2015 IL App (1st) 142385-U

FOURTH DIVISION
December 17, 2015

No. 1-14-2385

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN H. QUIRKE[1], on behalf of himself and others similarly situated,	)	
	)	Appeal from
Plaintiff-Appellant,	)	the Circuit Court
	)	of Cook County
v.	)	
	)	13-CH-25011
THE PRIVATE RESIDENCES AT ONTARIO PLACE CONDOMINIUM ASSOCATION, and SUDLER AND COMPANY d/b/a SUDLER PROPERTY MANAGEMENT,	)	Honorable
	)	Neil H. Cohen,
	)	Judge Presiding
Defendants-Appellees.	)	

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Where condo owner was evicted by court order for failure to pay monthly assessments and late fees, *res judicata* barred subsequent action disputing reasonableness of those fees.

¶ 2 John J. Quirke was sued and evicted by court order in 2011 from a Chicago residential condominium unit and deeded private parking space for not paying monthly assessments and late fees on the property. He filed the current class action in 2013 challenging the reasonableness of

[1] Shortly before we heard oral arguments, Quirke died and we granted the motion of his daughter, Sheila Quirke, to be appointed as special representative of his estate and substituted as the plaintiff-appellant.

the late fees. The trial court, however, granted the defendants' motion to dismiss the suit on grounds that Quirke's complaint was factually deficient and, that, in any event, the 2011 eviction suit was *res judicata* as to the validity of the fees. 735 ILCS 5/2-619.1 (West 2012) (providing for a motion to dismiss to include procedural and substantive arguments provided arguments are clearly separated). The trial court considered Quirke's proposed amended complaint, but denied leave to amend. Quirke took this appeal.

¶ 3 The defendants, which are the condominium association, The Private Residences At Ontario Place Condominium Association, and the property management company, Sudler and Company d/b/a Sudler Property Management, argue that the appeal was initiated more than 30 days after the class action was dismissed and was thus untimely. Pursuant to Supreme Court Rule 303(a)(1), if a party wishes to appeal, generally he or she must file a notice of appeal within 30 days after entry of the final judgment from which he or she is challenging. Ill. S. Ct. R. 303(a)(1) (eff. June 1, 2008). An order of the trial court dismissing a suit is a final and appealable order. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502, 687 N.E.2d 871, 874 (1997) (a judgment or order is "final" if it disposes of the rights of the parties, either as to the entire case or some definite and separate part of the controversy)*; Pick v. Pick*, 58 Ill. App. 3d 357, 359, 374 N.E.2d 689, 691 (1978) ("In our opinion, the law is clear and definite that an order dismissing a suit or proceeding with prejudice is a final, appealable order."). A timely notice of appeal is necessary for this court to have jurisdiction. *Heiden v. DNA Diagnostics Center, Inc.*, 396 Ill. App. 3d 135, 138, 918 N.E.2d 1083, 1086 (2009).

¶ 4 In his reply brief, Quirke points out that earlier in these proceedings, we considered and rejected a motion from the defendants to dismiss for lack of jurisdiction. That ruling, however, is not conclusive of the issue, as a question of whether we have jurisdiction to hear a case may be

revisited at any time before the final disposition of an appeal. *In re Marriage of Breslow*, 306 Ill. App. 3d 41, 57, 713 N.E.2d 642, 654 (1999); *Hess v. I.R.E. Real Estate Income Fund, Ltd.*, 255 Ill App. 3d 790, 798, 629 N.E.2d 520, 525 (1993) ("[t]he denial of a motion to dismiss made in the reviewing court does not bind the court. Such rulings are not unassailable, but rather open to reconsideration"). We have a firmly established duty to consider our jurisdiction and dismiss an appeal if jurisdiction is found wanting. *Breslow*, 306 Ill. App. 3d at 57, 713 N.E.2d at 654.

¶ 5 Despite the 30 day limitation associated with Rule 303(a)(1), Rule 303(a)(2) provides that a timely motion directed at a (final and appealable) judgment order will toll the running of the 30 days and that the deadline for filing a notice of appeal then becomes 30 days after the resolution of that postjudgment motion. Ill. S. Ct. R. 303(a)(1) (eff. June 1, 2008); Ill. S. Ct. R. 303(a)(2) (eff. May 30, 2008); *Vanderplow v. Krych*, 332 Ill. App. 3d 51, 773 N.E.2d 40 (2002) (determining whether motion to amend the pleadings to conform with the proof at trial qualified as a motion that tolled the 30-day period in which to file a notice of appeal).

¶ 6 The record indicates that Quirke filed his notice of appeal more than 30 days after the dismissal of the complaint, so his appeal was timely only if there was a postjudgment motion directed at the dismissal order. Accordingly, we first review the proceedings in the trial court.

