

2013 IL App (2d) 121291-U
No. 2-12-1291
Order filed September 30, 2013

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
SECOND DISTRICT

CHICAGO TITLE LAND TRUST CO.,)	Appeal from the Circuit Court
Trustee U/T/A Dated April 12, 1972 and)	of Kane County.
Known as Trust No. 558,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-L-556
)	
JON DeRAEDT,)	
)	
Defendant-Cross-Appellant.)	
)	
(Chicago Title Land Trust Co., Plaintiff-)	Honorable
Appellee v. Albus Real Estate, LLC, et al.,)	Keith F. Brown,
Defendants-Appellants and Cross-Appellees).)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing the counterclaim, where the party, as a lessee and not as an owner, had no standing to pursue drainage law claims. Affirmed.

¶ 2 This interlocutory appeal arises from the trial court's dismissal of a counterclaim filed in a trespass suit concerning two adjacent properties in Maple Park that contain a federally-protected wetland. In September 2012, plaintiff, Chicago Title Land Trust Co., as Trustee U/T/A dated April

12, 1972 and Known as Trust No. 558 (and for the benefit of certain members of the Strom family (the Stroms)), sued Algus Real Estate, LLC (owner of an adjacent property), Arthur Gustafson (Algus's principal), Jon DeRaedt (a lessee of both the Stroms and Algus), and Richard Brummel (DeRaedt's drain tile contractor) for trespass. In its complaint, Chicago Title alleged that DeRaedt and Brummel entered the Strom property at Algus's and Gustafson's request and destroyed several water-control structures and the portion of the federally-protected wetland that was on the Strom property.

¶ 3 The United States Army Corps of Engineers (Army Corps) investigated the trespass incident and issued several orders that required Chicago Title and Algus to take certain actions with respect to the portions of the wetland on their respective properties.

¶ 4 Precipitating a separate appeal (No. 2-12-1193) not at issue here, Algus filed a counterclaim in the trespass suit, raising the Illinois Drainage Code (Drainage Code) (70 ILCS 605/1-1 *et seq.* (West 2012)) and common-law drainage claims and arguing that the Stroms had wrongfully impeded the flow of water from the Algus property across the lowland Strom property. The Stroms moved to dismiss Algus's counterclaim (735 ILCS 5/2-619(a)(9) (West 2012)), arguing that the Army Corps' administrative action under the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act) (33 U.S.C. § 1251 *et seq.* (2012)) preempted Algus's claims under the Drainage Code and the common law. The trial court granted the Stroms' motion (dismissing counts I through IV) and made a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just reason to delay enforcement or appeal of the order. Algus appealed that order, which, again, is not at issue here, arguing that federal law does not preempt its state law claims and that certain factual issues precluded dismissal of its counterclaim.

¶ 5 Precipitating the present appeal, DeRaedt also filed a counterclaim (styled as a third-party complaint) in the trespass suit, arguing that Chicago Title and the Stroms had wrongfully impeded the flow of water from the Algus property across the Strom property. The Stroms moved to dismiss DeRaedt's counterclaim. The trial court granted the motion, finding that DeRaedt, who was a farm tenant/lessee, not an owner, on the Algus property, lacked standing to prosecute his claims. The court subsequently found, pursuant to Rule 304(a) that, as to counts I through III of DeRaedt's pleading, there was no just reason to delay enforcement or appeal of its order. On appeal, DeRaedt argues that, as a lessee, he has standing to sue under Illinois drainage laws and, thus, the trial court erred in dismissing his counterclaim. We affirm.

¶ 6

I. BACKGROUND

¶ 7 The Strom property, located at 7N411 Route 47, is bounded by Route 47 on the west and Silver Glen Road on the south. It consists of about 19 acres and has been owned by various members of the Strom family (or by land trusts established by them) since 1959. The Algus property lies to the east and north of the Strom property. The Algus property is on higher land than the Strom property and water flows, via drain tile, from the Algus property to the Strom property and then to Virgil Creek.

