2015 IL App (1st) 142444-U

FIFTH DIVISION
August 21, 2015

No. 1-14-2444

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
18TH STREET PROPERTY, LLC,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 13 L 004989
	)	
A-1 CITYWIDE TOWING & RECOVERY, INC., and	)	
JOHN S. ALLAN, an individual,	)	Honorable
	)	Margaret Ann Brennan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed the circuit court's dismissal of plaintiff's verified complaint, ruling that claims arising out of the breach of a lease with the defendants were not precluded by *res judicata*, collateral estoppel, or the policy against claim-splitting.

¶ 2 Plaintiff, 18th Street Property, LLC, appeals from an order of the circuit court of Cook County dismissing its verified complaint against the defendants, A-1 Citywide Towing &

Recovery, Inc. (A-1 Towing) and John S. Allan (Allan), based on the breach of a lease between plaintiff and A-1 Towing personally guarantied by Allan. On appeal, plaintiff argues the claims against the defendants are not precluded by the doctrines of *res judicata* or collateral estoppel, or the policy against claim-splitting. For the following reasons, we reverse the judgment of the circuit court and remand the case for further proceedings.

¶ 3 BACKGROUND

¶ 4 On March 31, 2008, plaintiff entered into a written lease with A-1 Towing regarding property at 1716 South Western Avenue in Chicago (premises).[1] The lease term was from April 1, 2008, through March 31, 2013. The lease provided for a "Base Annual Rental" and a "Base Monthly Rent." The lease generally obligated A-1 Towing to pay the "Base Monthly Rent" and any "Additional Rent" "on or before the first day of each *** calendar month." The lease provided that "[a]ll sums of money required to be paid by Lessee under this Lease that are not specifically referred to as rent ("Additional Rent") shall be considered rent although not specifically designated as such." Taxes and assessments were specifically designated as "Additional Rent" under the agreement, the monthly amount of this additional rent being determined by a formula set forth in paragraph 6 of the lease.

¶ 5 Paragraph 22A of the lease indentified nine types of events that would be deemed an "Event of Default," including the failure to observe or perform any of the covenants, conditions, or obligations of the lease.[2] Paragraph 22B provided that "[u]pon the occurrence of an 'Event of Default,' " plaintiff was "entitled to exercise, at its option, concurrently, successively, or in any

[1] The lease refers to "Western Street," but the verified complaint identifies the premises as located on Western Avenue.

[2] Although an "Event of Default" appears to be functionally identical to a default under the terms of the lease, we observe, for example, that paragraph 22A otherwise provides that an " 'Event of Default' or a breach or default" under any other lease between the parties is an "Event of Default" under the lease here, after the passage of applicable notice, cure or grace periods.

combination, all remedies available at law or in equity, including without limitation any one or more" of the remedies specified in the lease.

¶ 6 For example, under paragraph 22B(i) of the agreement, plaintiff was entitled to terminate the lease, whereupon A-1 Towing's right to possession of the premises would cease and the lease, except as to A-1 Towing's liability, would be terminated. Under paragraph 22B(ii) of the agreement, plaintiff had the option:

> "To reenter and take possession of the Premises, any or all personal property or fixtures of [A-1 Towing] upon the Premises and, to the extent permissible, all franchises, licenses, area development agreements, permits and other rights or privileges of [A-1 Towing] pertaining to the use and operation of the Premises and to expel [A-1 Towing] ***, without being deemed guilty in any manner of trespass or becoming liable for any loss or damage resulting therefrom, without resort to legal or judicial process, procedure or action. No notice from [plaintiff] hereunder or under a forcible entry and detainer statute or similar law shall constitute an election by [plaintiff] to terminate this lease unless such notice specifically so states. If [A-1 Towing] shall, after default, voluntarily give up possession of the Premises to [plaintiff], deliver to [plaintiff] or its agents the keys to the Premises, or both, such actions shall be deemed in compliance with [plaintiff's] rights and acceptance thereof by [plaintiff] or its agents shall not be deemed to constitute a termination of the Lease. [Plaintiff] reserves the right following any reentry and/or reletting to exercise its right to terminate this Lease by giving [A-1 Towing] written notice thereof, in which event this Lease will terminate as specified in said notice."