¶ 7 Both the 2011 eviction suit and the current suit filed in 2013 stem from Quirke's late payment of monthly assessments in 2010 for his condo unit and parking space. He owned residential unit #1010 and parking space P-S905 at 10 East Ontario Street, Chicago, which is a 467-unit building. He received monthly invoices which itemized the assessment for his residential unit, which was approximately $335, and the assessment for his deeded parking spot, which was approximately $55. The two items were presented in a single invoice each month, but a late fee would be assessed for each item that was paid untimely; thus, when Quirke was late to

pay his monthly assessments for September 2010, he was charged a late fee of $75 for his residential unit and a late fee of $75 for his parking spot. The payment he tendered in October 2010 was first applied to the September late fees and was insufficient to also cover his October assessment, so he was charged an additional $150 in late fees. This pattern of payments that were insufficient to cover both Quirke's past due balance and new assessments continued for the next three months. When he complained that the condominium bylaws did not specify this accounting method, the bylaws were updated in May 2011 to reflect this practice. Quirke did not make a payment in February 2011 or any month after that, and now states that he deliberately stopped paying assessments because he was "[d]ispleased by the compounding late fees." The condominium association filed suit seeking $2,659.50 in past-due charges, attorney fees, court costs, any subsequently accruing unpaid charges, and possession of Quirke's condo. Judgment was granted for the requested amounts and possession. The condominium association then rented Quirke's unit to tenants for $1400 or more per month beginning in January 2012. Although Quirke was still the owner and liable for monthly assessments accruing after his eviction, he did not pay the new assessments and he continued to incur late fees. In November 2012, the condominium association returned to court with a motion for leave to extend the tenancy for an additional 12 months. See 735 ILCS 5/9-111.1 (West 2010) (indicating a condominium board may lease a unit, and, with leave of court, may extend an initial 12 months tenancy by 12 months). The motion for leave to extend the tenancy included an accounting which showed Quirke was continuing to incur late fees and that the tenant's payments were being applied to these fees. See 735 ILCS 5/9-111.1 (West 2010) (indicating rental income shall first apply to assessments and other charges that were sued upon, then to statutory interest, attorney fees, court costs, "other expenses lawfully agreed upon (including late charges)", and "lastly to assessments

accrued thereafter until assessments are current"). The court approved the additional lease. Quirke's debt was finally satisfied in June 2013. He sold the property in August 2013. During the 52 months that he owned the unit and parking spot, he incurred late fees 34 times, and ultimately paid a total of $20,239.44.

¶ 8 Five months later, in November 2013, he filed this suit. The defendants argued for dismissal on two grounds, the first ground being that Quirke did not allege sufficient facts which, if proved, would entitle him to relief, and that this warranted dismissal of his complaint pursuant to § 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2012) (Code). Because Illinois is a fact-pleading jurisdiction, rather than a notice-pleading jurisdiction, conclusory allegations will not suffice. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426-27, 430 N.E.2d 976, 985 (1981). In order to survive a motion to dismiss pursuant to § 2-615, a complaint must be both legally and factually sufficient. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 167, 788 N.E.2d 740, 750 (2003). The complaint must set out all ultimate facts that support the plaintiff's cause of action. *Edelman, Combs*, 338 Ill. App. 3d at 168, 788 N.E.2d at 750. After written briefs and oral arguments, the trial court found that Count I of Quirke's complaint, which purported to be a claim for breach of contract, did not identify and include a copy of any particular contact Quirke had with the condominium association and instead stated in a non-factual, conclusory manner that a breach of "association bylaws and rules, and Illinois law" had occurred. Furthermore, there was no allegation that Quirke had any contract with the management company. The court next found that Count II, which was identified as a claim for breach of fiduciary duty, simply characterized the late fees as being "excessive" and "unreasonable" but did not indicate how this was a breach of the condominium association's fiduciary relationship with Quirke. Also, there were no facts suggesting a fiduciary relationship

between the management company and Quirke. Count III purported to be a claim under the Illinois Consumer Fraud and Deceptive Practices Act, but the court found that Quirke was not a "consumer" as defined by the statute. 815 ILCS 505/1(e) (West 2012). Finally, although Quirke styled Count IV as a claim for unjust enrichment, the fact that the condominium association obtained a judgment for the unpaid late fees indicated that he could not allege unlawful or improper conduct which would support his claim.

¶ 9 In the motion for dismissal, the defendants also contended that because of the 2011 forcible entry and detainer action, Quirke's suit was barred by *res judicata* pursuant to § 2-619(a)(4) of the Code. 735 ILCS 5/2-619(a)(4) (West 2012). *Res judicata* is a legal doctrine that requires parties to litigate, in one case, all the rights that arise out of the same set of operative facts. *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 319, 703 N.E.2d 883, 896 (1998). The doctrine protects a party from being forced to relitigate what is essentially the same case and it minimizes the waste of judicial resources. *River Park*, 184 Ill. 2d at 319, 703 N.E.2d at 896; *Baird & Warner, Inc. v. Addison Industrial Park, Inc.*, 70 Ill. App. 3d 59, 64, 387 N.E.2d 831, 837 (1979) (*res judicata* is "founded upon the plainest and most substantial justice, that litigation should have an end and that no person should be unnecessarily harassed with a multiplicity of suits"); *Pacemaker Food Stores, Inc. v. Seventh Mont Corp.*, 143 Ill. App. 3d 781, 784, 493 N.E.2d 390, 393 (1986) (*res judicta* conserves judicial resources by barring repetitive litigation). *Res judicata* bars not only what was actually decided in the first action but also all issues that could have been decided in the first action. *River Park*, 184 Ill. 2d at 302, 703 N.E.2d at 889. The doctrine bars suits based on facts that would constitute a defense or counterclaim in the earlier suit and where a "successful" outcome in the later suit would either nullify the earlier judgment or bar the rights established in the earlier suit. *Kosydor v. American Express Centurion*

Services Corp., 2012 IL App (5th) 120110, ¶ 19, 979 N.E.2d 123. The defendants argued that the eviction suit, which was based on Quirke's failure to pay monthly assessments and late fees, was where he could have challenged the reasonableness of those amounts and presented his position that the fees and their compounding nature were inappropriate.