¶ 8 In 1991, Gustafson purchased the Algus property, titling it to Algus Packaging, Inc. In 2006, Gustafson transferred title to Algus. The wetland area that is partially on both properties has existed since at least the 1960s. It is marshy and wooded and, thus, has never been cultivated on either property. The border between the Strom and Algus properties in the wetland was marked by a concrete weir/head wall, which was located on the Strom side of the boundary. The weir's top was flush with the ground level at the boundary (about 976 feet above sea level).

¶ 9 In about 1967, the Strom family worked with the Department of Agriculture to build a pond within the wetland (the center or original pond). The surface level of the center pond was 971.7 feet. In 2004, the Stroms installed a second pond (the swamp pond) to the east of the center pond. The swamp pond was located between the weir and the center pond and had an elevation of 975 feet that was maintained by a standpipe drain. The swamp pond drains, when necessary, into the center pond and then into Virgil Creek. In 2007, the Strom family expanded the center pond (that portion of which is called the westernmost pond). Warren Strom averred that the changes to the ponds on the Strom property did not alter the flow of water across it.

¶ 10 DeRaedt is a tenant on both the Strom and Algus properties and has farmed on them since about 1996. The Algus property contained a drain tile system since at least 1996. The tile terminated near the weir that marked the boundary of the two properties. In his affidavit, Warren Strom averred that, on October 5, 2009, DeRaedt entered the Strom property with Brummel, an excavator, and: (1) ripped out and destroyed the concrete weir; (2) dug a four-foot-deep trench from the Algus property to the Strom's swamp pond, connecting the drain tile with the swamp pond; and (3) toppled a standpipe (which maintains the elevation level of the water) in the Strom's swamp pond. This apparently resulted in more water flowing through the drain tile and more draining out of the swamp pond. Warren Strom discovered DeRaedt and Brummel and demanded that they leave the Strom property. The Stroms subsequently terminated DeRaedt's lease/tenancy (which was originally to expire on February 28, 2010).

¶ 11 Subsequently, the Army Corps, which regulates the discharge of dredged or fill material into United States waters (33 U.S.C. § 1344 (2012)), investigated the incident. On December 10, 2009, it issued a cease-and-desist order to John Strom on the basis of its representative's observation that

unauthorized in-stream pond construction and sidecasting caused “fill and/or dredged material [to be] discharged into an Advanced Identification (ADID #3467) wetland and a tributary of Virgil Ditch #2 located on your property” in violation of section 301 of the Clean Water Act (33 U.S.C. § 1311 (2012)). It ordered that initial corrective measures be taken (33 C.F.R. § 326.3(d) (2012)), including the removal of all fill and/or dredge material from the wetland and stream and “restor[ation of] the site to its original condition.”¹

¶ 12 Also on December 10, 2009, the Army Corps issued its first cease-and-desist order to Gustafson, asserting that, as a result of unauthorized piping and filling of Virgil Ditch #2 running through the wetland located on the Algus property, “fill and/or dredged material has been discharged into an Advanced Identification (ADID #3467) wetland and a tributary of Virgil Ditch #2 located on” the Algus property in violation of section 301 of the Clean Water Act. The Army Corps ordered that initial corrective measures be taken, including the removal of all fill and/or dredge material from the wetland and stream and “restor[ation of] the site to its original condition.”²

¹The Army Corps further ordered that Strom submit: (1) within 10 days of his receipt of the order, a written statement of his intent to comply with the order; (2) within 30 days, a plan to restore the site to its original condition; and (3) within 60 days, written certification that the site had been restored to its original condition. The letter also warned that violators could be subject to civil or criminal penalties and fines of up to \$32,500 per day or imprisonment. Also, the failure to comply with the order could result in enforcement action by the United State Environmental Protection Agency (EPA), which has independent enforcement authority under the Clean Water Act.

²The letter also contained the same deadlines and penalty warnings as those contained in the letter sent to Strom.

¶ 13 The Stroms hired KAM Solutions, P.C., to investigate the concrete weir's age. In a June 14, 2011, report, KAM opined that the concrete weir was likely constructed in the 1930s and not in 2003 as Gustafson had alleged. They also hired EnCAP, Inc., an environmental consulting firm, to assess the wetland issues on their property; it subsequently issued its proposal. (EnCAP proposed that the wetland be restored and that the following enhancements be made: "an additional 0.77 acres of emergent wetland, 1.72 acres of wet mesic prairie, and 0.5 acres of wildlife food plot [to be] integrated into the woodland ecosystem that is currently maintained and managed by the Strom family.")

