2015 IL App (1st) 140431-U

SECOND DIVISION
July 28, 2015

No. 1-14-0431

RICHARD HATABURDA, EVE MARKOU, SUSAN HAMDAN and KEITH SCHUTH,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 12 CH 19220
EQUESTRIAN ESTATES HOMEOWNERS ASSOCIATION, REMO TURANO, Registered Agent, MARY ANN BACHELOR and DANIEL NOONAN,	)	Honorable Rodolfo Garcia,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Liu concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's dismissal of plaintiffs' first amended complaint with prejudice is affirmed.

¶ 2 Plaintiffs, each acting *pro se*, jointly appeal the dismissal of their first amended complaint under section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)). For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 At the outset, we note that Supreme Court Rule 341(h)(6) requires that the statement of facts set forth in the appellants' brief "contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. Rule 341(h)(6) (eff. Feb. 6, 2013). In many instances, plaintiffs' statement of facts lacks citation to the record, which inhibits our ability to verify that these facts were argued before the trial court, and includes purported facts not pled or contained in the first amended complaint or, from our review of the record, raised before the circuit court. Any statement of fact made without reference to the record need not be considered by this court. *Beitner v. Marzahl*, 354 Ill. App. 3d 142, 146 (2004). Furthermore, any matters not previously raised in the circuit court will not be considered now by this court. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536 (1996). Adherence to Rule 341(h)(6) is mandatory (*Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8). Consequently, we will disregard any inappropriate or unsupported material provided by the plaintiffs on this basis. *Beitner*, 354 Ill. App. 3d at 146.

¶ 5 Because the issue here is whether the plaintiffs' first amended complaint was properly dismissed pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)) we provide a general background of the dispute in order to frame our disposition of this appeal. Plaintiffs admit that they are homeowners of property located in the Equestrian Estates subdivision community in Lemont, Illinois. Through this ownership, plaintiffs are members of the Equestrian Estates Homeowner's Association (Association). In 1977, Equestrian Estates recorded a document entitled General Declaration of Covenants and Restrictions (General Declaration) which generally governs the architectural and building

standards within the community. Article VII, Section 1 sets forth the manner in which the General Declaration could be amended. In 2000, plaintiffs contend the defendants, in concert with others, began a process to amend the General Declaration and eventually, in 2004, recorded an Amended and Restated General Declaration of Covenants and Restrictions for the Association (Amended Declaration) with the Cook County Recorder of Deeds. In May 2012, plaintiffs brought this action to quiet title against the Association and the defendant board of directors challenging the validity of the Amended Declaration. The contention is the Amended Declaration was improperly amended, in violation of Article VII, Section 1 of the General Declaration, to authorize an assessment against their property interests which constitutes a cloud on title.

¶ 6 This lawsuit was initially filed by counsel on behalf of four plaintiffs: Patricia Hataburda, Eve Markou, Susan Hamdan and Keith Schuth. Patricia was the original lead plaintiff. Defendants moved to dismiss the initial complaint pursuant to section 2-619.1 of the Code arguing, among other things, that Patricia's claim was expressly barred by a prior settlement agreement she executed releasing all claims that she raised in two earlier lawsuits against the Association and defendant Daniel Noonan relating to the same issues based on the alleged invalid Amended Declaration. After briefing that motion, but before any ruling, plaintiffs filed a written motion requesting leave to substitute a new party plaintiff and to file an amended complaint. Plaintiffs argued that Patricia's husband, Richard, should be substituted in her stead because "[d]efendants will probably be successful in their [m]otion" to dismiss Patricia's claim "based on a [r]elease signed by her in another lawsuit involving the same issues in this case." The circuit court allowed Patricia to withdraw, an amended complaint was filed and Richard was

substituted for Patricia as a plaintiff. The amended complaint was entitled "First Amended Complaint to Quiet Title" and is the complaint we consider in this appeal.

