SECOND DIVISION
September 1, 2015

No. 1-14-0580

THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* ILLINOIS DEPARTMENT OF HUMAN RIGHTS, on behalf of BARBARA MEREDITH, Individually,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellant,	)	No. 13 L 50190
v.	)	
FEDERAL SQUARE/DEARBORN PARK TOWNHOME ASSOCIATION and LEGUM & NORMAN MID-WEST, LLC,	)	Honorable Robert Lopez Cepero,
Defendants-Appellees.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The circuit court erred in dismissing plaintiff's complaint.

¶ 2 Plaintiff, People of the State of Illinois *ex rel.* Illinois Department of Human Rights, on behalf of Barbara Meredith, brought a claim for retaliation under section 6-101(A) of the Illinois Human Rights Act (775 ILCS 5/6-101(A) (West 2010)) against defendants, Federal

Square/Dearborn Park Townhome Association (Association) and its property management company, Legum & Norman Mid-West, LLC (L&N). Defendants filed a motion to dismiss the complaint arguing that L&N could not be held liable as alleged and that affirmative matter "barred" plaintiff's claim entirely. Specifically, the alleged adverse retaliatory action taken against Meredith was an exercise of the Association's legal rights, permitted by federal law, and therefore neither the Association nor L&N can be held liable for retaliation. The circuit court dismissed the complaint finding that the Association did not retaliate against Meredith because it was "only asserting its rights." Plaintiff appeals that dismissal. For the following reasons we reverse the judgment of the circuit court and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Because the issue here is whether the complaint was properly dismissed, we provide a general background of the dispute taken from the record in order to frame our disposition of this appeal. Meredith was the owner and resident of a townhouse at 1200 South Federal Street, Chicago, Illinois (Unit). Her property and 116 other properties located at 1200-1320 South Federal Street comprise the Federal Square/Dearborn Park Townhome Association. Each unit owner is required to pay monthly assessments for their proportionate share of common expenses to the Association. The Association acts through its property manager in collecting these assessments and communicating with the unit owners about their accounts. If an owner fails to pay their assessments, the Association, after a vote of its board, may initiate and maintain a forcible entry and detainer action to recover the past due assessments.

¶ 5 In 2009, Meredith fell behind on paying her $250 monthly assessments. On January 5, 2010, the Association filed a forcible entry and detainer action in the circuit court of Cook

County (Forcible 1), seeking money damages for the unpaid assessments and for possession of the Unit. On March 4, 2010, Meredith agreed to and signed an order for possession, whereby a money judgment of $5,816.46 was entered against her and possession of the Unit was awarded to the Association. In August 2010, Meredith was evicted from the Unit. One month later, Meredith satisfied the judgment and possession of the Unit was returned to her.

¶ 6 On September 13, 2010, Meredith filed a charge of discrimination (Charge 1) against the Association and L&N with the U.S. Department of Housing and Urban Development (HUD). Meredith alleged that defendants discriminated against her, because of her race, in violation of the Fair Housing Act (42 U.S.C. § 3601 *et sec.*), by bringing Forcible 1 and for evicting her from her home. Under section 3610(f) of the Fair Housing Act (42 U.S.C. § 3610(f)), HUD may refer adjudication of a housing discrimination complaint to the State of Illinois for local proceedings where the alleged discriminatory housing practice occurred in Illinois and the State's agency has been certified by the Secretary. HUD referred Meredith's complaint to the Illinois Department of Human Rights (Department) pursuant to section 3610(f) for adjudication of her claim. On September 14, 2010, HUD sent correspondence to defendants informing them of this referral and explaining that in addition to this complaint, "the complainant may file a civil lawsuit in Federal district court [42 U.S.C. § 3613]." Shortly thereafter, the Department sent defendants a notice that Meredith perfected the charge of housing discrimination, which would proceed before the Department. The Department eventually dismissed Charge 1 for lack of evidence finding that "there is no reason to believe that Respondent[s] violated Section 804 b of the Federal Fair Housing Act and Section 3-102 B of the Illinois Human Rights Act."