¶ 14 On July 25, 2011, the Army Corps issued a second cease-and-desist letter to Gustafson concerning the unauthorized piping and filling of a tributary of Virgil Ditch #2 and removal of a weir altering the hydrology in the wetland located on the Albus property. The Army Corps noted that its representative had observed, on December 8, 2009, that fill and/or dredged material from the tile work and weir removal had discharged into the wetland and tributary. The letter noted that the Army Corps had reviewed the June 14, 2011, KAM Engineering report provided by the Strom family and that the Army Corps concurred with its findings concerning "the historic presence of the subject weir, as well as previous findings of the 976' elevation." The Army Corps stated that its records showed that the piping and weir removal had not been authorized and, thus, violated section 301 of the Clean Water Act. It ordered Gustafson to cease and desist all work on the project and to take initial corrective measures, including removal of "all objectionable material from this wetland and restor[ation of] the site to its original condition." It further ordered that, within 10 days of receipt

of the letter, Gustafson: (1) “replace the weir at the recommended location and elevation;” (2) remove the drain tile from the wetland; and (3) “restore the tributary channel.”³

¶ 15 On August 15, 2011, Gustafson wrote to the Army Corps, stating that he intended to remove the objectionable material from the wetland, have the weir replaced to the 976-foot elevation, abandon the drainage tile through the wetland, and restore the tributary channel through it.

¶ 16 On August 31, 2011, John Strom executed an after-the-fact permit application with the Army Corps, “proposing to compensate for impacts.” On October 21, 2011, Strom and the Army Corps entered into a settlement agreement. (The agreement notes with respect to the Strom property that “an existing pond was expanded, and a new pond with a berm and water control structure were constructed within” the wetland without authorization and impacting 0.27 acres of wetland.) The agreement provides that, to mitigate for the environmental impacts that resulted from the unauthorized activity, “Strom shall construct the mitigation area as proposed” by his consultants (EnCAP, Inc.) to “provide [an additional] 0.77 acres of emergent wetland, 1.72 acres of wet mesic prairie, and 0.5 acres of wildlife food plot integrated into the wooded wetland ecosystem” on the site. The agreement further noted that it did not affect or relieve Strom of responsibility to comply with any federal, state, or local law or regulation. An accompanying letter issuing a permit for the foregoing work states that the proposed work “effectively resolves your violation under Section 404 of the Clean Water Act.”

¶ 17 Turning to the trial court proceedings, on September 30, 2011, Chicago Title sued DeRaedt, Albus, Gustafson (and subsequently Brummel) for trespass on the Strom property that resulted in alleged damages to the land, drainage system, and detention ponds. In his answer, DeRaedt admitted

³The letter also contained the penalties warnings noted above.

that he entered the Strom property and replaced the clay drain tile with plastic drain tile and made other modifications (including lowering the standpipe in the swamp pond by two to three inches), but denied that they were illegal because he was attempting to remove silt due to blockage of the natural flow of water, and because the overflow standpipe in the east pond was too high, thereby stopping water from flowing off the Algus property and moving downstream.⁴ DeRaedt and Algus filed counterclaims against Chicago Title and other parties.⁵

¶ 18

A. DeRaedt's Counterclaim

¶ 19 On November 23, 2011, DeRaedt filed a third-party complaint, seeking injunctive relief and damages due to alleged flooding on the Algus property caused by certain improvements to the Strom property. On January 24, 2012, the Stroms moved to dismiss DeRaedt's complaint, arguing that DeRaedt, as a lessee, not an owner, lacked standing to sue under the Drainage Code. In the alternative, the Stroms requested that the court order DeRaedt to file a more definite pleading to clarify the grounds on which he based his requests. On March 22, 2012, the trial court dismissed DeRaedt's complaint without prejudice. On April 13, 2012, DeRaedt filed an amended counterclaim (styled as a third-party complaint), raising claims under the Drainage Code (counts I and II), common

⁴DeRaedt alleged that he "lowered the level of the east pond by 30" to the natural elevation of the land at the border between the Gustafson and Strom Farms. DeRaedt remediated the damage caused by the construction of the east pond by replacing some of the silted clay tile with modern plastic tile. The lowering of the water level by 30" in the east pond and replacement of the silted tile were all in good agricultural practices in farming and drainage practices in Illinois."