¶ 10 Quirke responded in part that because a forcible entry and detainer action is designed to be a limited proceeding, the only issues which could be decided were possession rights to the real property and any claim for unpaid rent. 735 ILCS 5/9-106 (West 2012); *Miller v. Daley*, 131 Ill. App. 3d 959, 961, 476 N.E.2d 753, 754-55 (1985) ("Forcible entry and detainer is a summary statutory proceeding to adjudicate rights to possession and is unhampered by questions of title and other collateral matters not directly connected with the question of possession.").

¶ 11 Although there is authority stating this proposition, it pertains to landlord-tenant disputes, and forcible entry and detainer suits are filed not only in disputes between landlords and their tenants regarding unpaid rent, but also in disputes between condominium associations and condominium unit owners regarding unpaid assessments. Furthermore, in *Spanish Court*, the Illinois supreme court indicated that in a forcible entry and detainer action regarding the failure to pay condominium assessments, the question of whether the assessments were properly assessed is a permissible defense. *Spanish Court Two Condominium Ass'n v. Carlson*, 2014 IL 115342, ¶ 18, 12 N.E.3d 1 (because "Spanish Court's claim to possession of Carlson's unit was based on nonpayment of assessments," "[i]t necessarily follows that whether Carlson, in fact, owes any assessments is germane to the proceeding"). "A unit owner could, for example, challenge whether assessments are due by challenging the association's recordkeeping, or the manner in which the assessment was adopted." *Spanish Court*, 2014 IL 115342, ¶ 32, 12 N.E.3d 1. The supreme court also ruled, however, that a condominium association's purported failure to

properly maintain the common elements (roof and brick work) and cause damage to her unit would not nullify the unit owner's obligation to pay assessments and was not germane to the forcible action. *Spanish Court*, 2014 IL 115342, ¶ 26, 12 N.E.3d 1.

¶ 12 Therefore, the trial court ordered Quirke and the defendants to prepare supplemental briefs in light of the recent decision in *Spanish Court*. Then, citing *Spanish Court*, the court ruled that Quirke could have challenged the validity of the late fees in the 2011 action that was based on his nonpayment of those fees, and thus, *res judicata* barred his separate suit in 2013 challenging the validity of the fees. The court also ruled that because Quirke could not maintain an individual cause of action, he could not proceed with his proposed class action. *Jensen v. Bayer AG*, 371 Ill. App. 3d 682, 693, 862 N.E.2d 1091, 1101 (2007) (indicating that where a plaintiff's individual claims lacked merit, that person would be an inadequate representative in a class action). The order dismissing Quirke's complaint on May 22, 2014, concluded with three sentences:

> "Defendants' Motion to Dismiss Pursuant to 735 ILCS 5/2-615 is granted. Defendants' Motion to Dismiss pursuant to 735 ILCS 5/2-619(a)(4) is granted with prejudice.
>
> The status date of June 11, 2014 is stricken."

¶ 13 If this was a dismissal with prejudice, then the 30-day window for filing a notice of appeal would normally have closed on June 21, 2014, however, that date was a Saturday and the deadline was automatically extended to the next court date, which was Monday, June 23, 2014.

¶ 14 On June 20, 2014, Quirke filed a motion he entitled "Plaintiff's Motion for Leave to File Amended Complaint" in which he (1) recapped the history of his case, (2) pointed out that a complaint should not be dismissed with prejudice " 'unless it is clearly apparent that no set of

facts can be proved that would entitle the plaintiff to recovery' " (*Baird & Warner Residential Sales, Inc. v. Mazzone*, 384 Ill. App. 3d 586, 590, 893 N.E.2d 1010, 1013-14 (2008)) and (3) stated, "Plaintiff now seeks leave to file a First Amended Class Action Complaint ("FAC"), attached as Exhibit 2, to address the Court's order." Quirke cited § 2-616(a) of the Code, which provides that on "just and reasonable terms" a court may allow a party to amend his or her pleading. 735 ILCS 5/2-616(a) (West 2012). He summarized the "additional allegations" which he was presenting through his proposed amendment and contended that adding them to his pleading would " 'enable the plaintiff to sustain the claim *** which *** was intended to be brought.' "

¶ 15 Nonetheless, on July 1, 2014, the trial court entered a written order stating only: "Plaintiff's Motion for Leave to File Amended Complaint is denied." On July 29, 2014, Quirke filed his notice of appeal.

