2015 IL App (1st) 142962-U

FIRST DIVISION
July 13, 2015

No. 1-14-2962

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BANK OF AMERICA, N.A., as successor trustee to LaSalle Bank, N.A., as trustee for Morgan Stanley Mortgage Loan Trust 2006-8AR, Plaintiff-Appellee, v. LJUBA PAVLOV and UNKNOWN OWNERS, Defendants, and EMILIA LENKOWICZ, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 11 M1 728652 Honorable Mary Lane Mikva, Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** This forcible entry and detainer case involves possession of property which had previously been awarded through a mortgage foreclosure sale. The trial court correctly entered a judgment of possession against a resident, notwithstanding her defense that the new owner had failed to properly serve a statutory notice upon her 90 days before filing the lawsuit.

¶ 2 In this case, we hold that a new owner who acquires property from a foreclosure sale and who desires to evict nonmortgagor residents living at the property can serve those residents with the 90-day Notice of Intent (90-day notice) formerly required by section 15-1701(h)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/15-1701(h)(5) (West 2012)) by posting. Under the facts presented, posting met the requirements of that law, and the owner showed that it made appropriate, but unsuccessful, efforts to serve notice on the resident by more stringent means.

¶ 3 BACKGROUND

¶ 4 The dispute over the property involved in this case began in 2005 when Metrocities Mortgage, LLC (Metrocities), lent defendant Ljuba Pavlov almost $1,000,000 to purchase a home in Northbrook, Illinois (the Northbrook property). The loan was secured by a mortgage on the property which was duly recorded. In 2007, Metrocities' successor filed a mortgage foreclosure case against Pavlov, alleging that the loan had been delinquent since August 2007. Central Mortgage Co. v. Pavlov, No. 07 CH 33184 (Cir. Ct. Cook Co.). Metrocities recorded a *lis pendens* notice on November 14, 2007, so the public was then on notice that title to the property was subject not only to the mortgage, but also to the foreclosure lawsuit. The court entered a judgment of foreclosure and sale. The property was sold at auction on August 29, 2008, and the case was initially resolved on April 8, 2009, when the court confirmed the 2008 sale and approved the issuance of a deed to the original lender's successor, Bank of America, N.A., as successor trustee to LaSalle Bank, N.A., as trustee to Morgan Stanley Mortgage Loan

Trust 2006-8AR dated April 8, 2009 (Bank of America).[1] That deed was recorded on May 8, 2009.

¶ 5 However, Pavlov filed a timely motion to vacate the confirmation of sale. On August 18, 2009, the court vacated not only the confirmation order, but the prior foreclosure order, as well. The court rescinded the deed to Bank of America and allowed it to file an amended complaint, essentially starting the case over again. Bank of America recorded an amended *lis pendens* notice on October 20, 2009.

¶ 6 On January 20, 2010, the court entered a second order of foreclosure and sale in which the court found that Bank of America had priority over any other claimants or lienholders. On June 30, 2010, the selling officer issued a second deed to Bank of America. On June 22, 2012, the court again terminated the case by entering an order confirming the sale of the property to Bank of America. Along the way, Pavlov apparently paid next to nothing on the mortgage, as the resulting amount due, including interest and costs, had grown to over $1,300,000.

¶ 7 Pavlov's refusal to obey the foreclosure court's possession order and peaceably leave the property resulted in the filing of two other cases that were eventually consolidated in the trial court.

¶ 8 One of the two consolidated cases is not at issue in this appeal, so we only briefly mention it to demonstrate jurisdiction and for background. During the course of the foreclosure case, Pavlov undertook a series of steps apparently aimed at thwarting Bank of America's efforts to acquire the property. Pavlov recorded a series of nonsensical Uniform Commercial Code financing statements against the property naming the "United Nations," the United States of

[1] During the course of this dispute, the loan was transferred several times. The Bank of America trust eventually acquired the loan and became the owner after the second foreclosure sale.

America, State of Illinois, Cook County and other entities, purporting to "return [Metrocities' mortgage] for value." The recorded documents were laden with the hallmark language used by adherents of the "sovereign citizen" movement. See *Parkway Bank v. Korzen*, 2013 IL App (1st) 130380 (denying appeal of foreclosure case grounded in similar tactics).

