential Inc.'s motion to dismiss. The trial court did deny plaintiff's procedural due process rights by granting defendant Grater Illinois Title Co.'s motion to dismiss without providing plaintiff either an opportunity to respond to or be present for a hearing on the motion.

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Plaintiff Christopher Harlin filed a second amended complaint against defendants Chicago Residential, Inc. and Greater Illinois Title Co. (GIT) on October 27, 2009, alleging breach of contract, misrepresentation and unjust enrichment stemming from plaintiff's 2001 purchase of a condominium. The defendants filed separate motions to dismiss the complaint, both of which were granted by the trial court. Plaintiff appeals, contenting the trial court abused its discretion in granting the motions to dismiss because plaintiff was denied a hearing and an opportunity to respond to each of the motions. For the reasons that follow, we affirm the trial court's dismissal order as to plaintiff's claims against Chicago Residential. We reverse the dismissal order as to GIT and remand the cause for further proceedings consistent with this order.

BACKGROUND

I. Claims Against GIT

In Count I of his complaint, plaintiff alleged breach of contract against GIT based on GIT's alleged failure to inform him of any outstanding claims or assessments owed to Chicago Residential by the previous condominium owners. Plaintiff alleged he and GIT entered into a contract whereby GIT agreed "to insure title and disclose any defects in title as well as certify whether or not all assessments were paid up to date before

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Plaintiff purchased the subject property.”

On January 15, 2010, GIT filed a section 2-615(a) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615(a) (West 2010)) motion to dismiss the complaint based on plaintiff's failure to attach a copy of the contract, as required by 735 ILCS 5/2-606. Plaintiff failed to appear when the motion to dismiss was presented on January 25, 2010. The trial court entered an order granting the motion and dismissing the portion of the complaint filed against GIT. Plaintiff filed a motion to vacate the trial court's order on January 25, 2010, which was granted by the trial court on February 16, 2010. Plaintiff was given leave to respond to the motion and a hearing was set for 2:30 p.m. on April 8, 2010. Plaintiff filed a response to the motion on March 9, 2010, alleging the contract between plaintiff and defendant was an oral, not written, contract.

On March 26, 2010, GIT filed a “second” motion to dismiss the complaint under section 2-619(a) (5) (735 ILCS 5/2-619(a) (5) (West 2010)), alleging a claim for breach of an oral agreement between the parties would fall outside of the applicable five-year statute of limitations period. GIT mailed notice of the filing of the new motion that same day, which noted the motion to dismiss would be presented to the court at 2:00 p.m. on April 8, 2010 rather than the court ordered time of 2:30 p.m. GIT

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delivered the same notice to the trial court on April 1, 2010, along with a letter saying it would no longer be proceeding with its first motion to dismiss.

Shortly after 2 p.m. on April 8, 2010, the trial court granted GIT's second section 2-619 motion to dismiss. Plaintiff was not present in court at 2 p.m. When plaintiff arrived for the 2:30 p.m. hearing, a dismissal order had already been entered. On April 22, 2010, plaintiff filed a motion to vacate the dismissal, arguing he was not provided a hearing on or given an opportunity to respond to the second motion. The trial court denied the motion to vacate on May 10, 2010.

II. Claims Against Chicago Residential

In Counts II and III of his complaint, plaintiff alleged unjust enrichment and misrepresentation claims against Chicago Residential. The unjust enrichment claims stemmed from an allegation that for the past eight years plaintiff has been paying \$192.19 per month for "an assessment placed against the previous owners of the unit," and that at no time was he informed or aware he was being assessed an assessment for charges incurred by the previous owners. The misrepresentation claim stemmed from an allegation that Chicago Residential had provided him with a letter on June 12, 2001, which noted all of the previous owner's assessments had been paid.

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On January 11, 2010, Chicago Residential filed a motion for extension of time to answer or otherwise plead. At a hearing on January 25, 2010, the trial court granted Chicago Residential until January 28, 2010, to file its motion to dismiss. Plaintiff was granted until February 18, 2010 to file a response, with Chicago Residential granted until March 4, 2010, to file a reply. A hearing on the motion to dismiss was set for 2:30 p.m. on March 16, 2010.

Chicago Residential filed a section 2-619 motion to dismiss on January 28, 2010. Plaintiff did not file a response by February 18, 2010. At 2:30 p.m. on March 16, 2010, the trial court conducted a hearing on the motion. After plaintiff failed to appear at the hearing, the trial court granted the section 2-619 motion to dismiss.