A further remedy available to plaintiff under paragraph 22B(vi) of the lease was:

> "To accelerate and recover from [A-1 Towing] all rent and other monetary sums due and owing and scheduled to become due and owing under the Lease both before and after the date of such breach for the entire original scheduled Lease Term."

The lease was signed by Allan in his capacity as president of A-1 Towing. Allan also signed a personal guaranty to induce plaintiff to enter into the lease.

¶ 7 On October 29, 2012, plaintiff filed a complaint against the defendants in the circuit court, seeking possession of the premises and damages under the lease. The case was docketed in the circuit court under case number 12 M1 727084. On November 21, 2012, the circuit court entered an order granting possession of the premises to plaintiff and directing the defendants to pay "damages in the sum of $16,470.00 and [plaintiff's] COSTS."

¶ 8 On May 14, 2013, plaintiff filed a verified complaint against the defendants in the circuit court, alleging breach of the lease. The verified complaint, docketed as case number 13 L 4989, alleged A-1 Towing failed to pay the base monthly rent, holdover rent, taxes and late charges from January 2013 through March 2013. In addition to seeking these unpaid sums as damages, the verified complaint also sought attorney fees and costs pursuant to the lease. Plaintiff allegedly incurred the attorney fees and costs in the course of three prior forcible entry and detainer cases filed against the defendants, including case number 12 M1 727084.

¶ 9 On December 19, 2013, the defendants filed a motion to dismiss the verified complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(4),(9) (West 2012)). The defendants argued that plaintiff 's claims were barred under the principles of *res judicata*, based on the prior judgment entered in case number 12 M1 727084. The defendants

also asserted that plaintiff was collaterally estopped from seeking additional damages after the judgment was entered in case number 12 M1 727084. The defendants supported their motion with a copy of the prior judgment order, photographs of the padlocked storage gates of the premises, and an affidavit from Allan regarding the prior litigation and the eviction of A-1 Towing from the premises. The Allan affidavit stated that in case number 12 M1 727084, plaintiff sought "possession and lease damages" against the defendants based on the same lease involved in this matter.

¶ 10 On January 21, 2014, plaintiff filed its response in opposition to the motion to dismiss. Plaintiff argued that *res judicata* did not apply because the cause of action in this matter sought the recovery of unpaid rent, holdover rent, and unpaid late charges accruing after the date of the judgment in case number 12 M1 727084. Plaintiff also argued that it could not have raised the issues in the verified complaint in the forcible entry and detainer action. Plaintiff further asserted that collateral estoppel did not apply because the present claims were not previously litigated in case number 12 M1 727084. In addition, plaintiff contended that the terms of the lease reserved the right to sue for rent following an eviction.

¶ 11 On February 18, 2014, the defendants filed their reply in support of their motion to dismiss. The defendants argued that under the terms of the lease, all of plaintiff 's claims constituted "rent," and thus were already decided in case number 12 M1 727084. The defendants also argued that under the terms of the lease, all of plaintiff's claims could have been litigated in the prior case. The defendants further reiterated that plaintiff was also collaterally estopped from pursuing its claims in light of the prior judgment.

¶ 12 On April 2, 2014, following a hearing on the matter, the circuit court granted the defendants' motion to dismiss the verified complaint with prejudice, "for the reasons stated on

the record." The transcript of proceedings for the hearing indicates the circuit court ruled that plaintiff 's claims for breach of contract were barred because they could have been pleaded in the forcible entry and detainer proceedings, stating at one point that "[t]his is very much like pleading in the alternative."

¶ 13 On May 2, 2014, plaintiff filed a motion to reconsider the circuit court's dismissal of the verified complaint. Plaintiff argued collateral estoppel does not apply when the issues sought to be precluded in the subsequent lawsuit were not actually litigated in the prior lawsuit. Plaintiff also asserted that the circuit court erred in concluding *res judicata* applied because the present breach of contract claims could not have been brought in a forcible entry and detainer action. Plaintiff further argued that the breach of contract claims and the prior forcible entry and detainer action involved different causes of action. In addition, "to the extent that the [c]ourt's rationale, and its invocation of 'pleading in the alternative,' may suggest that the [c]ourt found that the present matter violates the Illinois rule against claim-splitting," plaintiff argued the rule did not apply where relief was unavailable in the first action due to a restriction of the subject-matter jurisdiction of the circuit court.

