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FIRST DIVISION
July 27, 2015

No. 1-14-3043
2015 IL App (1st) 143043-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LEOTA MENCONI,	)	
	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
STEWART TITLE OF ILLINOIS, STEWART TITLE GUARANTY COMPANY, JOSEPH BERRIOS, as Cook County Assessor, and MARIA PAPPAS, as Cook County Treasurer/ Collector,	)	No. 14 L 3183
	)	
Defendants-Appellees.	)	Honorable
	)	Margaret Brennan,
	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

Held: Trial court improperly granted one defendant's motion to dismiss where the pleadings, when viewed in a light most favorable to plaintiff, stated a viable cause of action for breach of contract against insurance company; trial court properly granted other defendants' motion to dismiss where plaintiff did not state a viable cause of action that she was

> under duress when she made her tax redemption payment.

¶ 1 Plaintiff Leota Menconi appeals from the trial court's dismissal of her complaint against defendants Stewart Title Guaranty Company (Stewart), the Cook County assessor, and the Cook County treasurer (collectively, Cook County defendants), seeking a return of the redemption she paid on her real estate taxes. Plaintiff contends on appeal that the trial court improperly dismissed her complaint because the voluntary payment doctrine does not bar her claims against the Cook County defendants, and she properly stated a cause of action for breach of contract. For the following reasons, we affirm in part and reverse in part.

¶ 2 On March 18, 2014, plaintiff filed her complaint. The following were general allegations in her complaint. Plaintiff was the owner of a parcel of real estate located at 4536 South Cicero in Chicago. She purchased the property on February 26, 2008, with Stewart acting as closing agent for the transaction. On March 28, 2008, a warranty deed for the property was recorded with the recorder of Cook County. Also on March 28, 2008, Stewart issued an Owner's Title Policy.

¶ 3 Plaintiff alleged that on the date of purchase and on the date of recording, the property was classified as "exempt from real estate taxes." On October 5, 2007, the Cook County assessor issued a "Notice of Intent to List Omitted Assessments" for the subject property for the real estate tax years 2003, 2004, and 2005.

¶ 4 On January 17, 2008, the Cook County assessor issued a "Final Result for the 2007 calendar year," which assessed the subject property for the 2003, 2004, and 2005 calendar years. Plaintiff alleged that all notices of intent to list omitted assessments and all final results for the subject property were mailed on October 5, 2007, to Joseph D. Palmisano at 79 West Monroe in Chicago. Plaintiff further alleged that the owner of the subject property on October 5, 2007, was

46th and Cicero, LLC, an Illinois limited liability company with an address of 1940 North Clark in Chicago.

¶ 5 On July 20, 2009, the subject property was sold at public auction by Cook County. Plaintiff alleged that she was never given copies of the notices of intent to list omitted assessments or a final result for the subject property, "at any time prior to February 26, 2008." Plaintiff claimed that she was first made aware of these assessments on the subject property when she received a "Notice of Right to Redeem" in 2012.

¶ 6 Count I of plaintiff's complaint was against Stewart for breach of contract. Plaintiff claimed that Stewart insured her against loss "by reason of certain covered risks" and that Stewart breached its contract of insurance, costing plaintiff $77,950.22.

¶ 7 Count II was a claim against Stewart for negligence. Plaintiff claimed that Stewart undertook a duty to discover and knew or should have known of the omitted assessments for the subject property and the final result assessing the subject property by the Cook County assessor. Plaintiff claimed that Stewart breached its duty by failing to determine the status of the omitted assessments and final result or by failing to disclose them to plaintiff prior to closing. Plaintiff alleged that based on Stewart's breach of duty, it "waived any exception for omitted assessments and induced [plaintiff] to purchase."

¶ 8 Count III was against the Cook County assessor for a refund. Plaintiff claimed that she paid full market value for the subject property and had no notice of the omitted assessments at the time she acquired title to the property. Plaintiff alleged that she was required to redeem the property after it was sold at a tax sale of which she had no notice. She claimed she was entitled to a refund of all funds paid to redeem the real estate from the tax sale by Cook County.

¶ 9 On April 14, 2014, Stewart filed a motion to dismiss alleging that plaintiff's breach of contract claim must fail because it sought to recover for real estate taxes that were assessed in 2008, which was after the date that Stewart issued its insurance policy, and which were specifically excepted from coverage under the policy. Stewart pointed to the portion of the insurance policy that read "ADDITIONAL EXCEPTIONS," which stated, "This policy does not insure against loss or damage * * * which may arise by reason of * * * [g]eneral real estate taxes for the year(s) 2007, 2008 and subsequent years."

¶ 10 Stewart also argued that plaintiff's negligence claims were barred because the alleged negligence occurred more than five years prior, which was beyond the statute of limitations.

¶ 11 The Cook County assessor and Cook County treasurer jointly filed a motion to dismiss, pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). They alleged that the voluntary payment doctrine barred plaintiff's claims because she failed to plead involuntary payment of the redemption as part of her *prima facie* case. Defendants stated that plaintiff admitted to redeeming the real estate taxes, but failed to allege that she did so under protest, and that Illinois courts have held that an allegation of involuntary payment is part of the *prima facie* case of any taxpayer seeking refunds. Defendants further alleged that there was no basis for plaintiff's request for a refund in the statute.