¶ 7 The "first amended complaint to quiet title" contained four counts, one count brought by each plaintiff. Each count requested a declaration that the Amended Declaration is a cloud on each plaintiff's title and of no legal effect. The core allegations were alleged by plaintiff Susan Hamdan in count I and were adopted and re-alleged by the remaining plaintiffs in their respective individual counts. Hamdan alleged she is an owner and resident of a one-acre lot in Equestrian Estates. In 1977, the "Equestrian Estates community" promulgated a "General Declaration of Covenants and Restrictions" which was recorded with the Cook County Recorder of Deeds. Equestrian Estates was incorporated as an Illinois not-for-profit corporation in 1986. Plaintiffs allege that in 2000, in "breach of their duty to the homeowners in Equestrian Estates" and "instead of following [the General Declaration]" defendants "embarked upon an unlawful scheme to create" the Amended Declaration and to "unlawfully commandeer[ ] control of Equestrian Estates for their own benefit to create the imposition of 'mandatory' assessments to the homeowners *** which was and is contrary" to the General Declaration. This "unlawful, secret and improper scheme" consisted of: (1) tricking and intimidating homeowners into signing index cards saying that they were in receipt for the delivery of the Amended Declaration; (2) considering the signature cards as a "vote" in favor of the Amended Declaration; (3) failing to formally record " 'an instrument signed by the then owners of two-third of the Lots' " as required by the General Declaration; (5) failing to send written notice to every owner at least 90 days in advance of any action taken as required by the General Declaration; and (6) misrepresenting to plaintiffs and the other homeowners that the Amended Declaration was properly adopted. As a

result, the Amended Declaration is an "unlawful cloud on the [p]laintiff's title having no force or legal effect." Plaintiffs became aware of the Amended Declaration in 2009 when defendants attempted to collect unlawful assessments. After plaintiffs declined to pay the assessments, the defendants began "a campaign of harassment, filing liens and collection lawsuits," including the threat of foreclosure. In each plaintiffs' respective prayer for relief, they requested a finding that: the Amended Declaration is a cloud on title having no force or effect and that each plaintiff's title is free and clear of the Amended Declaration. Attached to the plaintiffs' first amended complaint were copies of the General Declaration and the Amended Declaration.

¶ 8 The Amended Declaration states that the General Declaration was amended 15 times with each amendment recorded with the Cook County Recorder of Deeds. The purpose of the Amended Declaration was to consolidate into one document all prior amendments, supplements and modifications recorded after the General Declaration was adopted and recorded in 1977. The Amended Declaration specifically provides that it was adopted in accordance with Article VII, Section 1 of the General Declaration, it was signed by the owners of at least two-thirds of the community's lots who agreed to change the General Declaration, and that 90-day notice was given to homeowners prior to any action taken. It also reflects a $150 initial annual assessment against each property in the community.

¶ 9 Defendants filed a section 2-619.1 motion to dismiss the first amended complaint. Again, because we have not been provided with a transcript of proceedings or a proper substitute, we summarize the contents of the motion pursuant to our *de novo* review. Under section 2-619.1 a defendant is allowed to argue for dismissal of a complaint under sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2010)). Defendants argued that dismissal under section 2-

615 was proper because the first amended complaint failed to state a cause of action and failed to allege any wrongdoing by the individually named defendants. Defendants also argued that Hataburda, Markou and Schuth's claims were barred pursuant to section 2-619 and therefore, their claims must be dismissed. Defendants further asserted that Richard's claim was barred by virtue of a prior settlement agreement executed by his wife and joint tenant, Patricia, in her earlier lawsuits against the Association and Noonan. Defendants argued that Markou and Schuth's claims were barred because they executed written documents acknowledging and accepting the Amended Declaration. Underlying these specific arguments, defendants also argued that the Amended Declaration was properly adopted according to the provisions of the General Declaration.

¶ 10 In support of their motion to dismiss, defendants attached the following: a copy of the recorded Amended Declaration, including its exhibits and the signature cards, two of which bear the signature of Markou and Schuth; an affidavit by board secretary and defendant Mary Ann Bachelor attesting that the cards were voluntarily signed by at least two-thirds of the community's owners who approved the Amended Declaration; a copy of Patricia's February 2012 settlement agreement and release of claims; and, the order dismissing Patricia's prior action against the Association.

¶ 11 In response to the motion to dismiss, plaintiffs did not challenge the authenticity of these documents, although, on appeal, they argue the signature cards should be disregarded. Plaintiffs argued only that: (1) Richard did not sign the release executed by his wife and a question of fact exists as to whether his claim is barred; (2) there is a question of fact as to whether the Association was properly created and whether the Amended Declaration was properly adopted;

(3) the complaint was sufficiently pled; and (4) the individual board members should not be dismissed from the action because of a question of fact "as to whether their actions were willful and wanton." Plaintiffs attached the General Declaration as an exhibit to their responsive brief.

