

2011 IL App (2d) 102078-U
No. 1-10-2078

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KATHERINE DAVISON-YORK,)	Appeal from the
individually and on behalf of the)	Circuit Court of
shareholder-unit owners of the 680 Tower)	Cook County
Residence Condominium Association,)	
)	
Plaintiff-Appellant,)	
)	
v.)	No. 07 CH 16823
)	
BOARD OF MANAGERS OF THE 680,)	
TOWER RESIDENCE CONDOMINIUM)	
ASSOCIATION, JEFFREY COLE, KATHY)	
SCHENCK, and PHILIP PALMER, current)	
members of the BOARD AND HARVEY)	
CAMINS, and WAYNE RUDOLPH, members)	
of the 2006 Board,)	Honorable
)	Martin S. Agran,
Defendants-Appellees.)	Judge Presiding.

ORDER

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

¶ 1 *HELD:* The trial court did not err in dismissing plaintiff's complaint on the grounds that it was not a proper derivative action, plaintiff failed to join all necessary parties, and the claims were moot.

1-10-2078

¶ 2 Plaintiff, Katherine Davison-York, filed a two-count complaint against defendants, current and former members of the Board of Managers (Board) of the 680 Tower Residence Condominium Association (Association), where she resides, alleging that they improperly denied her and other unit owners use of one of the elevators in the condominium building, used Association funds for political purposes, and assessed \$1,970 against her account for repairs to another unit owners' property as retribution for her filing the instant lawsuit. The trial court dismissed both counts of plaintiff's complaint. Plaintiff now appeals contending that the trial court erred in: (1) ruling that count I of her complaint was not a proper derivative action; (2) dismissing count I for failing to name all unit owners as necessary parties; (3) refusing to grant her leave to file a third amended complaint; (4) dismissing two former Board members as defendants; and (5) dismissing count II on the grounds that her claims were moot. For the reasons set forth below, we affirm.

¶ 3 Plaintiff's condominium is located in a building at 680 N. Lake Shore Drive in Chicago, Illinois. The building consists of a "lower tower," which includes the lobby and floors 2 through 18 and an "upper tower," which includes floors 19 through 29. The building has four elevators. The P and Q elevators serve only the lower tower floors, while the R elevator serves only the upper tower floors. The S elevator can serve all floors but has been programmed to only serve the upper tower floors. Plaintiff resides in a unit on the 14th floor of the lower tower. In 2005, plaintiff gave the Board a lawyer's opinion letter stating that because the elevators were not designated as "limited common elements" in the Association's Declaration, the S elevator was a common element and had to serve all floors. The Board's law firm disagreed. In 2007, plaintiff

1-10-2078

and three other unit owners decided to run for membership on the Board. During the campaign, the Board sent a letter on January 18, 2007, to all unit owners critical of plaintiff's slate.

¶ 4 On June 26, 2008, plaintiff filed a complaint in the circuit court of Cook County on behalf of herself and other unit owners against the Board asserting in count I that the elevators are common elements and therefore, the S elevator must serve all 29 floors. In her complaint, plaintiff alleged that the Board's policy of preventing the S elevator from stopping at lower tower floors enabled upper tower owners to obtain a higher selling price for their units by claiming that their unit had a "private elevator." As amended, count I sought an order declaring that: (1) Board members who used their positions for private purposes are in breach of their fiduciary duties; (2) the S elevator is a common element; (3) by supporting the elevator policy, the Board converted the S elevator into a limited common element without the requisite approval of all of the unit owners; (4) that the Board members breached section 18(b)(2) of the Condominium Property Act (765 ILCS 605/18(b)(2) (West 2008)) by denying access to the S elevator to the units owners residing on lower tower floors; (5) defendant Philip Palmer should reimburse the Association for the portion of the sale prices he received for the sale of his upper tower unit as a result of supporting the elevator policy; (6) the action was a proper derivative action and therefore, plaintiff was entitled to reasonable attorney's fees and costs.

¶ 5 In count II, plaintiff contended that by sending the January 18, 2007, letter criticizing her slate during the campaign for Board membership, defendants illegally used Association funds in violation of section 18(a)(17) of the Condominium Property Act (765 ILCS 605/18(b)(2) (West 2008)), which prohibits the Board from expressing a preference in favor of any candidate. She

1-10-2078

also alleged that defendants used information from confidential Association files to justify claims made in that letter that plaintiff had violated Association rules and regulations by pressuring doormen to permit her access to the S elevator. Count II asked the court for an order declaring that: (1) count II constituted a proper derivative action, thereby entitling her to attorney's fees and costs; (2) Board members had breached their fiduciary duties in obtaining confidential uncorroborated information that was included in the letter; and (3) Board members must reimburse the Association for the cost of sending the letter.