¶ 16 Given this record, we reject the defendants' argument that the appeal should be dismissed as untimely. More specifically, the dismissal of the complaint pursuant to § 2-615 as factually deficient was a dismissal with prejudice because the court's order does not specify that the dismissal is without prejudice or that Quirke is granted leave to amend. The plaintiff bears the burden of persuading the trial judge to specify that its dismissal is without prejudice or that the plaintiff will be permitted to replead if he or she wishes to plead over. *Dunavan v. Calandrino*, 167 Ill. App. 3d 952, 957, 522 N.E.2d 347, 349 (1988). When a plaintiff fails to do either, Supreme Court Rule 273 dictates: "Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits." Ill. S. Ct. R. 273 (eff. Jan.1, 1967); *Dunavan*, 167 Ill. App. 3d at

957, 522 N.E.2d at 349. The wording of this particular order leaves no doubt that the § 2-615 dismissal was a dismissal with prejudice.[2] In addition, the trial court expressly dismissed the action with prejudice pursuant to § 2-619 on the basis of *res judicata*. The trial court also removed the case from its calendar by striking a June status date. Thus, the judge clearly intended to dispose of Quirke's action for all time.

¶ 17 Initially, Quirke's "Motion for Leave to File Amended Complaint" does not appear to be the type of motion that extends the deadline for taking an appeal. This is because to qualify as a postjudgment motion within the meaning of § 2-1203 of the Code, a motion must request at least one of the forms of relief specified in § 2-1203, which are a rehearing, retrial, modification or vacation of the judgment, or "other relief" which is similar in nature. 735 ILCS 5/2-1203(a) (West 2012); *Vanderplow*, 332 Ill. App. 3d 51, 773 N.E.2d 40. It is well established that a motion seeking only to file an amended complaint after a final judgment does not qualify as a § 2-1203 postjudgment motion and does not defer the deadline for filing an appeal. Ill. S. Ct. Rule 303(a)(1) (eff. May 30, 2008); *Geisler v. Everest National Insurance Co.*, 2012 IL App (1st) 103834, ¶ 50, 980 N.E.2d 1170, citing *Fultz v. Haugan*, 49 Ill. 2d 131, 136, 305 N.E.2d 873, 876 (1971). Thus, the title of Quirke's motion suggests that it was an ordinary motion for leave to file an amended complaint.

¶ 18 However, the title of a motion is not entirely determinative (*Geisler*, 2012 IL App (1st) 103834, ¶ 50, 980 N.E.2d 1170), and the substance of the request may bring it within the scope of § 2-1203. *Shutkas Electric, Inc. v. Ford Motor Co.*, 366 Ill. App. 3d 76, 81, 851 N.E.2d 66, 70

[2] Quirke suggests that we disregard the § 2-615 portion of the order, as he did when he focused his brief entirely on the § 2-619/*res judicata* finding. He contends that the § 2-615 portion of the order is neither final nor appealable. His argument is inconsistent with the notice of appeal he filed on July 29, 2014, indicating he was appealing from the orders dismissing his complaint and denying his motion for leave to file an amended complaint.

(2006); *Monat v. County of Cook*, 322 Ill. App. 3d 499, 505, 750 N.E.2d 260, 266 (2001), quoting *Town of Sugar Loaf v. Environmental Protection Agency*, 305 Ill. App. 3d 483, 488, 712 N.E.2d 393, 397 (1999) (stating courts "should not impose hypertechnical drafting requirements" and only a motion that is " 'totally devoid of any indication of points allegedly warranting relief *** is insufficient' ").

¶ 19 Furthermore, in *Kingbrook, Inc. v. Pupurs*, 202 Ill. 2d 24, 779 N.E.2d 867 (2002), the Illinois supreme court held that neither our civil practice statute nor the rules of the supreme court require that a postjudgment motion (in a case decided without a jury) contain any detail or argument. The postjudgment motion in *Kingbrook* was titled as a motion for reconsideration and the body of the motion consisted of a mere one sentence in which the plaintiff " 'move[d] the Court to reconsider its decision granting severing [(*sic*)] judgment in favor of Defendants.' " *Kingbrook*, 202 Ill. 2d at 26-27, 779 N.E.2d at 870. Although short, this motion was sufficient for purposes of tolling the time for filing a notice of appeal. *Kingbrook*, 202 Ill. 2d 24, 779 N.E.2d 867. Under *Kingbrook*, a single sentence could suffice, provided it requests the appropriate type of relief. *Muirfield Village-Vernon Hills, LLC v. K. Reinke, Jr. & Company*, 349 Ill. App. 3d 178, 185, 810 N.E.2d 235, 242 (2004) (pursuant to *Kingbrook*, a motion that does no more than request to strike or vacate the 'with prejudice' portion of the order would be sufficient to toll the 30-day time period in which to file a notice of appeal"). Quirke also cites *Muirfield Village-Vernon Hills*, in which a motion's caption and prayer for relief asked the trial court to reinstate the cause and allow the plaintiffs to file an amended pleading, but the body of the motion sought only leave to file an amended pleading. *Muirfield Village-Vernon Hills*, 349 Ill. App. 3d at 185, 810 N.E.2d at 242. The appellate court ruled that although the motion lacked "proper substance or detail," the express request to reinstate the cause was an effective request

for "modification" or "vacation" of the trial court's dismissal and was sufficiently "directed at the judgment" to come within the scope of § 2-1203(a) of the Code. *Muirfield Village-Vernon Hills*, 349 Ill. App. 3d at 185, 810 N.E.2d at 242. Summarizing these and other cases, Quirke contends his motion was a valid § 2-1203, postjudgment motion and he emphasizes that our "civil appeals rules are to be interpreted liberally, in order that lawsuits may be decided on the merits." *Kingbrook*, 202 Ill. 2d at 17, 779 N.E.2d at 871.