¶ 12 In a handwritten order entered after hearing on the defendants' motion, the circuit court dismissed plaintiffs' complaint pursuant to section 2-619.1 of the Code with prejudice. This timely filed appeal followed.

¶ 13 ANALYSIS

¶ 14 Section 2-619.1 permits a party to combine a section 2-615 (735 ILCS 5/2-615 (West 2010)) motion to dismiss, based on a plaintiff's substantially insufficient pleadings, with a section 2-619 (735 ILCS 5/2-619 (West 2010)) motion to dismiss, based on certain defects or defenses. A motion to dismiss under section 2-615 attacks only the legal sufficiency of a complaint based on defects appearing on the face of the complaint and does not raise affirmative factual defenses. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484 (1994). In comparison, a section 2-619 motion to dismiss, admits the legal sufficiency of the complaint, but asserts affirmative matter that allows for an involuntary dismissal of the claim based on certain defects or defenses. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 13. The basis of the 2-619 motion must go to an entire claim or demand. *Id*. "It is proper for a court[,] when ruling on a motion to dismiss under either section 2-615 or section 2-619[,] to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party." *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). "Our review is *de novo* for motions to dismiss brought under both sections 2-615 and 2-619." *Id*.

¶ 15 In the section 2-619.1 motion to dismiss, defendants argued that dismissal was proper under both sections 2-615 and 2-619 of the Code. The handwritten order entered after hearing on the motion, granted the section 2-619.1 motion to dismiss with prejudice. The order did not specify, and we are not otherwise informed by a transcript or bystander's report, the reasoning for the circuit court's dismissal. However, because plaintiffs appeal from the dismissal of the complaint in its entirety and copies of the operative pleadings are included in the common law record, and our review is *de novo*, we will address defendants' pertinent arguments for dismissal.

¶ 16 We may affirm the circuit court's dismissal for any reason that finds support in the record (*Holtkamp Trucking Co. v. Fletcher*, 402 Ill. App. 3d 1109, 1115 (2010)) and our *de novo* review demonstrates that the circuit court properly dismissed the first amended complaint with prejudice.

¶ 17 When viewed in a light most favorable to the plaintiffs, the basis for their claims are entirely grounded on their allegation that the Amended Declaration was not properly adopted in accordance with the General Declaration. Article VII, Section 1 of the General Declaration, provides that its covenants may be changed only by an instrument signed by two-thirds owners of the Estates' lots, however, no change shall be effective unless it is recorded one year in advance of the effective date of the amendment and not unless written notice of the proposed agreement is sent to every owner at least 90 days in advance of any action.

¶ 18 In defendants' motion, they argued that the first amended complaint should be dismissed under section 2-619 of the Code, because, among other reasons, the Amended Declaration was properly adopted in accordance with Article VII, Section 1 of the General Declaration.

¶ 19 Attached to plaintiffs' first amended complaint were copies of the General Declaration

and the Amended Declaration. The Amended Declaration bore a recording stamp evidencing that it was recorded on July 30, 2004. The amendment consisted of 116 pages. However, only the first 30 of the 116 pages of the Amended Declaration were included with the first amended complaint.

¶ 20 In support of the motion to dismiss, defendants attached the complete Amended Declaration, including its exhibits, as recorded with the Cook County Recorder of Deeds. Because plaintiffs did not dispute the completeness or accuracy of the exhibit, the entire recorded Amended Declaration was before the trial court for its consideration. The preamble to the Amended Declaration states that it was "signed, in counterparts, by the Owners of at least two-thirds (2/3) of the Lots agreeing to change the covenants and restrictions contained in the Declaration and, written notice of the proposed Amended and Restated Declaration was sent to every Owner at least ninety (90) days in advance of any action taken." Throughout the Amended Declaration there are references to its exhibits. Those exhibits include: the names of the owners and their corresponding lots and legal descriptions; the bylaws of the Association; the signature cards of those homeowners who acknowledged receiving and approving the Amended Declaration, two of which bear the signature of Markou and Schuth; and an affidavit by board secretary and defendant Mary Ann Bachelor. In the affidavit, Ms. Bachelor averred that, as the board secretary, she is the keeper and custodian of the books and records of the Association. She certified that the signature cards were voluntarily signed by at least two-thirds of the community's owners who freely and voluntarily approved the Amended Declaration and that 90 days notice was provided to every owner in advance of any action taken under the Amended Declaration.