On April 29, 2010, plaintiff filed a motion to vacate the dismissal order, arguing he was not given an opportunity to respond to the motion to dismiss. Following a hearing, the trial court denied the motion to vacate on May 10, 2010.

ANALYSIS

Plaintiff contends the trial court erred in denying his motions to vacate the dismissal orders entered in favor of GIT and Chicago Residential. Specifically, plaintiff contends the trial court abused its discretion by granting both motions to

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dismiss without providing plaintiff an adequate opportunity for a hearing on or a chance to respond to the respective motions. Plaintiff does not otherwise challenge the propriety of the dismissal orders.

I. Standard of Review

A section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that defeat the claims. 735 ILCS 5/2-619(a)(9) (West 2010); *Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 17 (2009). The question on review is whether a genuine issue of material fact precludes dismissal or whether dismissal is proper as a matter of law. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 613 (2007). Under section 2-619(a)(5), dismissal may be had upon a showing that the plaintiff's action was not commenced within the time limit provided by law. 735 ILCS 5/2-619(a)(5) (West 2010); *Gamboa v. Alvarado*, 407 Ill. App. 3d 70, 78 (2011). A 5-year statute of limitations applies for causes of action on "unwritten contracts, expressed or implied." 735 ILCS 5/13-205 (West 2010). We may affirm the trial court's judgment upon any ground appearing in the record, regardless of whether it was relied upon by the court and regardless of whether the court's adopted reasoning was correct. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill.

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App. 3d 446, 460 (2006).

We review a circuit court's judgment on a section 2-619 motion to dismiss *de novo*. *Valdovinos*, 394 Ill. App. 3d at 18.

Motions to vacate judgments that are filed within 30 days are governed by section 2-1301(e) of the Code, which provides:

"The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable." (735 ILCS 5/2-1301(e) (West 2010).

The moving party bears the burden of establishing sufficient grounds to vacate a judgment. *Day v. Curtin*, 192 Ill. App. 3d 251, 254 (1989). The trial court's decision to grant or deny a motion to vacate is discretionary and will not be reversed on appeal absent an abuse of discretion. *Day*, 192 Ill. App. 3d at 254.

II. Chicago Residential's Motion to Dismiss

Contrary to plaintiff's contentions, the record reflects he was provided an opportunity to respond to and an opportunity to be present for a hearing on Chicago Residential's motion to dismiss prior to the court granting the motion.

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The record clearly indicates a briefing schedule was set by the trial court with regards to Chicago Residential's motion to dismiss on January 25, 2010. The January 25 order indicates neither plaintiff nor his counsel were present when it was entered; however, plaintiff has not alleged he was unaware the order was entered. Although the order indicated plaintiff's response was due by February 18, 2010, and a hearing on the motion was scheduled for 2:30 p.m. on March 16, 2010, plaintiff failed to either file a response with the court by February 18 or appear for the hearing on the motion on March 16.

Notwithstanding, plaintiff cites to a letter Chicago Residential's counsel sent to plaintiff's trial counsel, which explained defendant's counsel had informed the trial court at the March 16 hearing that plaintiff's counsel had contacted her and requested additional time (28 days) to respond to the motion. The letter noted the trial court refused to grant additional time to the plaintiff to respond and entered an order granting Chicago Residential's motion to dismiss. Because the March 16 hearing was not transcribed, the letter provides the only indication of what transpired at the hearing.

While we recognize Illinois Supreme Court Rule 183 (134 Ill. 2d R. 183) vests the trial court with discretion to extend the time a party has to comply with a court-ordered or rule-imposed

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filling deadline either before or after the expiration of that deadline, the rule does not come into play unless the responding party can first show good cause for such an extension. *Parkway Bank and Trust Co. v. Meseljevic*, 406 Ill. App. 3d 435, 439-440 (2010), citing 134 Ill. 2d R. 183. Although plaintiff suggests the trial court acted arbitrarily in granting Chicago Residential's motion without allowing an opportunity to respond, plaintiff fails to show any reason as to why he was unable to comply with the February 18 response deadline. "We will not reverse a court's decision to deny a motion for extension of time absent an abuse of the court's discretion." *Parkway Bank and Trust Co.*, 406 Ill. App. 3d at 440.