¶ 14 On June 6, 2014, the defendants filed a response to the motion to reconsider. The defendants argued that plaintiff failed to set forth newly-discovered evidence, changes in the law, or errors in the circuit court's application of existing law.

¶ 15 On July 10, 2014, following a hearing on the matter, the circuit court denied plaintiff 's motion for reconsideration. On August 7, 2014, plaintiff filed a timely notice of appeal to this court.

¶ 16 ANALYSIS

¶ 17 On appeal, plaintiff asserts that the circuit court erred in granting the defendants' motion to dismiss its verified complaint pursuant to section 2-619 of the Code. "The purpose of section 2-619 is to afford litigants a means of disposing of issues of law and easily proved issues of fact at the outset of a case, reserving disputed questions of fact for trial." *Miner v. Fashion Enterprises, Inc*., 342 Ill. App. 3d 405, 413 (2003). A section 2-619 motion to dismiss admits as true all well-pleaded facts and all reasonable inferences therefrom. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). Therefore, when ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in the light most favorable to the non-moving party. *Id*. The movant bears the initial burden of proving any affirmative defense. *Advocate Health and Hospitals Corp. v. Bank One, N.A.*, 348 Ill. App. 3d 755, 759 (2004). In considering a ruling on a section 2-619 motion to dismiss, the reviewing court must determine whether a genuine issue of material fact exists and whether the defendants are entitled to judgment as a matter of law. *Miner*, 342 Ill. App. 3d at 413. We review a section 2-619 dismissal *de novo*. *Porter*, 227 Ill. 2d at 352.

¶ 18 The defendants' motion to dismiss was based upon section 2-619(a)(4) of the Code, which allows a circuit court to dismiss a cause of action on the ground that it "is barred by a prior judgment." 735 ILCS 5/2-619(a)(4) (West 2012). This subsection of section 2-619 incorporates the doctrines of *res judicata* and collateral estoppel. *Illinois Non–Profit Risk Management Ass'n v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 719 (2008) (citing *Yorulmazoglu v. Lake Forest Hospital*, 359 Ill.App.3d 554, 558 (2005)).[3] The doctrines of *res*

[3] We note that the defendants' motion to dismiss also cited section 2-619(a)(9) of the Code, which generally provides for dismissal of a complaint if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the

judicata and collateral estoppel serve the same purposes of promoting judicial economy and preventing repetitive litigation. *Hayes v. State Teacher Certification Board*, 359 Ill. App. 3d 1153, 1161 (2005).

¶ 19 Res Judicata

¶ 20 "*Res judicata*, or claim preclusion, refers to the preclusive effect that a final judgment on the merits has on the parties, in that it forecloses litigation of any claim that was, or could have been, raised in an earlier suit between the parties or their privies." *Gallaher v. Hasbrouk*, 2013 IL App (1st) 122969, ¶ 21 (citing *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998)). "Thus, when the doctrine is applied, a party is prevented from splitting his or her claims into multiple actions." *Gallaher*, 2013 IL App (1st) 122969, ¶ 21 (citing *Rein v. David A. Noyes & Co*., 172 Ill. 2d 325, 339 (1996). *Res judicata* extends to claims that were actually decided in the first action and to claims that could have been decided in the first action. *River Park*, 184 Ill. 2d at 302.

¶ 21 To invoke the doctrine of *res judicata*, the defendants must establish three elements: (1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) an identity of causes of action; and (3) an identity of the parties or their privies. *Id*. In this case, plaintiff does not deny it obtained a prior final judgment against the defendants in case number 12 M1 727084. Rather, plaintiff argues the causes of action are not identical. Plaintiff maintains that an action for past rent due and an action for future rent are not identical causes of action. Plaintiff also maintains that it was legally prohibited from pursuing claims for future rent in the forcible entry and detainer action.

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claim." 735 ILCS 5/2–619(a)(9) (West 2012). The arguments presented in the motion to dismiss, however, are more specifically addressed under section 2-619(a)(4). See *Illinois Non–Profit Risk Management Ass'n*, 378 Ill. App. 3d at 719.