¶ 21 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(9) of the Code permits involuntary dismissal of a claim where the claim asserted is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010)). Affirmative matter is "something in the nature of a defense which negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994). Unless the affirmative matter is apparent from the face of the complaint, the moving party must support the affirmative matter with an affidavit or other material that could be used to support a motion for summary judgment. *Pleasant Hill Cemetery Ass'n v. Morefield,* 2013 IL App (4th) 120645, ¶ 21. Once a defendant has presented adequate affidavits or other evidence to support the motion to dismiss, " 'the defendant [has] satisfie[d] the initial burden of going forward on the motion' " and the burden then shifts to the plaintiff who is required to establish that the affirmative matter is either unfounded or involves an issue of material fact, before it can be proven. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 37. A plaintiff may overcome this burden by presenting "affidavits or other proof." 735 ILCS 5/2-619(c) (West 2010). However, a plaintiff cannot rely on the allegations from his own complaint to refute such evidence. *Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101-02 (2009).

¶ 22 Defendants, through the evidence attached to their motion, consisting of the recorded Amended Declaration and exhibits showing it was properly adopted in compliance with Article VII, Section 1, satisfied their initial burden of going forward on their section 2-619 motion to

dismiss by presenting affirmative matter that would justify an involuntary dismissal of this complaint. The burden then shifted to the plaintiffs to establish that this affirmative matter was disputed by presenting material issues of fact that would defeat the defendants' motion to dismiss. *Reynolds*, 2013 IL App (4th) 120139 at ¶ 37. We find that plaintiffs failed to meet this burden and therefore, dismissal of the first amended complaint was proper.

¶ 23 In response to the motion to dismiss, plaintiffs argued, in a conclusory fashion and without the support of any "affidavits or other proof," that a question of material fact existed as to whether the Amended Declaration was properly adopted. It is not legally sufficient to simply argue that issues of material fact exist without specifically stating or presenting what those facts are. Plaintiffs were required to present to the trial court, by way of affidavit or other competent and credible evidence, facts that would persuade the trial court that there was arguable merit to their complaint that the Amended Declaration was not properly adopted and had no legal effect. Plaintiffs are not permitted to rely on the allegations in the complaint to overcome the affirmative matter presented by defendants' evidence that the Amended Declaration was legally sufficient. *Hollingshead*, 396 Ill. App. 3d at 1101-02. Plaintiffs' conclusory assertion that questions of fact existed without any factual or evidentiary support is insufficient to overcome their burden of establishing that an issue of material fact exists to preclude dismissal. *Id*. at 1101-02; *Harris v. Vitale*, 2014 IL App (1st) 123514, ¶ 23 (section 2-619(a)(9) motion to dismiss properly granted where movant meets its initial burden of proof and non-moving party fails to submit admissible evidence to refute the movant's evidence).

¶ 24 On appeal, plaintiffs' appellate brief is replete with factual arguments that are raised for the first time on appeal in support of the argument that the first amended complaint should not

have been dismissed. They also argue the merits of their case in an effort to convince this court that their claims are valid and should be allowed to stand. These factual assertions involve: defendants' wrongdoing; the adverse actions taken against plaintiffs for not paying the assessments; the improper adoption of the Amended Declaration; and the specific facts of how Markou and Schuth were "tricked" into signing the cards expressing their approval of the Amended Declaration. However, even if these arguments and allegations were considered meritorious and sufficient to create a genuine issue of material fact, we cannot now consider plaintiffs' asserted facts for the first time on appeal because these statements should have been, and were not, submitted to the trial judge in the form of "affidavits or other proof" for his consideration in ruling on the motion to dismiss. This court cannot consider these arguments, raised for the first time on appeal, because they have been forfeited. *Haudrich*, 169 Ill. 2d at 536. Therefore, we find that the circuit court did not err in dismissing plaintiffs' first amended complaint with prejudice.

¶ 25 We conclude the defendants presented sufficient affirmative matter to the trial court that refutes the crucial conclusions of law inferred from the first amended complaint. *Illinois Graphics Co.*, 159 Ill. 2d at 486. Because we find the trial court did not err in dismissing with prejudice plaintiffs' claims under section 2-619 of the Code, we need not reach the merits of defendants' other arguments in support of the trial court's order of dismissal.

¶ 26 CONCLUSION

¶ 27 For the aforementioned reasons, we affirm the order of the circuit court.

¶ 28 Affirmed.