¶ 7 On September 10, 2011, Meredith filed an appeal (request for review) from the dismissal

of her housing discrimination complaint at the Illinois Human Rights Commission (Commission) pursuant to section 7A-102(D)(3) of the Human Rights Act (775 ILCS 5/7A-102(D)(3) (West 2010)).

¶ 8 By the end of September 2011, Meredith fell behind in paying her assessments again. Meredith made a partial payment but failed to bring her account current. The Association sent Meredith a demand that she pay the back due assessments and legal fees incurred in preparing the demand letter. Meredith failed to tender full payment. Thereafter, defendants recorded a lien on Meredith's unit for the outstanding assessments and accumulated late fees.

¶ 9 On November 29, 2011, the Association filed a second forcible entry and detainer action (Forcible 2) against Meredith in the circuit court of Cook County to collect the remaining amounts due ($400) in count I and for attorney fees ($3,206.50) in count II of the complaint. The claim for attorney fees alleged that Meredith is responsible for repayment of the Association's attorney fees and costs incurred in defending Charge 1, pursuant to section 3612(p) of the Fair Housing Act (42 U.S.C. § 3612(p)). The Association alleged that it suffered damages in "defending against [Meredith's] baseless allegations" as a "result of the frivolous Discrimination Complaint." After hearing, the trial court in Forcible 2 entered an order of possession and a money judgment on count I for $2,501.18 ($500 for the unpaid assessments, $481.18 for costs and $1,520 for attorney fees incurred in bringing Forcible 2). However, the trial court's order stated that it "makes no finding as to count 2."

¶ 10 On January 17, 2012, Meredith returned to the Department and filed a second complaint (Charge 2) under section 6-101(A) of the Human Rights Act (775 ILCS 5/6-101(A)(West 2010)) alleging that the Association's attorney fee claim, alleged in count II of Forcible 2, was filed in

retaliation for her filing of Charge 1 against the defendants. After investigation, the Illinois Department of Human Rights issued a finding that there was "substantial evidence" to support the retaliation charge. Accordingly, the Department filed a complaint for retaliation with the Commission.

¶ 11 The Association elected to have the circuit court of Cook County, rather than the Commission, adjudicate the complaint. As a result, the Attorney General of Illinois filed this action on Meredith's behalf in the circuit court. Plaintiff alleged that the Association violated section 6-101(A) of the Human Rights Act by retaliating against Meredith for filing Charge 1. Specifically, Meredith alleged that she filed Charge 1 for what she reasonably believed to be unlawful discrimination in violation of the Fair Housing Act; Charge 1 was dismissed, however, while review of the dismissal was still pending, the Association filed its claim for attorney fees incurred in defending Charge 1, as part of Forcible 2, an unrelated eviction action. Plaintiff alleged that the filing of the attorney fee claim in Forcible 2 was an unlawful adverse action taken in retaliation for Meredith's filing of Charge 1 and the appeal of its dismissal.

¶ 12 Defendants filed a combined motion to dismiss pursuant to section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)). Under section 2-619.1 defendants may seek an involuntary dismissal of a complaint under both section 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2012)). In their motion, defendants argued that the claim against the Association's property manager, defendant L&N, must be dismissed under section 2-615 because L&N was not a claimant in the underlying Forcible 1 and Forcible 2 lawsuits. Additionally, they argued that the retaliation claim must be dismissed under section 2-619 because L&N "never committed any retaliatory action" against Meredith.