¶ 22 Plaintiff 's argument finds support in *Miner*, a case cited in plaintiff 's brief. In *Miner*, the plaintiff leased retail space to the defendants. *Miner*, 342 Ill. App. 3d at 409. Paragraph 13 of the lease provided that if the defendants vacated the premises for a period of 10 days, their right to possession would terminate. *Id*. Paragraph 14 provided that if the defendants' right to possession terminated, the plaintiff was not obligated to mitigate damages by accepting a new tenant and that the defendants would satisfy any rent deficiency. *Id*. A rider to the lease provided that rent would be paid on the first of each month and other provisions relating to real estate taxes, assignment, and permitted activity on the premises. *Id*. at 410. On September 3, 1996, the plaintiff filed an action seeking unpaid rent accruing through that date and a default judgment was entered. *Id*. The plaintiff then filed a second lawsuit against the defendants seeking, in part, rent that had accrued up to September 3, 1996. See *id*. at 411-13. The circuit court dismissed the delinquent rent-related counts pursuant to the doctrine of *res judicata*. See *id*. at 413 (second amended complaint was dismissed for "the reasons previously stated," having dismissed prior pleadings based on *res judicata*).

¶ 23 On appeal, the *Miner* plaintiff argued that "under the common law, there is no present obligation to pay future rent, and therefore, the trust properly limited its 1996 claim to rent due at the time of trial." *Id*. at 416. The plaintiff also argued that the circuit court misconstrued paragraph 14 of the lease by ruling that because the lessor was under no duty to mitigate after the lessee abandoned the premises in 1996, the due dates of the remaining rent were accelerated so that the entire amount under the lease was due immediately. *Id*. The circuit court had thus concluded the trust could have used its 1996 action to obtain the entire amount of rent contemplated by the lease and that its failure to do so operated as *res judicata*. *Id*.

¶ 24 The *Miner* appellate court agreed that payment of future rent was not a present obligation

and the failure to pay rent when it accrues did not accelerate future unpaid rent absent a lease provision providing for the acceleration of rent. *Id*. at 416-17. The court also noted that under Illinois law, a lessor had the option of suing for rent as it became due, suing for several accrued installments, or suing for the entire amount when the lease ended. *Id*. at 417 (and cases cited therein). The appellate court further noted that the rights of the parties were limited to the contract and that the lease indicated that the defendants' obligation to pay monthly rent would survive its premature relinquishment. See *id*. at 417-18. Therefore, the *Miner* court concluded that the circuit court erred by adding an acceleration provision that was not provided in the parties' contract. *Id*. at 418. The appellate court concluded that a new set of operative facts arose each month for unpaid rent and, therefore, "there is no 'identity of cause of action' between the [first lawsuit] and the portion of the new action which seeks subsequently accruing rent." *Id*. at 417. Accordingly, the *Miner* court ruled that: (1) *res judicata* did not bar the new action to enforce the 1996 judgment and to obtain additional rent accruing after the 1996 action; and (2) paragraph 14 of the lease did not accelerate the rent due under the lease. *Id*. at 421.

¶ 25 Among the decisions cited by the *Miner* court was *Elliot v. LRSL Enterprises, Inc*., 226 Ill. App. 3d 724 (1992), which is also instructive in this case. In *Elliot*, the lease expressly provided that the lessee's obligation to pay rent was not waived by the service of a five-day notice, demand for possession, or by a forcible detainer action. *Id*. at 726. The appellate court observed that the mere surrender of possession of the leased premises did not terminate the contract altogether. *Id*. at 730 (quoting *Heims Brewing Co. v. Flannery*, 137 Ill. 309, 318 (1891)). The *Elliot* court held that the forcible entry and detainer action did not terminate the lease because "the distinctive purpose of [such proceedings] is to determine the party entitled to possession of the premises," and the order resulting from that proceeding "noticeably lack[ed]

any language concerning rent payments for the balance of the leasehold." *Elliot*, 226 Ill. App. 3d at 731. The appellate court additionally noted that the circuit court had found the order ambiguous, which would have created a question of fact precluding dismissal. *Id*. at 732.

¶ 26 In this appeal, the defendants do not address *Miner*, but argue that *res judicata* applies in this case because plaintiff could have sought future rent pursuant to the acceleration clause in its lease. Illinois law provides that a lease is a contract between two parties and is subject to the law of contracts. *Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1039 (2009). Leases should be construed to ascertain the parties' intent, and where the lease terms are unambiguous, " 'they must be enforced as written, and no court can rewrite a [lease] to provide a better bargain to suit one of the parties.' " *Id*. (quoting *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 349 (2000)). " 'There is a strong presumption against provisions that easily could have been included in the contract but were not.' " *Miner*, 342 Ill. App. 3d at 417 (quoting *Wright v. Chicago Title Insurance Co*., 196 Ill. App. 3d 920, 925 (1990)).

