

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).

2013 IL App (4th) 120483-U

NO. 4-12-0483

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 4, 2013
Carla Bender
4th District Appellate
Court, IL

DAVID NESBIT,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	McLean County
MIDWEST MOLDING SOLUTIONS, INC.,)	No. 11MR353
and JOSEPH G. DIEMER,)	
Defendants-Appellees.)	Honorable
)	Paul G. Lawrence,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justice Turner concurred in the judgment.
Justice Appleton specially concurred.

ORDER

¶ 1 *Held:* The trial court erred in granting defendants' motion to dismiss plaintiff's complaint.

¶ 2 In November 2011, plaintiff, David Nesbit, brought suit against defendants, Midwest Molding Solutions, Inc. (Midwest), and Joseph G. Diemer, alleging defendants failed to make rental payments on a commercial property in Bloomington, Illinois, and pay attorney fees. In December 2011, defendants filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)). In April 2012, the trial court granted defendants' motion to dismiss and dismissed plaintiff's complaint with prejudice.

¶ 3 Plaintiff appeals, arguing the trial court erred in granting defendants' motion to

dismiss. Specifically, plaintiff asserts (1) defendants admitted the factual allegations contained in plaintiff's complaint by not filing a verified response, (2) defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Code did not properly assert an "affirmative matter," and (3) the court improperly denied his attempts to file a bystander's report (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)). Defendants respond (1) the motion to dismiss was proper because the mortgagee in possession of the property "waived and released" rental payments and this represents an "affirmative matter" under section 2-619(a)(9) of the Code and (2) the court properly denied plaintiff's attempts to file a bystander's report. Because defendants did not meet their burden on the motion to dismiss and this case presents an issue of material fact, we reverse and remand for further proceedings.

¶ 4

I. BACKGROUND

¶ 5 In November 2011, plaintiff filed a complaint against defendants (1) alleging failure to make rental payments and (2) seeking attorney fees. The complaint stated plaintiff is the owner and lessor of 2906-B Gill Street, Bloomington, Illinois (Property), and defendants have been tenants in the Property since October 1, 2003. According to the complaint, beginning June 1, 2007, Midwest occupied an additional 5,972 square feet, for a total of 8,750 square feet of the Property at the rental rate of \$7 per square foot. (Our calculations based on an attached exhibit indicate this is a per annum rate.) Plaintiff attached a copy of the original lease dated October 1, 2003, stating Midwest leased 2,800 square feet of the Property at the rate of \$1,620 per month. The term of this lease was one year. According to the complaint and the attached exhibit, Midwest failed to pay a total of \$192,512 in rent and late fees and, though not clear, \$43,500 in attorney fees. The exhibit states for rent and late fees incurred (1) over seven months in 2010

and six months in 2011, defendants owe \$21,920; (2) over an unspecified 48 months, defendants owe \$165,080; and (3) over an unspecified five months, defendants owe \$5,512.

¶ 6 On December 22, 2011, defendants filed, among other motions, a "Motion to Dismiss Pursuant to 735 ILCS § [sic] 5/2-619(a)(9)." Attached to the motion to dismiss were the following exhibits: (1) an affidavit from Diemer, (2) a letter dated December 9, 2009, from Mark Truax at Regions Bank, N.A. (Regions), to Diemer; (3) e-mail exchanges dated February 19, 2010, and February 23, 2010, between Truax and Diemer; (4) an August 26, 2011, letter between Diemer as president of Midwest and plaintiff; (5) a copy of the September 2001 mortgage on the Property between plaintiff and Union Planters Bank, N.A. (Union Planters); and (6) from McLean County Case No. 06-CH-116, (a) a record sheet; (b) an August 29, 2008, court order; (c) a June 18, 2010, motion filed by plaintiff; (d) a June 30, 2011, motion filed by Regions; and (e) a July 8, 2011, court order.

¶ 7 The court documents from No. 06-CH-116, indicate the following: On April 7, 2006, Union Planters filed a complaint for foreclosure against plaintiff and others for the Property. On December 18, 2006, the trial court placed Union Planters in possession of the Property and ordered the bank "to account for all rents and other management issues." On August 29, 2008, the court ordered Regions, successor through merger to Union Planters, placed in possession of the Property. On June 30, 2011, Regions filed a motion to dismiss the foreclosure. On July 8, 2011, the court dismissed No. 06-CH-116 with prejudice.