¶ 6 Defendants filed a motion to dismiss pursuant to sections 2-615, 2-619, and 2-619.1 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-61, 2-619, and 2-619.1 (West 2008). In response, the trial court issued a memorandum opinion on March 11, 2008, finding that count I, the elevator claim, stated a cause of action but was not a proper derivative action because there was no injury to the Association. Further, the court found that Count I was not barred by laches and that upper tower unit owners were not necessary parties but current Board members were. The court also dismissed two former board members from count I. As to count II, the letter claim, the court found that it was a proper derivative action because the letter was distributed using Association funds but that any harm to the Association was minor. The court also found that any award of attorney's fees for this claim was recoverable only out of money the claim might recover for the Association. Based on these findings, the trial court granted defendants' motion to dismiss count I, with leave to amend to add necessary parties and denied the defendants' motion to dismiss count II.

¶ 7 Plaintiff filed a first amendment to the complaint on April 8, 2008 to add then-current

1-10-2078

Board members as defendants and a second amendment on August 27, 2008, which added an allegation to Count II asserting that the Board, through its management agent, took retribution against her for filing this action by levying \$1,970 on her account for repairs to a portion of the property that plaintiff claims she had no ownership interest in. Defendants contend that the charge against plaintiff's account preceded the lawsuit and was for repairs made to the unit above plaintiff's unit after plaintiff complained about a noise in the water pipes in her bedroom ceiling. Plaintiff sought an order declaring that defendants breached their fiduciary duties by attempting to take retribution against her.

¶ 8 Both parties also filed motions asking the trial court to reconsider portions of its March 11, 2008 order. Plaintiff's motion sought reconsideration of the trial court's dismissal of two former Board members, while defendants' motion sought reconsideration of the court's finding that count I was not barred by laches and that upper tower unit owners were not necessary parties. On December 16, 2008, the trial court issued an order denying plaintiff's motion to reconsider and granting defendant's motion, stating, in relevant part, that all unit owners were necessary parties who must be joined before plaintiff's lawsuit could proceed. The court gave plaintiff 28 days to name all unit owners as defendants.

¶ 9 On April 17, 2009, plaintiff filed a motion for leave to file a third amended complaint, which she asserted would state a proper derivative action under count I and therefore, eliminate the need to name all unit owners as necessary parties. On that same date, the trial court denied plaintiff's request to file a third amended complaint and dismissed count I of her complaint with prejudice for failing to join all other unit owners as ordered.

1-10-2078

¶ 10 In May 2009, the Board voted to pay \$98 to the Association as reimbursement for the cost incurred in sending the January 18, 2007 letter to unit owners and to waive its right to collect the \$1,970 charged to plaintiff for the plumbing repairs. Defendants then filed a motion to dismiss count II of plaintiff's complaint pursuant to section 2-619. On March 12, 2010, the trial court dismissed count II, finding that the Board's payment to the Association offsetting the estimated costs of the letter and its waiver of the \$1,970 charge on plaintiff's account made both claims in count II moot. On July 19, 2010, plaintiff filed a notice of appeal.

¶ 11 As a preliminary matter, we must first address defendants' request that we dismiss this appeal because plaintiff failed to comply with Supreme Court Rules 341 and 342. Specifically, defendants contend that plaintiff's brief lacks the jurisdictional statement required by Rule 341(h)(4), omits citations to the record in its statement of facts, in violation of Rule 341(h)(6), fails to state the standard of review, in violation of Rule 341(h)(3), includes citations that violate Rule 341(g), fails to adhere to the format requirements listed in Rule 341(a), and omits the judgment appealed from, the opinions and orders challenged, the pleadings that are the basis of the appeal, and a notice of appeal, as required by Rule 342. Where an appellant's brief fails to comply with supreme court rules, this court has inherent authority to dismiss the appeal for noncompliance. *Kuzmanich v. Cobb*, 276 Ill. App. 3d 634, 636 (1993). While plaintiff's failure to comply with the rules hinders our review, since we are still able to understand the issues raised on appeal, it does not deprive this court of jurisdiction. *Twardowski v. Holiday Hospitality Franchising, Inc.*, 321 Ill. App. 3d 509, 511 (2001). Therefore, we will consider the merits of the issues plaintiff raises on appeal.