¶ 13 Defendants also argued that under section 2-619 the claim for retaliation must be dismissed because defendants cannot be held liable for the Association "enforc[ing] its legal rights and remedies" against a unit owner "who failed to make her monthly assessment payments *** and made a baseless allegation of discrimination against the Association, thereby causing substantial harm and costs to the Association, and its unit owners." Meredith "elected" to pursue her initial discrimination claim under the Fair Housing Act, therefore, the Association had the right to seek attorney fees as provided under section 3612(p) of the Fair Housing Act. To hold the defendants liable under the Illinois Human Rights Act, as alleged, would directly conflict with the attorney fee provisions in the Fair Housing Act. Lastly, defendants could not have violated the Human Rights Act because Meredith did not have a reasonable or good faith belief that she was discriminated against because she had been the respondent of several previous demands for unpaid assessments. Attached to the motion were copies of the pertinent correspondence, orders and decisions from the circuit court in Forcible 1 and Forcible 2 and the Department and the Commission relating to Charges 1 and 2.

¶ 14 In response, plaintiff argued that the complaint sufficiently alleged a cause of action and questions of fact exist regarding whether defendants retaliated against Meredith by filing the Association's claim for attorney fees as part of an unrelated eviction action. First, plaintiff argued that the property manager was a proper party to this litigation because L&N took action on behalf of the Association in the underlying matters and was named as a respondent in Charges 1 and 2. Plaintiff next argued that the Association's attempt to seek attorney fees incurred in defending Charge 1 was procedurally and substantively improper. Plaintiff contends that defendants were not yet the prevailing party because the appeal from the Department's dismissal

of Charge 1 was still pending at the time the attorney fee claim was filed. In addition, although Charge 1 was reviewed by the Department and the Commission, the Association filed its attorney fee claim in the circuit court as part of a separate and unrelated action for past due assessments and eviction. Lastly, plaintiff argued that any assertion that Meredith had no good faith belief that she had been discriminated against prior to filing Charge 1, is a question of fact that cannot be determined at this stage of the proceeding, and irrelevant to the retaliation claim.

¶ 15 The circuit court denied the section 2-615 motion to dismiss and permitted the parties to conduct "jurisdictional discovery" on the remaining issues raised in the motion to dismiss.

¶ 16 On October 23, 2013, the circuit court held a hearing on the section 2-619 portion of the motion to dismiss. During the hearing, the circuit court found that "for the purposes [of] the allegations that are made seeking redress for attorney's fees *** I am exercising my discretion in favor of allowing attorney's fees because as near as I can tell thus far, although we don't have the proofs necessary yet, that the public policy underpinnings of the very statute under which the original Claimant/Plaintiff had brought it allows for it, and I believe that it would be *** violating the very legislative purpose for me not to allow it, and that would be tantamount to an abuse of discretion." Following the hearing, the circuit court entered a handwritten order granting the "motion to dismiss this case with prejudice." The circuit court found that "it was the intent of the Fair Housing Act, an election made by the individual alleging the discrimination, and public policy to allow the prevailing party to seek attorneys fees and not to allow defendants to seek attorneys fees in count II of 11-M1-728395 [Forcible 2] would violate public policy and the intent of the legislature to vest the judiciary with discretion to make such determinations if a civil action is filed."

¶ 17 On November 14, 2013, plaintiff filed a motion to reconsider arguing that the circuit court erred in its application of existing law. Plaintiff argued that the issue is not whether defendants were entitled to attorney fees but whether defendants acted in a retaliatory manner in filing a claim for the attorney fees as part of an unrelated forcible action while the underlying charge of discrimination is pending on appeal. The circuit court denied the motion to reconsider and this timely appeal followed.

¶ 18 ANALYSIS

¶ 19 Defendants brought a hybrid motion to dismiss under section 2-619.1 of the Code, which permits a party to combine a section 2-615 motion to dismiss with a section 2-619 motion to dismiss. 735 ILCS 5/2-619.1 (West 2010). In defendants' motion they argued that dismissal was proper under section 2-615 because L&N was not a party to the underlying forcible actions and dismissal was also proper under section 2-619(a)(9) because the Association did not retaliate against Meredith but rather exercised its "legal right to seek attorney fees as the prevailing party to Charge 1." Initially, the circuit court denied defendants' section 2-615 motion to dismiss. Later, following the hearing on defendants' arguments for dismissal under section 2-619, the circuit court dismissed the complaint with prejudice. In doing so, the circuit court exercised its "discretion in favor of allowing attorney's fees" and found that defendants' alleged retaliatory act was merely the exercise of the Association's legal right, as the prevailing party, to seek recovery of attorney fees incurred in defending against Meredith's dismissed discrimination charge. We review dismissal of the complaint *de novo*. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 164 (2003). Our *de novo* review demonstrates that the circuit court erred in dismissing the complaint where, viewing the complaint in a light most favorable to

plaintiff, the asserted "affirmative matter" does not bar plaintiff's claim.