¶ 8 Diemer's affidavit states in paragraph eight, Regions "by written letter, waived and released the rent due and owing from [Midwest] on the [Property] from April 2006 through January 2010." The paragraph continues to state this "waiver and release" is contained in the

December 9, 2009, letter and "confirmed" in the February 23, 2010, e-mail. According to paragraph nine of the affidavit, Midwest paid rent on March 9, 2010, to Regions and "continued to do so for the time period of February through June of 2010." Rental payments were conditioned on Regions addressing "certain immediate problems" such as "leaks," and "[n]otwithstanding the fact that [Midwest] paid an additional five (5) months of rent [Regions] failed to follow through with making certain repairs to the Property." "As a result of [Regions'] failure to make repairs to the Property [Midwest] again withheld rent." In paragraph 11, the affidavit states on August 26, 2011, plaintiff and defendants executed a letter in which they acknowledged the disputed rent. (The letter states the parties acknowledge rental payments for the period prior to July 2011 are disputed.) In paragraph 12, the affidavit states Midwest has made all rental payments since the August 26, 2011, letter.

¶ 9 The December 9, 2009, letter from Truax at Regions, in relevant part, states as follows:

"Thank you for your e-mail of October 19, 2009. Regions Bank has reviewed this matter, and has determined that Midwest Molding Solutions, Inc. has not paid rent for the space at 2906-B Gill Street, Bloomington, Illinois, since April 2006. Prior to that date, rent was being paid in the amount of \$1,620.00 per month. You have indicated that a representative of Regions Bank agreed that rent could be suspended due to the repairs that were necessary to the space, which you were performing yourself. From your e-mailed list of items that were required to be completed and

repaired, it appears to Regions Bank that Midwest Molding Solutions, Inc. should have more than completed its recoupment of the costs of such repairs. Therefore, at this time, Regions Bank demands that Midwest Molding Solutions, Inc. resume making rent payments in the amount of \$1,620.00 per month, on the first day of each month, beginning **February 1, 2010.**" (Emphasis in original.)

¶ 10 The February 23, 2010, e-mail from Truax to Diemer states as follows:

"I'm waiting on the first rent check—once we get the first rent check we can discuss concerns with the building. Regarding 'back rent', in speaking with [b]ank [c]ounsel, the letter we previously provided serves as the Bank's admission that there was an earlier agreement and points to the fact that the agreement is now over. The only rent you will be responsible for is the rent that began February 1, 2010.

To reiterate—I need the February payment ASAP—once I get that I will contact you to discuss any further concerns you have. Please note that you will have a March rent payment due in 6 [d]ays."

¶ 11 The September 2001 mortgage includes a provision permitting the mortgagee to collect rents, "including amounts past due and unpaid, and apply the net proceeds, over and above [l]ender's costs, against the [i]ndebtedness." It includes a provision permitting the lender to be placed as mortgagee in possession with the power "to collect the [r]ents from the Property

and apply the proceeds, over and above the cost of the receivership, against the [i]ndebtedness."

¶ 12 In February 2012, plaintiff filed a response to defendants' motion to dismiss pursuant to section 2-619 of the Code asserting the existence of disputed issues of fact. Plaintiff did not attach a counteraffidavit.

¶ 13 In April 2012, the trial court held a hearing on defendants' motions. As discussed below, no transcript or bystander's report (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)) of this hearing is part of the record on appeal. The court granted defendant's motion to dismiss pursuant to section 2-619 of the Code and dismissed plaintiff's complaint with prejudice. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Plaintiff argues the trial court improperly granted defendants' motion to dismiss. Specifically, plaintiff asserts (1) defendants admitted the factual allegations contained in plaintiff's complaint by not filing a verified response, (2) defendants' motion to dismiss pursuant to section 2-619(a)(9) of the Code did not properly assert an "affirmative matter," and (3) the court erred by denying his attempts to file a bystander's report (Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005)). Defendants respond (1) the motion to dismiss was not required to be verified; (2) the motion to dismiss properly set forth an "affirmative matter" because (a) Regions was appointed as mortgagee in possession, had the power to collect rent and operate the property (see 735 ILCS 5/15-1703(a)(1) (West 2010) (providing a mortgagee in possession has the "right to receive the rents" of a mortgaged property)), and (b) purportedly "waived and released" unpaid rent for the period prior to February 1, 2010, and "for the timeframe [*sic*] thereafter"; and (3) the court properly declined to certify plaintiff's proposed bystander's report.

¶ 16

A. Plaintiff's Verification Claim

¶ 17 Plaintiff contends defendants admitted the factual allegations contained in the complaint when defendants did not file a verified response. Defendants assert the motion to dismiss was not required to be verified.