¶ 20 We agree that our jurisdiction does not depend on the soundness of a postjudgment motion (*Berteli v. Rockford Memorial Hospital*, 393 Ill. App. 3d 469, 913 N.E.2d 123 (2009)), its clarity (see *e.g.*, *Muirfield Village-Vernon Hills*, 349 Ill. App. 3d at 185, 810 N.E.2d at 242)), or its length or specificity (*Kingbrook*, 202 Ill. 2d at 321-32, 779 N.E.2d at 872). In the body of his motion, Quirke challenged the court's conclusion that it is "clearly apparent that no set of facts can be proved that would entitle" him to recover damages from the condominium association and property management company. Quirke proposed the addition of allegations that would "address the Court's Order" and enable him "to proceed with his alleged claims." Thus, he was asking the court to reconsider its reasoning for entering the dismissal "with prejudice" and to modify or vacate that judgment.

¶ 21 We find that Quirke's motion was more than a motion for leave to amend because it sought modification or vacation of the underlying order dismissing his complaint with prejudice. It was a valid postjudgment motion within the meaning of § 2-1203 of the Code and its filing tolled the running of the 30 day period for the filing of a notice of appeal as provided in Supreme Court Rule 303(a). 735 ILCS 5/2-1203(a) (West 2012); Ill. S. Ct. R. 303(a)(1) (eff. June 1, 2008). Accordingly, we find his notice of appeal was timely filed within 30 days of the

resolution of his postjudgment motion and we reject the defendants' renewed argument for dismissal.

¶ 22 Nevertheless, we find that Quirke's appeal fails, for two reasons. The first reason is that although the complaint was dismissed as factually deficient and on *res judicta* grounds, Quirke does not address the finding that his complaint was factually deficient. In effect, this is a concession that the dismissal on that ground was proper. When an appellant fails to challenge a finding, he or she waives our review of that finding. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 55, 988 N.E.2d 984 (summarily affirming portion of order that appellant failed to address); Ill. S. Ct. R. 341(h)(7) (eff. Feb.6, 2013) ("Points not argued [in the appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Even if we were to be persuaded by Quirke's *res judicata* arguments, the undisputed finding of factual deficiency leads us to affirm the dismissal order.

¶ 23 Secondly, his *res judicata* arguments are unpersuasive. As we noted above, *res judicata* bars not only what was actually decided in the first action but also all issues that could have been decided there. *River Park*, 184 Ill. 2d at 302, 703 N.E.2d at 889. *Res judicata* bars suits based on facts that would constitute a defense or counterclaim in the earlier suit and where a "successful" outcome in the later suit would either nullify the earlier judgment or bar the rights established in the earlier suit. *Kosydor*, 2012 IL App (5th) 120110, ¶ 19, 979 N.E.2d 123; *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 92, 753 N.E.2d 1138, 1145 (2001).

¶ 24 *Res judicata* applies where three requirements are met: (1) an identity (sameness) of the parties or their privies, (2) an identity of the causes of action, and (3) a final judgment on the merits. *River Park*, 184 Ill. 2d at 302, 703 N.E.2d at 889. Quirke takes issue with only the second element. He does not dispute that there is an identity or sameness of the parties in the two suits.

The condominium association was a party in both the forcible entry action and the present suit. The property manager was not a party in the first suit but its actions on behalf of the condominium association to bill, collect, and apply the disputed fees is sufficient to establish privity with the condominium association. Also, there was clearly a final judgment in the first action, which the condominium association enforced by evicting Quirke and renting out the unit for two terms with the court's approval. Therefore, we find that the first and third elements are satisfied.

¶ 25 Quirke argues, however, that he had no choice but to present his late fee claims as a subsequent, separate suit. He attempts to differentiate the two actions, by arguing that the condominium association's suit revolved around unpaid assessments but his suit concerned late fees, and the first suit sought possession but he never wanted to be awarded possession of a condominium unit he no longer owned and instead sued for damages. Quirke argues that the two claims were entirely different in substance. With these distinctions in mind, he contends forcible actions are limited to the issue of who is entitled to possession of the land *(Suttles v. Vogel*, 126 Ill. 2d 186, 195, 533 N.E.2d 901, 905 (1988)) and that counterclaims seeking money damages are not considered germane in those proceedings (*American National Bank by Metroplex, Inc. v. Powell*, 293 Ill. App. 3d 1033, 1044, 691 N.E.2d 1162, 1170 (1977)). His appeal relies heavily on *Spanish Court*, which he contends the trial court misconstrued. *Spanish Court*, 2014 IL 115342, ¶26, 12 N.E.3d 1. According to Quirke, *Spanish Court* indicates that challenging the propriety of the late fees would have been an improper "nullification defense" that was not germane to the condominium association's suit. Thus, the trial court should have found no identity of causes of action and denied the motion to dismiss.