¶ 9 Also, on December 3, 2008, while the foreclosure case was still pending awaiting confirmation of the first sale to Bank of America, Pavlov quitclaimed the property to an entity named "0416208009 LLC 1" (the LLC), which was named for the real estate tax identification number of the subject property. This deed was recorded May 29, 2009, which was more than 30 days after the foreclosure case first terminated, but while Pavlov's motion to vacate was pending and keeping the foreclosure case alive.

¶ 10 In 2012, two years after title had transferred to Bank of America from the second foreclosure sale, the LLC filed a quiet title lawsuit against a host of persons and entities, including Bank of America, claiming that the LLC had superior title to all the named defendants. The quiet title suit alleged that the foreclosure *lis pendens* notice expired on May 8, 2009 (30 days after entry of the first confirmation order), and since the LLC took title from Pavlov during an interim period before an amended *lis pendens* notice was recorded, it acquired superior title to Bank of America and the other defendants. 0416208009 LLC 1 v. Bank of America, No. 12 CH 25108 (Cir. Ct. Cook Co.). The LLC was represented by the same attorney who represented Pavlov in the foreclosure lawsuit.

¶ 11 The trial court granted summary judgment to Bank of America on its quiet title counterclaim and denied the LLC's cross-motion for summary judgment. The court found that because the original *lis pendens* notice remained in effect at all pertinent times, the LLC's interest was junior to Bank of America's. Even if the *lis pendens* had somehow expired, the

court reasoned, the amended *lis pendens* notice which Bank of America recorded when it amended the complaint related back to the original *lis pendens*. (Additionally, we note, a third reason demonstrating Bank of America's superior title was that the recorded mortgage itself long pre-dated the LLC's acquisition of title.) The court then issued a quiet title order finding that Bank of America had clear valid title to the Northbrook property. No appeal was filed from this order.

¶ 12 The second lawsuit is the one at issue in this appeal. In 2011, Bank of America filed a forcible entry and detainer action against Pavlov and "unknown owners," alleging that they unlawfully withheld possession from the bank. Pavlov never participated in this case. However, a resident, appellant Emelia Lenkiewicz, did appear, represented by the same attorney who had represented the LLC in the quiet title action and Pavlov in the foreclosure case. She immediately filed a motion captioned as a "motion to quash service," although she was not yet a party to the case. The motion asserted that Lenkiewicz had never been served with process, that she lived at the property for two years so Bank of America "could have found her," and that the bank failed to exercise due diligence to identify and serve her. It also stated that Bank of America did not serve her with a 90-day "Notice of Intent" required by section 15-1701(h)(5) of the Code. The motion was supported by a cursory affidavit, in which Lenkiewicz stated that she had been living at the property "with her daughter and others" for two years and that she did not receive the 90-day notice. Bank of America responded by submitting several exhibits and detailed counteraffidavits signed by a special process server and a real estate agent indicating that "the previous homeowner" (Pavlov) twice threatened Bank of America representatives by telephone that she had cameras on the property and she would call the police if anyone came onto the property to attempt to determine who lived there or "make contact with the tenants." In the

second telephone call, Pavlov asserted that Bank of America was "not the rightful owner of the property" and that the Bank should only communicate through her attorney. Notwithstanding these threats, the Bank's materials showed that they had made multiple attempts to determine who, if anyone, was actually occupying the premises and to serve the 90-day notice on an occupant. The affidavits also demonstrated that Lenkiewicz was unknown to Bank of America. The response noted that service by posting was sufficient since it was seeking only possession, and not a money judgment. It suggested that if Lenkiewicz wanted to participate in the case, she should move to intervene. The court denied the "motion to quash."

¶ 13 Now knowing that Lenkiewicz was the mystery resident, Bank of America joined her as a defendant in the forcible entry and detainer case. The forcible entry and detainer case was consolidated into the quiet title case.

¶ 14 Bank of America moved for summary judgment on the forcible case. Through a new attorney, Lenkiewicz filed another motion to dismiss ("final motion to dismiss"), again claiming that she was not provided the 90-day notice. Her motion, filed pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)), was supported only by an unauthenticated copy of the Notice to Vacate that Bank of America had posted on the property in August 2011. In response, Bank of America argued that the Notice to Vacate was properly served by posting because, as the real estate agent's affidavit and related exhibits demonstrated, Lenkiewicz had essentially secreted herself on the property and had, through Pavlov, threatened a police response and a trespass prosecution on anyone who entered upon it to serve her. Additionally, Bank of America argued that service by posting was adequate under the statute. Finally, it argued that the court had already resolved the same issue when it denied the first motion to dismiss.