¶ 18 Plaintiff's argument defendants' motion to dismiss is subject to the verification requirement is unpersuasive. Under section 2-605 of the Code, civil pleadings generally need not be verified but if "any pleading is so verified, every subsequent pleading must also be verified, unless verification is excused by the court." 735 ILCS 5/2-605(a) (West 2010). A motion to dismiss the complaint is not considered a pleading requiring a verification. *Firkus v. Firkus*, 200 Ill. App. 3d 982, 987, 558 N.E.2d 554, 556 (1990); *McWane Cast Iron Pipe Co. v. Aetna Casualty & Surety Co.*, 3 Ill. App. 2d 399, 402, 122 N.E.2d 435, 436 (1954); see also *Tyler v. J. C. Penney Co.*, 145 Ill. App. 3d 967, 971-72, 496 N.E.2d 323, 326-27 (1986) (discussing procedural difference between an answer and a motion to dismiss). As defendants only filed motions to dismiss, they did not file a pleading requiring verification.

¶ 19 B. Defendants' Motion To Dismiss Pursuant to Section 2-619(a)(9)

¶ 20 1. *Section 2-619(a) Motions To Dismiss in General*

¶ 21 Under section 2-619(a)(9) of the Code, a defendant may file a motion for dismissal on the grounds "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 2010). "[A] motion to dismiss under section 2-619(a) of the Code *** admits the legal sufficiency of the complaint." *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361, 919 N.E.2d 926, 931-32 (2009). When ruling on the section 2-619 motion to dismiss, the trial court should construe the pleadings

"in the light most favorable to the nonmoving party" and "must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that may reasonably be drawn in plaintiff's favor."

Sandholm v. Kuecker, 2012 IL 111443, ¶ 55, 962 N.E.2d 418, 434.

¶ 22 The question on appeal from dismissal pursuant to a section 2-619(a) motion is whether the case presents a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. *Stark Excavating, Inc. v. Carter Construction Services, Inc.*, 2012 IL App (4th) 110357, ¶ 36, 967 N.E.2d 465, 473-74 (quoting *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494, 639 N.E.2d 1282, 1293-94 (1994)). Dismissal on a section 2-619(a) motion is reviewed *de novo*. *Kean*, 235 Ill. 2d at 361, 919 N.E.2d at 932.

¶ 23 *2. Affirmative Matter Under Section 2-619(a)(9)*

¶ 24 An affirmative matter pursuant to section 2-619(a)(9) is " 'something in the nature of a defense which negates the cause of action completely.' " *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367, 799 N.E.2d 273, 278 (2003) (quoting *Nickum*, 159 Ill. 2d at 486, 639 N.E.2d at 1290). The affirmative matter must " 'be something more than evidence offered to refute a well-pleaded fact in the complaint.' " *Zahl v. Krupa*, 365 Ill. App. 3d 653, 659, 850 N.E.2d 304, 310 (2006) (quoting *Heller Equity Capital Corp. v. Clem Environmental Corp.*, 232 Ill. App. 3d 173, 178, 596 N.E.2d 1275, 1280 (1992)). The standard description of an affirmative matter is,

" [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 [in] or inferred from the complaint *** [not] merely evidence upon which defendant expects to contest an ultimate fact stated in the

complaint.' " *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 121, 896 N.E.2d 232, 238 (2008) (quoting 4 Richard A. Michael, Illinois Practice § 41.7, at 332 (1989)).

In *Smith*, the supreme court held tort immunity is a proper affirmative matter because it completely negates the plaintiff's ability to bring the claim. *Smith*, 231 Ill. 2d at 121, 896 N.E.2d at 238; see also *Jackson v. Randle*, 2011 IL App (4th) 100790, ¶ 12, 957 N.E.2d 572, 575 (standing); 4 Richard A. Michael, Illinois Practice § 41:7, at 475-78 (2d ed. 2011) (listing other defenses Illinois courts have held to be affirmative matters).