¶ 26 To determine whether there is an identity of causes of action for purposes of *res judicata*, Illinois courts use the liberal "transactional test." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 703 N.E.2d 883 (1998). Under the transactional analysis, separate claims will be considered the same cause of action for *res judicata* purposes if they arise from a single group of operative facts, regardless of whether different theories of relief are asserted. *River Park*, 184 Ill. 2d at 311, 703 N.E.2d 883. The transactional test allows claims to be considered part of the same cause of action "even if there is not a substantial overlap of evidence, so long as they arise from the same transaction." *River Park*, 184 Ill. 2d at 311, 703 N.E.2d 883. What constitutes a "transaction" should be "determined pragmatically," and a court should " 'give[] weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " *River Park*, 184 Ill. 2d at 312, 703 N.E.2d 883, quoting Restatement (Second) of Judgments § 24, at 196 (1982).

¶ 27 Rather than basing our analysis on Quirke's description of the two proceedings, we look to the record. The record makes clear that a single set of operative facts underlie both suits. The condominium association sued Quirke for damages and possession of his units due to "[unpaid] common expenses/late charges/parking fees or fines plus subsequently accruing unpaid assessments and charges." Quirke later sued the condominium association and property manager for the "unlawful charge and collection of excessive and multiple $75 late fees on condominium living-unit and parking-space assessments." Both claims arise from the condominium association's imposition of separate $75 late fees for the monthly assessments on Quirke's residential unit and parking space and what he deemed to be the "unilateral" accounting practice of first applying his payments to his past-due balance. This accounting method perpetuated his

monthly deficiency and what he characterized as "compounding late fees" and he specified that because he was "[d]ispleased" by this accounting, he ceased making any payments after February 2011. Quirke also complained that this accounting method was used after his eviction when the condominium association "unilaterally applied the rent money received from the tenants in Plaintiff's condominium unit to pay Plaintiff's past-due assessments," unilaterally "imposed a $150 late fee" each month, and ultimately caused him to "involuntarily" pay "a $150 late fee 34 times" before he sold his property in 2013. He asked, in part, that he and the class of individuals who had either paid multiple or excessive late fees for any month be "restore[d] *** to the financial position they would have been in absent [the] unlawful conduct." There is no question that a single set of operative facts was the basis for the two lawsuits and that Quirke's complaint asked the court to determine that the factual and legal basis for the judgment in the first action was improper or unlawful.

¶ 28 We also point out that although Quirke attributed the accounting method to the unilateral decision of the condominium association, it is actually specified by statute and was approved by the trial court when it authorized an extension of the tenant's lease for Quirke's unit. The motion for leave to extend the tenancy included an accounting which showed the condominium association was continuing to charge late fees after Quirke's eviction and that the tenant's payments were being applied first to these fees. See 735 ILCS 5/9-111.1 (West 2010) (indicating rental income shall first apply to assessments and other charges that were sued upon, then to statutory interest, attorney fees, court costs, "other expenses lawfully agreed upon (including late charges)," and "lastly to assessments accrued thereafter until assessments are current"); see 735 ILCS 5/9-111.1 (West 2010) (indicating a condominium board may lease a unit, and, with leave of court, may extend an initial 12 months tenancy by 12 months).

¶ 29 Furthermore, if Quirke managed to succeed on his request to regain the "unlawful[ly]"imposed late fees, he would essentially undo the judgment granted in the first suit, which is contrary to *res judicata*'s ban on suits which impair the rights established in an earlier suit or nullify an earlier judgment. See *Kosydor*, 2012 IL App (5th) 120110, ¶ 19, 979 N.E.2d 123 (*res judicata* bars suits based on facts that would constitute a defense or counterclaim in the earlier suit and where a "successful" outcome in the later suit would either nullify the earlier judgment or bar the rights established in the earlier suit).

¶ 30 For these reasons, we find that, despite Quirke's arguments, all the elements of *res judicta* have been met.

¶ 31 We also find that the trial court correctly applied *Spanish Court* to the proceedings. *Spanish Court*, 2104 IL 115342, 12 N.E.3d 1. In that case, a condominium association filed a complaint for forcible entry against a unit owner named Lisa Carlson, alleging that Carlson had not paid assessments in six months and that this entitled the association to a money judgment and possession of her unit. *Spanish Court*, 2104 IL 115342, ¶ 3, 12 N.E.3d 1. Like Quirke, Carlson had intentionally withheld payment. *Spanish Court*, 2104 IL 115342, ¶ 3, 12 N.E.3d 1. In her answer to the complaint, Carlson denied that she owed the assessments, because, among things, her top-floor unit suffered water damage due to the association's failure to properly maintain the roof directly over her unit. *Spanish Court*, 2104 IL 115342, ¶ 3, 12 N.E.3d 1. Carlson repeated the allegations as an affirmative defense, contending that the failure to maintain the roof was in breach of the association's duties under the condominium declaration, and that this breach estopped the association from seeking payment of her assessments and entitled her to a set off against any money judgment that was entered against her on the complaint. *Spanish Court*, 2104

IL 115342, ¶ 4, 12 N.E.3d 1. Notably, Carlson repeated the same allegations in a counterclaim seeking money damages. *Spanish Court*, 2104 IL 115342, ¶ 4 12 N.E.3d 1.

¶ 32 The association moved to strike her affirmative defenses and sever her counterclaim, contending they were not "germane" to a forcible entry action. *Spanish Court*, 2104 IL 115342, ¶ 5, 12 N.E.3d 1. The trial judge granted the motion, struck Carlson's affirmative defenses, and ordered that her counterclaim be reassigned to the appropriate division of the circuit court. *Spanish Court*, 2104 IL 115342, ¶ 5, 12 N.E.3d 1. Accordingly, Carlson's counterclaim about the problems in her unit would be heard in a different division, and the association's claim about the assessments proceeded to trial as filed in the forcible entry and detainer division. *Spanish Court*, 2104 IL 115342, ¶ 5, 12 N.E.3d 1.