¶ 20 Plaintiff alleged a claim for retaliation under section 6-101(A) of the Human Rights Act which provides that it is a civil rights violation to:

> "[r]etaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination *** or because he or she has made a charge *** under this Act." 775 ILCS 5/6-101(A) (West 2010).

¶ 21 Once a person has filed a charge of discrimination under the Human Rights Act, regardless of the disposition of that charge and regardless of whether that charge is meritorious, that person is protected from retaliation for bringing that charge. *Dana Tank Container, Inc. v. Human Rights Comm'n*, 292 Ill. App 3d 1022, 1025 (1997).

¶ 22 In the operative complaint, plaintiff alleged that the Association's attorney fee claim was an adverse act taken in retaliation for Meredith filing and pursuing Charge 1. Charge 1 was filed with HUD, pursuant to the Fair Housing Act (42 U.S.C. §3601 *et seq.*) and was referred to the Department for adjudication. Charge 1 was dismissed by the Department in August 2011, and in September 2011, Meredith exercised her right to seek review of the dismissal by the Commission. Two months later, in November 2011, defendants filed a claim to recover attorney fees incurred in defending Charge 1, pursuant to the Fair Housing Act (42 U.S.C. § 3612(p)), not as part of the Charge 1 proceeding, but rather as part of a forcible eviction and detainer action (Forcible 2) in the circuit court of Cook County. For a reason not apparent from the record, in its ruling in Forcible 2, the trial court entered judgment against Meredith on Count I and "ma[de] no finding as to count 2," the Association's attorney fee claim.

¶ 23 Plaintiff's alleged claim of discrimination is that the Association's attorney fee claim was filed in retaliation for Meredith's filing of Charge 1 and is based on the argument that the Association's claim was procedurally improper because: (1) it was brought as part of an unrelated forcible entry and detainer action before a court that did not evaluate or consider the underlying charge of discrimination; and (2) the attorney fee claim was brought while the dismissal of Charge 1 was still under review.

¶ 24 Defendants contend that the Association merely exercised its legal right under section 3612(p) of the Fair Housing Act to seek recovery of its attorney fees incurred in defending Charge 1 and therefore, plaintiff's claim for retaliation is "barred" and should be dismissed under section 2-619(a)(9) of the Code.

¶ 25 Section 2-619(a)(9) 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 2012). 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, 484 (1994). In ruling on a motion to dismiss, it is proper for the court to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmovant. *Edelman*, 338 Ill. App. 3d at 164. A complaint "will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover." *Rodgers v. Peoples Gas, Light & Coke Co.*, 315 Ill. App. 3d 340, 345 (2000). If a material and genuine question of fact exists in the record, the court must deny the section 2-619 motion to dismiss. 735 ILCS § 5/2-619(c); *Semansky v. Rush-Presbyterian-St.*

Luke's Medical Center, 208 Ill. App. 3d 377, 384 (1990).

¶ 26 Section 3612 of the Fair Housing Act "Enforcement by Secretary [of Housing and Urban Development]" provides that when a charge is filed under the Fair Housing Act, the complainant, respondent or aggrieved party may elect to have the claim adjudicated before either an administrative law judge or in a United States district court. 42 U.S.C. ¶ 3612(a), (b), (o). Section 3612 further sets forth the methods and rules for discovery, the effect of choosing a civil action or administrative proceedings, the rights of the parties, review by the Secretary, judicial review, the relief which may be granted, and entry and enforcement of a decree or court order. It also includes a provision for the award of attorney fees and costs for the prevailing party. 42 U.S.C. § 3612(p).