¶ 25 *3. Burden of Presenting an Affirmative Matter*

¶ 26 On a motion to dismiss pursuant to section 2-619(a)(9) of the Code, the defendant, as the movant, "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). "When a motion to dismiss is based on facts not apparent from the face of the complaint, the movant must support its motion with affidavits or other evidence." *City of Springfield v. West Koke Mill Development Corp.*, 312 Ill. App. 3d 900, 908, 728 N.E.2d 781, 787 (2000). "By presenting *adequate* affidavits supporting the asserted [affirmative] defense ***, the defendant satisfies the initial burden of going forward on the motion." (Emphasis added.) *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 735 (1993); see also *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101-02, 920 N.E.2d 1254, 1260 (2009) ("By presenting an affidavit supporting the basis for the motion, the defendant satisfies the initial burden of going forward."). If the defendant can carry this burden of going forward, "the burden then shifts to the plaintiff, who must establish that the affirmative defense

asserted either 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, 687 N.E.2d 1042, 1049 (1997) (quoting *Hodge*, 156 Ill. 2d at 116, 619 N.E.2d at 735). The plaintiff may establish this by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2010).

¶ 27 To reiterate, defendant, as movant, must present an affirmative matter that completely negates plaintiff's claim; to do such, defendant may use affidavits and must not merely contest factual allegations contained in the complaint.

¶ 28 4. *Defendants Have Failed To Meet Their Initial Burden*

¶ 29 Defendants have failed to meet their initial burden pursuant to section 2-619(a)(9) to present an affirmative matter that completely negates plaintiff's claim for unpaid rent and attorney fees.

¶ 30 a. The Record in No. 06-CH-116

¶ 31 The parties dispute whether the trial court took judicial notice of the proceedings in No. 06-CH-116. Defendants point out their motion to dismiss requested the trial court take judicial notice of the proceedings in No. 06-CH-116. Defendants assert the foreclosure proceedings "necessarily resolved any outstanding issues with respect to the waiver and forgiveness of the rent on the Property" because plaintiff was aware of Regions' "waiver" during the pendency of the foreclosure.

¶ 32 Here, the record does not show whether the trial court took judicial notice of the proceedings in No. 06-CH-116. We decline defendants' invitation to scour the motions plaintiff submitted in No. 06-CH-116 and use their content for the purpose of establishing facts in this matter. See *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166, 449 N.E.2d 812, 815

(1983) ("[W]here the facts are derived from pleadings in a case not involving the same parties and are not proved, judicial notice is improper."). Further, we decline to speculate whether the foreclosure proceedings terminated because Regions credited plaintiff's indebtedness for rental payments received from defendants, because of other reasons, or a combination thereof.

¶ 33 For purposes of our review, because they are not disputed and are readily verifiable facts contained in a court order, we take notice of the dates Union Planters and Regions were placed in possession of the Property, December 18, 2006, and August 29, 2008, respectively. See *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153, 159, 355 N.E.2d 7, 9 (1976).

¶ 34 b. The Diemer Affidavit

¶ 35 Illinois Supreme Court Rule 191(a) provides, in part, an affidavit "shall set forth with particularity the facts upon which the *** defense is based," and "shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. July 1, 2002). "When supporting affidavits have not been challenged or contradicted by counteraffidavits or other appropriate means, the *facts* stated therein are deemed admitted." (Emphasis added.) *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 21, 960 N.E.2d 18, 25 (quoting *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262, 807 N.E.2d 439, 447 (2004)). Rule 191(a) makes clear an affidavit must state *facts*; conclusions contained in an unopposed affidavit are not taken as true. *Forrester v. Seven Seventeen HB St. Louis Redevelopment Corp.*, 336 Ill. App. 3d 572, 579, 784 N.E.2d 834, 839 (2002).

¶ 36 Paragraph eight of the affidavit states Regions "waived and released the rent due and owing [*sic*] from [Midwest] on the Property from April 2006 through January 2010." For

this statement, the affidavit relies on the December 9, 2009, letter and the February 2010 e-mails from Regions. In the December 9, 2009, letter Regions (1) acknowledges Midwest performed repairs on the property and withheld rent in recoupment of the cost of such repairs, (2) acknowledges "a representative of Regions" agreed Midwest could suspend payment of rent (providing no time frame), and (3) demands rent payments commence February 1, 2010, in the amount of \$1,620 per month. The February 23, 2010, e-mail indicates Midwest had not paid February 2010 rent by that date and Regions repeated its demand for payment of rent before continuing to address Midwest's recoupment arguments. Paragraph nine of the affidavit states Midwest began "on or about" March 9, 2010, paying rent to Regions and continued to do so for the time period of February 2010 through June 2010, approximately five months.