1-10-2078

¶ 12 Plaintiff first contends that the trial court erred in finding that all unit owners were necessary parties and in subsequently dismissing count I for failing to join all unit owners. An order granting a motion to dismiss pursuant to section 2-619 is reviewed *de novo*. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). A party is necessary where its presence in a lawsuit is required in order to: (1) protect an interest which the absentee has in the subject matter which would be materially affected by a judgment entered in his absence; (2) reach a decision which will protect the interests of those who are before the court; or (3) enable the court to make a complete determination of the controversy. *State Farm Fire & Cas. Co. v. John J. Rickhoff Sheet Metal Co.*, 394 Ill. App. 3d 548, 563 (2009). A change in policy regarding the S elevator would clearly affect the interests of all unit owners and therefore, the trial court correctly found that they were necessary parties. It is clear that upper tower unit owners would be affected by a change in the elevator policy because not only would they be required to make additional stops at floors 1 through 17 but the value of their units would likely diminish, since, as plaintiff notes, upper tower unit owners were able to obtain a higher sales price by advertising their unit as having a "private elevator." A change in the policy would also affect the interests of lower tower unit owners. While making a fourth elevator available for their use might improve their elevator service, it would also create security issues. The S elevator would be used by the general public to go to floors 19 and 20, which are two business floors in the building. Since those visitors would also have access to floors 1 through 17, they would have to be screened before entering the elevator and monitored once in the building, at a cost that would have to be paid by the Association. Therefore, because all unit owners have an interest that could be affected by a

1-10-2078

judgment in count I, the trial court did not err in ruling that they were necessary parties and in subsequently dismissing that claim when plaintiff failed to join them as parties.

¶ 13 Plaintiff, however, asserts that in a derivative action the necessary parties rule does not apply because the plaintiff represents absent shareholders who are bound by the decision.

Plaintiff acknowledges that the trial court found that count I did not state a proper derivative action but contends that the court erred in reaching that conclusion. We disagree. A derivative action is an action that a corporate shareholder (or a member, in the case of a condominium association) brings on behalf of a corporation to seek relief for injuries done to that corporation, where the corporation either cannot or will not assert its own rights. *Davis v. Dyson*, 387 Ill. App. 3d 676, 682 (2008). Conversely, in a direct claim, the shareholder seeks recovery for injuries sustained individually or by a class of shareholders. *Caparos v. Morton*, 364 Ill. App. 3d 159, 167 (2006). Whether an action is derivative or direct, however, requires a strict focus on the nature of the alleged injury, *i.e.*, whether it is to the corporation or to the individual shareholder that injury has been done. *Sterling Radio Stations, Inc. v. Weinstine*, 328 Ill. App. 3d 58, 62 (2002).

¶ 14 Here, plaintiff contends that because this case involves "common elements," the condominium association has a legally valid claim that can be asserted through a derivative lawsuit. However, the cases cited by plaintiff do not support this conclusion. The question to be answered is who has allegedly been injured by the elevator policy. While it is possible that plaintiff and perhaps other individual unit owners have been injured by this policy, it is clear that the Association has not. Therefore, we reject plaintiff's assertion that this is a derivative action,

1-10-2078

which does not require naming all unit owners as necessary parties.

¶ 15 We also reject plaintiff's contention that the trial court erred in refusing to grant her leave to file a third amended complaint to add an allegation that the Board expended Association funds to carry out and enforce its policy of denying unit owners in the lower tower use of the S elevator by sending its January 26, 2007 letter to all unit owners attacking her and other unit owners who opposed the elevator policy and by pressuring doormen to write incident reports accusing plaintiff of abusive behavior when she requested access to the S elevators, which were later referenced in that letter. Plaintiff argues that the allegations in this third amended complaint would have converted count I into a proper derivative claim, eliminating the need to join all unit owners. Section 2-616(a) of the Code provides that at any time before final judgment, the court may permit amendments on just and reasonable terms to enable the plaintiff to sustain the claim brought in the suit. *Ahmed v. Pickwick Place Owner's Ass'n*, 385 Ill. App. 3d 874, 881 (2008). In considering whether a circuit court abused its discretion in ruling on a motion for leave to file an amended complaint, the reviewing court considers the following factors: "(1) whether the proposed [amended complaint] would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleadings could be identified." *Id.* quoting *Loyola Academy v. S.S. Roof Maintenance Inc.*, 146 Ill. 2d 263, 273 (1992). Given the broad discretion a trial court exercises in ruling on motions to amend pleadings prior to final judgment, a court will not reverse the denial of a motion for leave to amend unless there has been a manifest abuse of discretion. *Id.* at 881-82

1-10-2078

citing *Loyola Academy*, 146 Ill. 2d at 273-74.