Because the record reflects plaintiff was provided an adequate opportunity to respond to, and be present for the hearing on, Chicago Residential's section 2-619 motion to dismiss, we find plaintiff's due process contention lacks merit.

Plaintiff also seems to suggest, without providing any authority in support for his contention, that a briefing schedule could not have properly been entered by the trial court on January 25 because the motion itself was not filed by the defendant until January 28. A reviewing court is entitled to have issues clearly defined with relevant authority cited. See *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 336

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Ill. App. 3d 442, 449 (2002). Further, Illinois Supreme Court Rule 341(e)(7) requires an argument "shall contain the contentions of the appellant and the reasons therefore, with citation of the authorities and the pages of the record relied on." 188 Ill. 2d R. 341(e)(7). Based on plaintiff's complete failure to provide any authority to support his contention, we see no reason to address the issue in detail here.

In light of the record before us, we see no reason to disturb the trial court's decision to deny plaintiff's motion to vacate the court's dismissal order as to the claims against Chicago Residential. See *Day*, 192 Ill. App. 3d at 254.

III. GIT's Motion to Dismiss

With regards to GIT's "second" motion to dismiss, the record reflects plaintiff's counsel was sent a "Notice of Motion" by U.S. Mail on March 26, 2010. The notice of motion provided that at 2 p.m. on April 8, 2010, defendant GIT would "present" a motion to dismiss Count I of the plaintiff's complaint. A copy of the motion to dismiss--which GIT referred to below as its "second" motion to dismiss under section 2-619(a)(5) based on plaintiff's response to its initial motion--was attached to the mailed notice. Plaintiff has not contended that his counsel failed to receive the notice. However, neither plaintiff nor his counsel appeared at 2 p.m. on April 8.

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Shortly after 2 p.m., the trial court granted GIT's motion to dismiss. Plaintiff's motion to vacate alleged plaintiff's trial counsel appeared in court at 2:25 p.m. Plaintiff was told by the trial court that the case had been called at 2:00 p.m., and that GIT's "new" motion to dismiss had been granted. When plaintiff's counsel orally requested the court vacate the dismissal and allow plaintiff an opportunity to respond, the court told counsel to file a motion to vacate. Plaintiff then timely filed a motion to vacate the dismissal on April 29, 2010, alleging he was never provided "an opportunity to respond to or request time to respond to this 'new' motion." The trial court denied the motion to vacate. A transcript of the hearing on the motion to vacate does not appear in the record. Although plaintiff's brief references a bystander's affidavit prepared by plaintiff's counsel regarding what occurred at the hearing on the motion to vacate, no such affidavit appears in the record before us.

Plaintiff's contention on appeal basically amounts to an argument that he was denied due process because he was given neither an opportunity to respond to nor granted a hearing on the merits of GIT's "second" motion to dismiss. We note that at a minimum, procedural due process requires notice, an opportunity to respond, and a meaningful opportunity to be heard. See *Gold*

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Reality Corp. v. Kismet Café, Inc., 358 Ill. App. 3d 675, 681 (2005), citing *In re Estate of Gustafson*, 268 Ill. App. 3d 404, 409 (1994).

Because even the limited record before us clearly reflects plaintiff was never afforded an adequate opportunity to respond to the merits of GIT's second motion to dismiss, we must find plaintiff's procedural due process rights were not adequately protected here. Therefore, we find plaintiff presented sufficient grounds to support that the trial court should have granted his motion to vacate the dismissal order. Accordingly, we remand the cause in order for the court to vacate the dismissal order and provide plaintiff both an opportunity to respond to, and a meaningful opportunity to be heard on, GIT's second 2-619 motion to dismiss prior to reaching a finding.

In reaching this conclusion, however, we are careful to note we express absolutely no opinion regarding the underlying merits of either plaintiff's claim or GIT's motion to dismiss. We simply find the basic tenants of due process indicate plaintiff should be provided the opportunity to respond to, and be heard on, GIT's second motion before the court grants or denies it. See *Gold Reality Corp.*, 358 Ill. App. 3d at 681.

CONCLUSION

We affirm the trial court's dismissal order as to

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plaintiff's claims against Chicago Residential. We reverse the trial court's dismissal order as to the claim against GIT and remand the cause for further proceedings consistent with this order.

Affirmed in part, reversed in part, and remanded.