¶ 37 On its face, the affidavit does not address the June 2010 through July 2011 time period or whether Midwest paid rent to either Regions or plaintiff during this time. Paragraph eight only states "no rent would be due and owing for the timeframe [*sic*] prior to February 1, 2010" and references the documents. However, the December 2009 letter reflects the agreement to withhold rent was terminated by Regions at that time. The record before us contains no agreement covering the 13-month time period after June 2010. Because these 13 months are not addressed by the affidavit and defendants' alleged "affirmative matter" does not *completely* bar plaintiff's claim, the motion to dismiss was improperly granted. See *Nickum*, 159 Ill. 2d at 497, 639 N.E.2d at 1295 (rejecting the defendant's argument the voluntariness of third-party payment was an affirmative matter as it did not "negate completely" plaintiff's claim based on mistake of fact).

¶ 38 Further, while the mortgage expressly provided the mortgagee had the power to

collect rents and apply the rent to the mortgage, there is no statement in the affidavit, or the documents, that Regions had the power to retroactively and prospectively waive rent. The proceedings in No. 06-CH-116 indicate from April 2006 through December 18, 2006, no mortgagee was in possession. This presents the question of whether Regions had the power to waive unpaid rent retroactively for a period it was not in possession of the Property.

¶ 39 Upon closer examination, the Diemer affidavit fails to comply with Rule 191(a) as it contains conclusory statements concerning Regions' actions. The documents relied on in paragraphs eight and nine provide no factual support for the conclusion Regions "waived and released" from April 2006 through January 2010 or any time period. These documents are merely letters acknowledging a prior "agreement" permitting Midwest to withhold rent to make repairs, said agreement was deemed over, and demanding payment of rent starting February 1, 2010. These documents do not contain (1) a time frame for the "agreement" between Regions and Midwest, (2) the amount of square footage covered by the "agreement" (the letter demands rent of \$1,620 per month which is the rental for 2,800 square feet and would not appear to include the additional 5,972 square feet occupied after June 1, 2007), or (3) language stating Regions "waived and released" rent prior to February 2010. The affidavit contradicts defendants' assertion Regions "waived and released" rent for the time frame after February 2010 because it states Midwest paid rent for the five months for February 2010 through June 2010. If Regions "waived and released" rent after February 2010, Midwest had no reason to pay rent for the five months after February 2010.

¶ 40 We conclude defendants did not present an adequate affidavit supporting their claims Regions "waived and released" rental payments. See *Schmitz v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 405 Ill. App. 3d 240, 244-45, 939 N.E.2d 40, 44 (2010) (examining agreement between trust beneficiaries and trustees to determine if trustees carried their burden of going forward on section 2-619(a)(9) motion to dismiss). Because the affidavit's statements consist of conclusions without supporting facts, we reject defendants' assertion the Deimer affidavit must be taken as true because plaintiff failed to file a counteraffidavit. As a practical matter, plaintiff could have improved his position by responding with an appropriate counteraffidavit.

¶ 41 Factual issues remain over whether (1) Regions (a) had the power to waive rent and actually purported to waive rent for the time periods after April 2006 when it was not a mortgagee in possession (namely April 2006 through December 18, 2006), (b) waived unpaid rent for the period prior to February 2010, (c) waived rent from June 2010 through July 2011, and (d) credited plaintiff's indebtedness for rental payments received; and (2) Midwest (a) paid rent to either plaintiff or Regions after April 2006 (other than the five months from February 2010 through June 2010), (b) properly asserted recoupment against plaintiffs, and (c) the cost and value of repairs made to the property. The affidavit provides nothing more than conclusory statements to resolve these questions and only contains sufficient factual detail to indicate Midwest paid rent to Regions for five months out of the 64-month period between April 2006 through July 2011.

¶ 42 We reiterate, defendants have not met their initial burden by producing an affidavit containing conclusory statements about a third party's "waiver and release." These statements are not factually supported. Defendants' claims rely on the actions of an interested third party that is not party to the instant suit. Defendants are asserting a major financial

institution "waived and released" rent for a 64-month period without providing evidence the bank clearly did so. A closer look at defendants' claims reveal the presence of factual issues and they are not entitled to judgment as a matter of law.

¶ 43 C. Plaintiff's Bystander's Report Claim

¶ 44 Plaintiff asserts the trial court erred by not allowing him to amend his docketing statement or certifying the proposed bystander's report. In response, defendants contend plaintiff fails to comply with Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) by failing to "present a coherent argument or cite any authority supporting his position."

¶ 45 In light of our decision reversing the trial court's dismissal, we need not address this issue.

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, we reverse the trial court's judgment and remand the cause for further proceedings.

¶ 48 Reversed and remanded.

¶ 49 JUSTICE APPLETON, specially concurring.

¶ 50 I concur but write separately to state that, on remand, the actions or inactions of Regions should be relevant to the determination of the issues arising between the parties.