¶ 16 Our review of the record does not support the plaintiff's argument that the trial court abused its discretion in denying the plaintiff leave to file a third amended complaint. The trial court found that count I in plaintiff's complaint was not a derivative action and subsequently ordered plaintiff to name all unit owners as necessary parties in order to avoid dismissal of count I. On the date she was required to file an amended pleading joining all unit owners, plaintiff instead presented a motion to file a third amended complaint that, as the trial court noted "attempts to reargue points that the Court has resolved against plaintiff and that the Court has reconsidered and reaffirmed." This motion appears to be nothing more than an attempt to avert the trial court's order requiring plaintiff to join all necessary parties in order to avoid dismissal. Further, all of the facts and circumstances that the plaintiff sought to add to a third amended complaint regarding the Board's January 2007 letter were included in count II of her previous amended complaint and could and should have been included in count I if they were as crucial as the plaintiff now implies. Therefore, the trial court was well within its authority in denying the plaintiff leave to file yet another version of the complaint. Accordingly, we hold that the trial court did not abuse its discretion in denying the plaintiff leave to file a third amended complaint.

¶ 17 Plaintiff next argues that the trial court erred in dismissing count I against two former Board members, Harvey Camins and Wayne Randolph, after Camins moved out of the building and Rudolph resigned from the Board. Plaintiff relies on *Davis v. Dyson*, 387 Ill. App. 3d 676 (2008) for support. In *Davis*, a property manager embezzled funds from a condominium association while defendants were board members. After they left the board, several unit owners

1-10-2078

sued the former board members, alleging that they failed to monitor the activities of the property manager, causing loss to the association. In addition to bringing individual claims, plaintiff brought a derivative action after the board declined to sue the former directors. *Id.* at 680-81. This court held, in part, that derivative claims are not limited to suits against current directors, but may also be asserted against third parties, which in *Davis* were the former board members. *Id.* at 689.

¶ 18 Similarly, in this case, plaintiff contends, she should be permitted to bring her claims against the former Board members. Her reliance on *Davis* is misplaced, however, because that case involved a derivative action while here, we have affirmed the trial court's finding that count I was not a valid derivative action. Further, in *Davis*, the plaintiff sought to recover from the former Board members the money that was embezzled by the accountant. Here, plaintiff's complaint seeks no monetary damages, but rather wants a declaratory judgment that the former Board members breached their fiduciary duties by enforcing a policy that prohibits the S elevator from stopping at all floors. However, Illinois courts do not pass judgment on mere abstract propositions of law, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 266 (2010). Here, a declaration that former Board members breached a fiduciary duty, where no money damages were sought from those defendants, would serve merely as an advisory opinion and would have no other consequences. Therefore, the trial court did not err in dismissing former Board members as defendants.

¶ 19 Lastly, plaintiff contends that the trial court erred in dismissing count II on the grounds

1-10-2078

that her claims were moot. Illinois courts "do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided." *In re Alfred H.H.*, 233 Ill. 2d 345, 351 (2009). The determination of whether an appeal is moot is a question of law to be reviewed *de novo*. Here, the Board reimbursed the Association \$98, slightly more than it cost to distribute the January 18, 2007 letter to unit owners. The Board also waived any claim it had for reimbursement of the \$1,970 plumbing repairs that were assessed against plaintiff. Therefore, any claim for monetary relief for the claims raised in count II was clearly moot.

¶ 20 Plaintiff, however, asserts that voluntary cessation of allegedly illegal conduct does not moot a case unless it is clear that such conduct could not reasonably be expected to recur. In the cases cited by plaintiff to support their argument, the defendants tried to moot a case by ceasing the conduct complained of while still insisting they had the right to engage in that conduct. For instance, in *Amoco Realty Co. v. Montalbano*, 133 Ill. App. 3d 327 (1985), the developer of a residential community sought and obtained an injunction against homeowners who for two years violated a covenant against using their home for a contracting business. *Id.* at 328-31. The homeowners voluntarily ceased using their home for that purpose and claimed that the issue was therefore rendered moot. This court rejected that argument because although defendants ceased doing business from their home, they continued to claim the right to carry on their contracting business from there. *Id.* at 336. "This claim inescapably leaves open the possibility that the activity will recur *** [t]hus, [defendants'] voluntary cessation of business and their claim of waiver of the restrictive covenant disallows the issue of 'moot' status." *Id.* The instant case is

1-10-2078

inapposite, because the claims in count II, regarding the letter and the plumbing issue do not involve ongoing conduct that is likely to recur. They were one-time incidents that were resolved by the Board when it reimbursed the Association and waived its right to reimbursement from plaintiff. Therefore, because the result will not be affected regardless of how those issues are decided, the trial court did not err in finding them moot and granting defendants' motion to dismiss.

¶ 21 For the foregoing reasons, we affirm the circuit court.

¶ 22 Affirmed.