¶ 15 The court entered a series of orders: (1) granting Bank of America's motion for summary judgment on its counterclaim to quiet title; (2) denying the LLC's motion for summary judgment on its complaint to quiet title; (3) granting Bank of America's motion for summary judgment on the forcible entry and detainer case; (4) denying Lenkiewicz's motion to dismiss the forcible case; (5) quieting title in favor of Bank of America, finding that the interests of various claimants were "illegal and void"; and (6) entering a judgment of possession in favor of Bank of America and against Pavlov, Lenkiewicz, and "all unknown occupants." These orders resolved all pending issues in the consolidated cases. This appeal in the forcible entry and detainer case followed.

¶ 16 ANALYSIS

¶ 17 On appeal, Lenkiewicz, the sole appellant, raises no issue regarding the quiet title lawsuit. She merely challenges the trial court's orders: (1) granting possession in favor of Bank of America on the forcible entry and detainer complaint and (2) denying her section 2-619 motion to dismiss that complaint. Lenkiewicz's challenge to both orders is based on the same single premise: that Bank of America did not properly serve her with a 90-day Notice of Intent required by section 15-1701(h)(5).

¶ 18 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "Where a reasonable person could draw

divergent inferences from undisputed facts, summary judgment should be denied." *Id.* We review a trial court's entry of summary judgment *de novo*. *Id.*

¶ 19 When we review dismissals pursuant to section 2-619 of the Code, we must take the well-pleaded facts in the complaint as true, interpret all pleadings and supporting documents in the light most favorable to the plaintiff, and take all reasonable inferences therefrom. *Wackrow v. Niemi*, 231 Ill. 2d 418, 422 (2008). A court cannot grant a motion to dismiss under this section unless the plaintiff can prove no set of facts that would support a cause of action. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matter which appear on the face of the complaint or are established by external submissions that defeat the plaintiff's claim. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584. We review section 2-619 dismissals *de novo. King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005).

¶ 20 Lenkiewicz presents the same arguments against both the summary judgment order and the order denying her final motion to dismiss. The analysis as to each is the same, so we will address them together. The final motion to dismiss was primarily grounded in the incorrect premise that the 90-day notice was only addressed to Pavlov. However, the copy of the August 25, 2011, notice in the record clearly shows that it was also just as prominently addressed to "Unknown Occupants." The motion is also sloppily drafted in that it is supported merely by the say-so of her attorney and does not even refer to any other pleadings, affidavits, depositions, or other materials to support the numerous factual assertions the attorney makes regarding service of the 90-day notice. Giving Lenkiewicz the benefit of the doubt, we will assume that she intended to rely on the affidavit she submitted in connection with her first motion to dismiss.

Lenkiewicz's affidavit consists of just five substantive sentences, but she does state therein she never received a 90-day notice.

¶ 21 In response to Lenkiewicz's final motion to dismiss, Bank of America responded that the court resolved the issue of proper service two years earlier when the court denied Lenkiewicz's first motion to dismiss. The bank again relied on its counteraffidavits to demonstrate its due diligence and that service of the 90-day notice by posting was proper under the circumstances. Lenkiewicz submitted nothing to contradict the bank's affidavits, and, in particular, never presented anything demonstrating how Bank of America could have served, identified, or found her through the exercise of greater due diligence. See, *e.g.*, *Bank of New York v. Unknown Heirs & Legatees of Hatch*, 369 Ill. App. 3d 472, 475-76 (2006) (requiring plaintiffs to exercise due diligence before serving by publication).

¶ 22 The statute at issue required that someone who acquired title from a foreclosure sale could file a forcible entry and detainer case "against an occupant of the mortgaged real estate until ninety (90) days after a Notice of Intent to file such action has been properly served upon the occupant." 735 ILCS 5/15-1701(h)(5) (West 2012).[2]

¶ 23 As a matter of general policy, it is always preferable to effectuate service by a relatively strict method calculated to ensure the best possible level of notice. However, all that is required is to follow the applicable statute. The statute at issue here did not define "properly served." Many other types of pre-suit notices apply to forcible entry and detainer cases, though, and we look to them for guidance. Lenkiewicz asks that we use section 9-211 of the Code (735 ILCS

[2] The 90-day notice was a temporary requirement created by Public Act 95-933 and eliminated by Public Act 98-514. See Pub. Act 95-933 (eff. Aug. 26, 2008) (amending 735 ILCS 5/15-1701(h)(5) (West 2008)); Pub. Act 98-514 (eff. Nov. 19, 2013) (amending 735 ILCS 5/15-1701(h)(5) (West 2012)). Thus, it was in effect in 2011 when Bank of America filed this forcible entry and detainer case.