⁵Specifically, Chicago Title, Strom family members (John, Leland, Lucas, and Warren), and Kane County.

law of drainage (count III), for trespass against Warren Strom (count IV), and for trespass and wrongful lease termination against John Strom (count V).

¶ 20 On May 21, 2012, the Stroms moved to dismiss DeRaedt's amended counterclaim (735 ILCS 5/2-615, 2-619(a)(9) (West 2012)), arguing that DeRaedt lacked standing (counts I through III) under the Drainage Code or the common law; that, as to count IV, DeRaedt failed to state a trespass claim against Warren Strom for lack of standing; and that, as to count V, DeRaedt's allegations were conclusory and he had not adequately pleaded a cause of action for wrongful termination of his farm lease for the Strom property.

¶ 21 On July 12, 2012, the trial court dismissed counts I through III of DeRaedt's amended third party complaint with prejudice. (The court also took count IV under advisement and dismissed count V without prejudice. Subsequently, the court dismissed count IV without prejudice.) On October 30, 2012, the court made a finding under Rule 304(a) that there was no just reason to delay an appeal of the dismissal of counts I through III. DeRaedt appeals (styled as a "cross-appeal").

¶ 22 **B. Algus's Counterclaim**

¶ 23 On April 30, 2012, Algus filed its four-count counterclaim. In count I, Algus sought injunctive relief for alleged violations of the Drainage Code. Algus claimed that the water detention ponds (and pond drain pipes and earthen berms) constructed on the Strom property raised the water level in the drainage areas on the Algus property, causing silt to fill the covered drain tiles on the Algus property and interfere with and block the natural flow of water in the tiles and causing flooding on the Algus property and damaging crops. Algus further alleged that the ponds were built without permission from Kane County (in violation of a 2002 conservation deed to maintain the

property as an easement for agricultural purposes in perpetuity),⁶ without the Army Corps' approval, and without Algus's consent. It argued that DeRaedt acted to repair the drainage. 70 ILCS 605/2-11 (West 2012) ("The owner of any land connected to or protected by such a mutual drain or levee may, at his own expense, go upon the lands upon which the drain or levee is situated and repair the drain or levee, and he shall not be liable for damage to lands or crops unless he is negligent in performing the work."). In count II, Algus sought damages under the Drainage Code for the costs of its repairs and the value of the property lost for agricultural purposes. In counts III and IV, Algus sought injunctive relief (including the removal of the standpipe and ponds built without Kane County's and Algus's permission and restoration of all wetlands destroyed by the ponds, drainpipes, and berms to their natural state) and damages for trespass.

¶ 24 On June 20, 2012, Chicago Title and the Stroms moved to dismiss Algus's counterclaim. 735 ILCS 5/2-619(a)(9) (West 2012), arguing that the Army Corps' actions under the Clean Water Act preempted Algus's state law claims. Specifically, Chicago Title and the Stroms argued that the Army Corps' orders were inconsistent with the relief Algus sought in the trial court; that the Army Corps made findings adverse to Algus, such as that the weir was constructed in the 1930s, not in 2003 as Algus had claimed; that the Army Corps determined that Algus is not entitled to drain its wetland; and that the Army Corps issued an order requiring the Strom ponds to be kept at certain elevations. The trial court granted the motion, dismissing all four counts of Algus's counterclaim with prejudice; it further made a Rule 304(a) finding. Algus appealed that order in a separate appeal.

¶ 25

II. ANALYSIS

⁶70 ILCS 605/2-5 (West 2012).

¶ 26 DeRaedt argues that the trial court erred in dismissing his counterclaim against the Stroms on the basis that DeRaedt lacked standing to sue under the Drainage Code and the common law. In his briefs to this court, which are not particularly clear, DeRaedt argues that the statute and the common law “provide for the right of water to freely flow from the upland over the lower lands of Illinois.” For the following reasons, we reject his arguments.