¶ 27 Specifically, section 3612(p) provides in pertinent part that

> "[i]n any administrative proceeding brought under this section, or any court proceeding arising therefrom, or any civil action under this section, the administrative law judge or the court, as the case may be, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3612 (p).

¶ 28 On appeal, the parties dispute whether the Association's attorney fee claim was properly brought as part of the forcible action. Defendants argue that plaintiff has waived its right to assert that the claim was improperly filed and cite to legal authority for support, because, in their view, plaintiff did not sufficiently address this argument at the trial court. However, the record establishes that plaintiff sufficiently raised this contention before the trial court, therefore plaintiff has not waived review of this argument on appeal.

¶ 29 A prevailing party is not permitted to file a freestanding claim for attorney fees under section 3612(p) of the Fair Housing Act as part of an unrelated civil action in order to recover fees incurred in defending a housing discrimination charge. See *Housing Opportunities Made Equal, Inc. v. Digiulio*, 2000 WL 1481016 (W.D.N.Y. Sept. 27, 2000) *4-5 (finding that a section 3612(p) claim for attorney fees incurred in litigating a housing discrimination charge cannot be brought before a court as a "civil action" where the charge was commenced and decided on its merits by a state administrative agency); see also *Housing Opportunities Made Equal, Inc. v. Digiulio*, 20 Fed. Appx. 67, 69 (2d Cir. 2001) ("a free standing action for attorney's fee[s] fits none of the[ ] three categories" permitting a prevailing party to bring a section 3612(p) claim for attorney fees before a court, and, in order for a party to "preserve" such a claim for adjudication by the court that party needs to elect to have the discrimination charge proceed before the court, from the outset).

¶ 30 Here, Meredith's initial charge of housing discrimination was investigated and adjudicated by an administrative agency, the Illinois Department of Human Rights. Neither the claimant (Meredith) nor the respondents (defendants) requested that Charge 1 proceed in any other forum than the Department. In fact, both parties followed the procedure set forth in the Illinois Human Rights Act and permitted Charge 1 to be adjudicated by the Department.

¶ 31 A plain reading of section 3612(p) makes clear that a claim for attorney fees must be brought in the proceeding, and as part of the proceeding, that gave rise to the attorney fees sought. Defendants' attorney fee claim was not brought before the Department in the Charge 1 proceeding, which dismissed the housing discrimination charge, instead the claim was filed as part of an unrelated forcible entry and detainer action. As a result, the Association's filing of its

section 3612(p) attorney fee claim in an unrelated forcible entry and detainer action in the circuit court did not comply with section 3612(p). Section 3612(p) clearly provides that attorney fees may be awarded to the prevailing party as part of the "proceeding" brought "under this section." In other words, because defendants incurred attorney fees defending the discrimination claim in Charge 1 before the Department, a claim for an award of attorney fees would be part of that proceeding. Therefore, we find there is a question of fact as to whether the filing of the attorney fee claim constitutes retaliatory action sufficient to deny the motion to dismiss on the basis that the attorney fee claim was filed in a separate proceeding, Forcible 2, in retaliation for bringing Charge 1 because defendants knew or should have known the claim could only be brought as part of the Charge 1 proceedings.

¶ 32 Defendants also argue that the exercise of a legal right, even if brought through improper procedure, cannot be considered retaliatory conduct, and to permit plaintiff to recover on the claim alleged would cause a direct conflict with the attorney fee provision of the Fair Housing Act. Contrary to defendants' position, however, even if the Association was permitted to file the attorney fee claim as it did, and was "exercising its legal rights," the filing of a legal claim can serve as a basis for impermissible retaliatory conduct. For example, claims for abuse of process and malicious prosecution, if successful, permit aggrieved litigants to seek money damages for the misuse of the legal process for some other purpose (*Neurosurgery & Spine Surgery, S.C. v. Goldman*, 339 Ill. App. 3d 177, 182 (2003)) or to recover for the suffering caused by a lawsuit that was maliciously filed and without probable cause (*Miller v. Rosenberg*, 196 Ill. 2d 50, 58 (2001)).