5/9-211 (West 2012)) as our touchstone. The delivery methods in that section are "an exhaustive list" that are strictly enforced. *American Management Consultant, LLC v. Carter*, 392 Ill. App. 3d 39, 57 (2009). Section 9-211 provides:

> "Service of demand or notice. Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person of the age of 13 years or upwards, residing on or in possession of the premises; or by sending a copy of the notice to the tenant by certified or registered mail, with a returned receipt from the addressee; and in case no one is in the actual possession of the premises, then by posting the same on the premises." 735 ILCS 5/9-211 (West 2012).

¶ 24 Section 9-211 is in a section of the forcible entry and detainer laws establishing procedures for "joint actions," that is, cases where an owner seeks both possession and a judgment for past due rent. Since this lawsuit does not seek delinquent rent, we agree with Bank of America that the most analogous statutory guidance is found elsewhere, in the general portion of the forcible entry and detainer statute dealing with demands for possession only. Section 9-104 of the Code (735 ILCS 5/9-104 (West 2012)) specifically applies to cases like this, where the resident has no lease. It establishes a more lenient notice procedure, all the more appropriate because no money judgment is sought against the resident. It provides, in part:

> "The demand *** may be made by delivering a copy thereof to the tenant, or by leaving such a copy with some person of the age of 13 years or upwards, residing on, or being in charge of, the

> premises; or in case no one is in the actual possession of the premises, then by posting the same on the premises; *or if those in possession are unknown occupants who are not parties to any written lease, rental agreement, or right to possession agreement for the premises, then by* delivering a copy of the notice, directed to 'unknown occupants,' to the occupant or by leaving a copy of the notice with some person of the age of 13 years or upwards occupying the premises, *or by posting a copy of the notice on the premises directed to 'unknown occupants'*." (Emphasis added.) 735 ILCS 5/9-104 (West 2012).

See also 735 ILCS 5/9-107 (West 2012) (providing that if a forcible entry and detainer plaintiff cannot obtain personal service on an unknown occupant, the plaintiff may file an affidavit stating that the unknown occupant on due inquiry cannot be found, and "notify" the unknown occupant by posting and mailing of notices).

¶ 25 Lenkiewicz has never revealed how she came to reside at the property. Her affidavit does not state she is a tenant, only that she "live[s] there." When considering the validity of service here, we must take into account the unusual nature of the relationship between the plaintiff and the types of "unknown occupants" entitled to the 90-day notice. The occupant's possession may have been facilitated by the mortgagor; her possession may be a subterfuge to allow the mortgagor to also remain at the property as a guest even though the mortgagor has already been evicted; or she can be someone squatting at the property with or without the assistance of the mortgagor. In any of these cases, she has no leasehold interest and is unlikely to cooperate with

respect to receipt of any notices. Lenkiewicz is clearly in privity with Pavlov and the LLC, because they were all originally represented by the same attorney.

¶ 26 In light of the unrefuted assertions in the counteraffidavits, service of the 90-day notice by posting was probably the best Bank of America could do, short of staking out the boundaries of the property with barricades and guards round-the-clock waiting for the moment when Lenkiewicz drove off of the property. Bank of America served the 90-day notice in a manner consonant with both the specific statute governing 90-day notices and the general forcible entry and detainer notice statute. Using section 9-104 as a guide, we find that service by posting is appropriate under the facts of this case.

¶ 27 Bank of America also contends that because the change in the notice requirement relates to a procedural issue, it can be given retroactive effect under authority such as *People v. Glisson*, 202 Ill. 2d 499 (2002). It claims reversing the decision below would create an "absurd result" because the case would be remanded to require service of a notice which state law abolished almost two years ago. However, because we have determined the 90-day notice was properly served, we need not address this alternative argument.

¶ 28 CONCLUSION

¶ 29 For these reasons, the trial court did not err in granting summary judgment to Bank of America, nor in denying Lenkiewicz's motion to dismiss.

¶ 30 Affirmed.