¶ 27 In this case, the lease includes acceleration as one among several remedies plaintiff could pursue in the event of a default. Moreover, paragraph 22B(ii) of the lease provided that no notice from plaintiff under a forcible entry and detainer statute or similar law shall constitute an election by plaintiff to terminate the lease unless such notice specifically so stated. Paragraph 22B(ii) of the lease also provided that plaintiff reserved the right following any reentry or reletting to exercise its right to terminate the lease by giving A-1 Towing written notice thereof, indicating that reentry or reletting did not necessarily terminate the lease or A-1 Towing's obligations thereunder. Holding that the lease required plaintiff to accelerate rent upon an event of default would require this court to disregard the express provisions of the lease and place the defendants in a better position by adding a provision to the lease that the parties did not include,

which, as the *Miner* court noted, we are not permitted to do. See *Miner*, 342 Ill. App. 3d at 417. Accordingly, the issue of whether the judgment in case number 12 M1 727084 involves an identical cause of action to those in the verified complaint depends on whether plaintiff sought to accelerate the rent in case number 12 M1 727084.

¶ 28 The defendants in this case relied upon the judgment order entered in case number 12 M1 727084. The order, similarly like the order in *Elliot*, does not indicate whether plaintiff sought to accelerate the rent or sought to terminate the lease. See *Elliot*, 226 Ill. App. 3d at 731. The defendants also submitted the Allan affidavit, but that document merely stated that in case number 12 M1 727084, plaintiff sought "possession and lease damages" against the defendants. The affidavit is silent on whether plaintiff sought to accelerate the rent. Given this record, a genuine issue of material fact exists regarding the identity of the causes of action. Thus, the defendants are not entitled to judgment as a matter of law based on the principles of *res judicata*. See *Miner*, 342 Ill. App. 3d at 413.[4]

¶ 29 Collateral Estoppel

¶ 30 The defendants also raised collateral estoppel as a basis for dismissing the verified complaint. Collateral estoppel, or issue preclusion, is much narrower than *res judicata* in that it prevents relitigation of issues of law or fact that have previously been litigated and decided in an action that resulted in a final judgment on the merits involving the same parties or their privies. *Du Page Forklift Service, Inc. v. Material Handling Services, Inc.*, 195 Ill. 2d 71, 77-80 (2001)

[4] On appeal, the defendants also argue that the verified complaint violates the policy against claim-splitting – an argument not raised in their motion to dismiss, but in plaintiff 's motion to reconsider, based on a perceived ambiguity in the circuit court ruling. The policy against claim-splitting is an aspect of the law of preclusion that prohibits a plaintiff from suing for part of a claim in one action and then suing for the remainder in another action. *Rein*, 172 Ill. 2d at 340. The *Miner* court concluded that a new set of operative facts arose each month for unpaid rent. *Miner*, 342 Ill. App. 3d at 417. The lack of identity of the causes of action would necessarily defeat the argument that plaintiff was claim-splitting. See *id*.

(rejecting argument that collateral estoppel should apply only to fact determinations); *Schratzmeier v. Mahoney*, 246 Ill. App. 3d 871, 875 (1993) (collateral estoppel precludes the relitigation of "any matter" actually decided in prior claim or cause of action). In contrast to *res judicata*, under collateral estoppel, the judgment in the first suit acts as a bar only to the points or questions that were actually litigated and determined, rather than to matters that might have been litigated and determined but were not. See *LaSalle Bank National Ass'n v. Village of Bull Valley*, 355 Ill. App. 3d 629, 635 (2005).

¶ 31 In this case, for the reasons previously stated, a genuine issue of material fact exists regarding whether plaintiff sought acceleration of the rent in case number 12 M1 727084. As collateral estoppel applies only to the points or questions that were actually litigated and decided in the prior litigation, we conclude the defendants failed to establish collateral estoppel in this case and we cannot affirm the decision of the circuit court on that basis. See *id.*

¶ 32 CONCLUSION

¶ 33 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is reversed and the case is remanded for further proceedings consistent with this order.

¶ 34 Reversed and remanded for further proceedings.