¶ 33 During that bench trial, Carlson persuaded the trial judge that a special assessment for upgrading the fire alarms and elevator on the property had not been properly adopted. *Spanish Court*, 2104 IL 115342, ¶ 5, 12 N.E.3d 1; *Spanish Court Two Condominium Ass'n*, 2012 IL App (2d) 110473, ¶ 1, 979 N.E.2d 891. After hearing the evidence, the special assessment was disallowed, but the condominium association succeeded on its claim for other assessments and was awarded possession of Carlson's unit. *Spanish Court*, 2104 IL 115342, ¶¶ 5-6, 12 N.E.3d 1. Both parties appealed. The appellate court affirmed the decision to severe Carlson's counterclaim and on further appeal, the supreme court addressed whether it was appropriate to consider her affirmative defenses in the forcible action. *Spanish Court*, 2104 IL 115342, ¶¶ 9-12, 12 N.E.3d 1.

¶ 34 The scope of a forcible entry action is limited by § 9-106 of the Forcible Entry and Detainer Act, which states "no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim, or otherwise." 735 ILCS 5/9-106 (West 2010). Historically, the "distinctive purpose" of a forcible action was for a landlord to regain possession

of property being unlawfully withheld. *Spanish Court*, 2104 IL 115342, ¶ 15, 12 N.E.3d 1, citing *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 357-58, 280 N.E.2d 208 (1972). The legislature expanded the purpose of such actions by authorizing joinder of a claim for rent and judgment for the amount of rent found due. *Spanish Court*, 2104 IL 115342, ¶ 15, 12 N.E.3d 1. The legislature further expanded the purpose by adding condominium property and a unit owner's failure to pay common expenses or any other expenses lawfully agreed upon. *Spanish Court*, 2104 IL 115342, ¶ 15, 12 N.E.3d 1, citing 735 ILCS 5/9-111(a) (West 2010).

¶ 35 In *Spanish Court*, the supreme court reviewed these legislative amendments, as well as some of its prior holdings. In *Jack Spring*, for instance, where a forcible action was based on unpaid rent, the supreme court held "whether the tenant, in fact, owes rent is germane to that proceeding." *Spanish Court*, 2014 IL 115342, ¶ 16, 12 N.E.3d 1, citing *Jack Spring*, 50 Ill. 2d at 358-59, 280 N.E.2d 208. In fact, " 'the question of whether rent is due and owing is not only germane, but in these cases where the right to possession is asserted solely by reason of nonpayment, is the crucial and decisive issue for determination.' " *Spanish Court*, 2014 IL 115342, ¶ 16, 12 N.E.3d 1, quoting *Jack Spring*, 50 Ill. 2d at 358, 280 N.E.2d 208. Based on *Jack Spring* and other precedent, the supreme court reasoned that because the condominium association's claim for possession of Carlson's unit was based on her nonpayment of assessments, "It necessarily follows that whether Carlson, in fact, owes any assessments is germane to the proceeding." *Spanish Court*, 2014 IL 115342, ¶ 18, 12 N.E.3d 1.

¶ 36 The supreme court then analyzed whether Carlson's specific arguments were germane to the forcible proceeding. Carlson's answer, affirmative defenses, and counterclaim were all based on the contention that her obligation to pay assessments was nullified by the association's failure to maintain the common elements. *Spanish Court*, 2014 IL 115342, ¶ 18, 12 N.E.3d 1. A

nullification defense would be germane in a landlord-tenant dispute, because a landlord-tenant relationship is created by contract and a material breach of a contract provision by one party may be grounds for releasing the other party from his or her contractual obligations. *Spanish Court*, 2014 IL 115342, ¶ 20, 12 N.E.3d 1. Thus, a landlord's failure to maintain the premises in a habitable condition may entitle a tenant to withhold rent or rescind or reform their lease. *Spanish Court*, 2014 IL 115342, ¶ 20, 12 N.E.3d 1.

¶ 37 "Although contract principles have sometimes been applied to the relationship between a condominium association and its unit owners based on the condominium's declaration, bylaws, and rules and regulations [citation], the relationship is largely a creature of statute, defined by the provisions of the Condominium Act (765 ILCS 605/1 et seq. (West 2008)). Under that act, the board of managers, through whom the association of unit owners acts (765 ILCS 605/2(o) (West 2008)), has the duty '[t]o provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements.' 765 ILCS 605/18.4(a) (West 2008). The Condominium Act also addresses the '[s]haring of expenses' among unit owners, and establishes that: 'It shall be the duty of each unit owner *** to pay his proportionate share of the common expenses.' 765 ILCS 605/9(a) (West 2008). Although these duties may also be reflected in the condominium declaration and bylaws, as they are in this case, they are imposed by statute and exist independent of the association's governing documents. Accordingly, a unit owner's obligation to pay assessments is not akin to a tenant's purely contractual obligation to pay rent, which may be excused or nullified

because the other party failed to perform." *Spanish Court*, 2014 IL 115342, ¶ 21, 12 N.E.3d 1.