¶ 27 We initially note that this appeal involves only the dismissal of counts I through III of DeRaedt’s counterclaim because the trial court made Rule 304(a) findings only with respect to the dismissal of those counts.

¶ 28 We further note that DeRaedt’s statement of facts lacks any citations to the record in violation of Illinois Supreme Court Rule 341(e)(6) (eff. July 1, 2008). The Stroms argue that this court should disregard DeRaedt’s statement of facts. We agree. Where an appellant’s brief violates the requirements of our supreme court rules, the appellate court has the discretion to strike that brief and dismiss the appeal or disregard any inappropriate material. *Alderson v. Southern Co.*, 321 Ill. App. 3d 832, 845 (2001); *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 171 (2008); see also *In re Marriage of Eberhardt*, 387 Ill. App. 3d 226, 228 (2008) (“It is within our discretion to consider an appeal despite minimal citation to the record in the appellant’s statement of facts.”).

¶ 29 The Stroms’ motion to dismiss was brought under sections 2-615 and 2-619 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615, 2-619(a)(9) (West 2012). A dismissal under section 2-615 admits all well-pleaded facts and attacks the legal sufficiency of the complaint. *La Salle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 790 (2001). A motion to dismiss under section 2-619 of the Code, on the other hand, admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are

established by external submissions that act to defeat the claim. 735 ILCS 5/2-619(a)(9) (West 2012); *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569-70 (2002). Standing is a proper affirmative matter under section 2-619(a)(9). *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121 (2008). We review *de novo* a dismissal under either section. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003).

¶ 30 First, DeRaedt raises the Drainage Code, arguing that he has standing to sue thereunder as a farm tenant, but also conceding that the statute (and the case law interpreting it) allows only owners, not tenants, to sue each other for violation of drainage rights. He argues that the case law and statute are “not fair” and the statute “must be extended to all Illinois owners, tenants and parties interested in land” because (according to DeRaedt) more than half of Illinois farms are tenant-operated. We reject this argument outright. As DeRaedt concedes, there is no case law supporting his argument and the statute explicitly grants certain rights only to owners. See, e.g., 70 ILCS 605/2-2 (West 2012) (“owner of land which may be drained” may initiate suit to force the extension of a covered drain); see also 70 ILCS 605/1-2(i) (West 2012) (defining “landowner” and “owner,” and explicitly noting that it “does not include *** a lessee.”). DeRaedt also argues that the exclusion of tenants from the statute violates their equal protection and due process rights, rendering the statute (or portions thereof) unconstitutional. This argument is forfeited because it is undeveloped and because DeRaedt cites no relevant authority to support his claim. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (a point raised but unsupported by argument or citation to relevant authority is waived); *Romano v. Bittner*, 157 Ill. App. 3d 15, 32 (1987) (argument that statute was unconstitutional was forfeited). We also note that the appellate court is not a repository into which an appellant may foist

the burden of argument and research. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010).

¶ 31 For the same reasons, we reject DeRaedt’s argument that he has standing to sue under the common law of drainage. Again, he cites no case law supporting his claim; indeed, he asserts in his reply brief that there is none. This appears to be so. See 36 Ill. Law and Prac. Waters §55 (August 2013) (“While each overflow of lands *** constitute[s] [a] wrong permitting successive recoveries for successive injuries, [footnote] where the overflow causes permanent injury to the land only, one recovery may be had, [footnote] and the recovery may be had only by the person owning the land at the time of the overflow.”); see also *Handfelder v. East Side Levee & Sanitary District*, 194 Ill. App. 262 (1915) (abstract of op.) (tenant had no interest in land such that he or she may sue for and recover damages for permanent injury to the land); cf *Tankersley v. Peabody Coal Co.*, 31 Ill. 2d 496, 506 (1964) (noting that it is established law that a tenant may recover for crop injury caused by a third party, but primarily relying on a case analyzing an early drainage statute). DeRaedt again claims that his lack of standing as to his common-law claim is unfair and violates his constitutional rights. This argument is forfeited because it is not fully developed and for failure to cite to any relevant authority. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 32 In summary, the trial court did not err in dismissing DeRaedt’s counterclaim.

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 35 Affirmed.