¶ 33 The Human Rights Act was "intended to provide the exclusive and comprehensive

scheme of remedies and administrative procedures to redress human rights violations." *Habitat Co. v. McClure*, 301 Ill. App. 3d 425, 426-37 (1998). An act of retaliation "has a chilling effect on the stated goals and policies of the [Human Rights] Act." See *Maye v. Human Rights Comm'n*, 224 Ill. App. 3d 353, 363 (1991). The mere existence of a valid reason for the alleged retaliatory act will not defeat a claim for retaliation. *Siekierka v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 222 (2007). To prevail on a section 2-619(a)(9) motion to dismiss, the defendant must establish an affirmative matter that defeats the alleged claim. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 32. Asserting what amounts to a defense to a well-pled claim, cannot form the basis of involuntary dismissal under section 2-619(a)(9). See *id.*, ¶¶ 32-34.

¶ 34 In this case, defendants essentially contend that they have a defense to plaintiff's action: that the Association's conduct was not and cannot be considered retaliatory because it was permitted by law and therefore, they cannot be held liable as alleged in plaintiff's complaint. Whether or not defendants had a valid basis for filing their attorney fee claim goes to the question of motive and purpose behind the alleged retaliatory act (*Reyes v. Fairfield Properties*, 661 F. Supp. 2d 249, 267 (E.D.N.Y. 2009) and presents a question of fact which cannot be determined at this stage of the proceedings (*Paz v. Commonwealth Edison*, 314 Ill. App. 3d 591 (2000); *Grchan v. Illinois State Labor Relations Board*, 315 Ill. App. 3d 459, 467 (2000)). An asserted "affirmative matter" which is more properly characterized as the mere negation of a well-pled fact and an essential element of a plaintiff's claim, is not "affirmative matter" but merely a defense and therefore, cannot form the basis of involuntary dismissal under section 2-619(a)(9). See *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶¶ 32-34. Accordingly, we reverse the trial court's dismissal of plaintiff's complaint because defendants' asserted

"affirmative matter" does not bar plaintiff's claim but rather negates plaintiff's well-pled allegations.

¶ 35 The purpose of pleadings is to present, define and narrow the issues and present a valid legal issue by one side and denied by the other so that a trial may determine the actual truth. *Golf Trust of America, L.P. v. Soat*, 355 Ill. App. 3d 333, 336 (2005); *People ex rel. Fahner v. Carriage Way West, Inc.*, 88 Ill. 2d 300, 307 (1981). To this end, viewing the well-pled facts in the amended complaint and drawing reasonable inferences from them, we find that the circuit court erred in dismissing plaintiff's well-pled claim for retaliation.

¶ 36 We emphasize that our ruling in no way indicates whether defendants' acts constitute improper retaliation or a legal mis-step remedied by a denial of request for legal fees for lack of jurisdiction which is the practical effect of the ruling of the court in Forcible 2. We also note we make no indication as to whether plaintiff will be successful with the retaliation claim. Our ruling only relates to whether a cause of action was properly pled and withstands the defendants' motion to dismiss.

¶ 37 Lastly, we note that there is confusion in the record regarding the circuit court's ruling on whether the property manager, defendant L&N, is a proper party defendant in this suit. The ruling of the circuit court is unclear and the appellate arguments of the parties do not provide clarification. Our view of the record indicates that L&N, while a respondent in plaintiff's discrimination Charge 1 and Charge 2, has not been a party to and did not bring Forcible 2. The circuit court, on remand, is directed to resolve whether L&N is a proper party to this action and whether the complaint sufficiently alleges a cause of action against L&N for retaliation.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, we reverse the judgment of the circuit court and remand the cause for further proceedings consistent with this order.

¶ 40 Reversed; cause remanded.