¶ 38 After considering language in the Condominium Act, the supreme court concluded that Carlson's nullification defense regarding the maintenance of the common elements was not germane in the forcible action. *Spanish Court*, 2104 IL 115342, ¶ 26, 12 N.E.3d 1. Nevertheless, Carlson's challenge to the adoption of the special assessment to upgrade the fire alarms and elevator was germane to those proceedings, because "[a] unit owner *** [is permitted to] challenge whether assessments are due by challenging the association's recordkeeping, or the manner in which the assessment was adopted. See 765 ILCS 605/2(m) (West 2008) (defining ' "[c]ommon [e]xpenses" ' as those 'lawfully assessed' by the board)." *Spanish Court*, 2104 IL 115342, ¶ 32, 12 N.E.3d 1.

¶ 39 Quirke confuses these two conclusions. His disagreement with the late fees was not a dispute regarding the common elements of his building or the condominium association's maintenance obligations, and it was not a "nullification defense" to the forcible action. Instead, it was like Carlson's challenge to the special assessment to upgrade the fire alarms and elevator, and it was an appropriate defense to the association's action. Both Carlson and Quirke disagreed with their condominium association's right to impose certain assessments. Carlson, but not Quirke, was also dissatisfied with her condominium association's effort to maintain the property. The appropriate time and place for Quirke to challenge his association's accounting method or right to assess separate late fees for his residential unit and parking space was in the forcible action regarding his nonpayment of the fees. Like Carlson, he could have presented those facts in opposition to the forcible action. His answer would have been heard in the forcible action and could have resulted in factual findings and a judgment in his favor in that proceeding. Quirke,

however, did not dispute the forcible action. Instead, he failed to appear there and subsequently filed the separate complaint now at issue. In light of these circumstances, we reject Quirke's contention that he "did not get his day in court" and that it is "fundamentally unfair" to reject his claim regarding "double-billed, compounded assessment late fees *** [that] were excessive as a matter of law."

¶ 40 Moreover, the other cases that Quirke cites are distinguishable on their facts and consistent with the trial court's ruling. For instance, Quirke disputed whether he was required to pay past-due assessments and fees, but the commercial condominium unit owners in *100 Roberts Road Condominium Association* made no such argument. *100 Roberts Road Condominium Ass'n v. Khalaf*, 2013 IL App (1st) 120461, 996 N.E.2d 263. In that case, after entering judgment for several years of unpaid assessments, the trial court was persuaded to reduce the damage award due to the condominium association's purported failure to mitigate its damages. *100 Roberts Road Condominium Ass'n*, 2013 IL App (1st) 120461, ¶¶ 2-3, 996 N.E.2d 263. The condominium association then filed a motion to reconsider in which it contended it was inappropriate to reduce the award on that basis. *100 Roberts Road Condominium Ass'n*, 2013 IL App (1st) 120461, ¶ 3 996 N.E.2d 263.The trial court agreed but then made a finding that the condominium association's suit was brought for an improper purpose and it dismissed the suit. *100 Roberts Road Condominium Ass'n*, 2013 IL App (1st) 120461, ¶ 3, 996 N.E.2d 263. Thus, the issues on appeal were whether it was proper for the trial court to consider mitigation and an improper motive in the context of a limited proceeding regarding unpaid assessments. *100 Roberts Road Condominium Ass'n*, 2013 IL App (1st) 120461, 996 N.E.2d 263. The case does not support Quirke's broad statement that he "[would not have been] permitted to pursue counterclaims or affirmative defenses related to his own damages."

¶ 41 Similarly, in *Gotham Lofts Condominium Association*, the trial court improperly strayed from the central issue of whether the condominium association was entitled to possession of a unit owner's property, when the court considered whether the association's property manager had been negligent after the owner was evicted and also whether the association was liable for that negligence. *Gotham Lofts Condominium Ass'n v. Kaider*, 2013 IL App (1st) 120400, ¶ 17, 4 N.E.3d 92. Like Carlson's dissatisfaction with her leaky roof in *Spanish Court*, the allegations of property mismanagement in *Gotham Lofts* were beyond the appropriate scope of consideration. The case is not analogous to Quirke's disagreement with his condominium association as to whether it was fair to assess multiple late fees in a single month.

¶ 42 Quirke's reliance on *Court of Northbrook Condominium Association* is also misplaced, because there the court ruled that an argument which had never been made in the trial court (breach of fiduciary duty) was waived. *Court of Northbrook Condominium Ass'n v. Bhutani*, 2014 IL App (1st) 130417, ¶ 42, 7 N.E.3d 839.

¶ 43 For these reasons, we reject Quirke's contention that he could not have disputed the validity of the late fees in the forcible action, and thus, the validity of those charges has not yet been adjudicated. We are not persuaded that the trial judge erred in declaring Quirke's subsequent suit barred by the principle of *res judicata*. The judge's order was consistent with the facts and the law.

¶ 44 Accordingly, we affirm the trial judge' order dismissing with prejudice Quirke's claim as factually deficient pursuant to section 2-615 of the Code and barred by *res judicata* pursuant to section 2-619(a)(4) of the Code. 735 ILCS 5/2-615, 2-619(a)(4) (West 2012).

¶ 45 Affirmed.