¶ 12 On June 16, 2014, plaintiff filed a first amended complaint, adding certain facts. She alleged that upon receiving the "Notice of Right to Redeem" in May 2012, she made inquiries at various offices in Cook County, but was not provided any information as to how the property was taxed, when its status had changed, how the tax was calculated, or who received notice. Plaintiff alleged that as a result, she was forced to pay the redemption amount or lose her interest

entirely, which she described as an investment of roughly $2 million. The three counts against defendants were substantially the same as those in her original complaint.

¶ 13 On September 3, 2014, a hearing was held on the motions to dismiss. Stewart argued that under *Rhone v. First American Insurance Co.*, 401 Ill. App. 3d 802 (2010), the assessed taxes became a lien on the property in 2008. And the insurance policy attached to the complaint specifically excepts from coverage taxes for 2007, 2008, and subsequent years. Accordingly, Stewart argued that there was no lien or encumbrance on the property as of the date of the issuance of the policy and thus the assessments are excepted from coverage.

¶ 14 Stewart also argued that the negligence claim was time-barred based on the five-year statute of limitations because its policy was issued more than five years before the filing of the complaint.

¶ 15 The Cook County defendants argued that the property at one point had been used for tax-exempt purposes, as it was owned by a church, but that the assessor had the statutory authority to return the property to the tax rolls when it no longer was used for those purposes. The Cook County defendants argued that the assessor issued its notice of intent to list in October 2007, which was four months before plaintiff purchased the property. They argued that the assessor then issued a final result for the tax years of 2003, 2004, and 2005, on January 17, 2008, which was six weeks before plaintiff purchased the property. They stated that plaintiff proceeded with her closing in February 2008, that some four years later she received a right to redeem the property and she voluntarily redeemed her property, and has now filed a claim for a refund. The Cook County defendants contended that she had to show that the payment was involuntary, but she did not file her payment under protest. The Cook County defendants submitted that the taxes were ascertainable in January 2008, at which point in time plaintiff was not the owner of the

property, but that ultimately plaintiff failed to show how she was entitled to a refund of redemption payment from the Cook County defendants.

¶ 16 Plaintiff's counsel contended that *Rhone* actually favored plaintiff because in that case, the omitted taxes became a lien in 2008, and the policy was issued in 2006. The court in *Rhone* held that there was not coverage because the lien came into existence after the policy date. Plaintiff's counsel argued that in the case at bar, the tax liability became a lien on the property in January 2008, and the insurance policy was not issued until March 2008. Thus, the lien existed at the time when the policy was issued.

¶ 17 The trial court stated that it had gone through the briefs, but that "given the clear language in the guaranty concerning what is exempted and what years are exempted, Stewart's motion to dismiss will be granted." As to the Cook County defendants, the trial court stated that it believed that the voluntary payment doctrine applied, and thus granted their motion to dismiss. Plaintiff now appeals.

¶ 18 On appeal, plaintiff contends that the trial court improperly granted defendants' motions to dismiss. We will address each motion individually.

¶ 19 Stewart's Motion to Dismiss

¶ 20 The trial court granted Stewart's motion to dismiss based on the language in Stewart's guaranty concerning which tax years were excepted from the policy. Plaintiff contends that her complaint stated a viable cause of action for breach of contract despite the exceptions listed in the insurance policy. Initially we observe that Stewart's motion to dismiss failed to designate the applicable section of the Code under which it was brought. Meticulous practice dictates that movants clearly state the section of the Code under which a motion to dismiss is brought. *Wheaton v. Steward*, 353 Ill. App. 3d 67, 69 (2004). While failure to properly label a motion to

dismiss is not a pleading practice that should be encouraged, reversal for such a deficiency is appropriate only when prejudice to the nonmovant results. *Id.*

¶ 21 The trial court's order dismissing plaintiff's first amended complaint merely stated that all defendants' motions to dismiss were granted, and did not specify the grounds it relied on in granting the motions to dismiss. However, based on the transcript of the hearing on defendants' motions to dismiss, the trial court granted Stewart's motion based on the wording of the insurance policy. Accordingly, the applicable section is section 2-619(a)(9) of the Code, which admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, but asserts an affirmative matter outside the complaint that bars or defeats the cause of action. 735 ILCS 5/2-619(a)(9) (West 2012). When ruling on a section 2-619(a)(9) motion, the court construes the pleadings in the light most favorable to the nonmoving party, and should only grant the motion if the plaintiff can prove no set of facts that would support a cause of action. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. A section 2-619(a)(9) dismissal is reviewed *de novo*. *Id.*

¶ 22 Both parties rely on *Rhone*, 401 Ill. App. 3d 802, to support their arguments on this issue. In *Rhone*, the plaintiffs closed on their purchase of a townhome on August 31, 2006. The policy insured the plaintiffs against losses caused by any defect in, or lien or encumbrance on, the title as of August 31, 2006, subject to several exceptions to coverage, including "[t]axes, or special assessments which are not shown as existing liens by the public records." However, the insurance company waived those exceptions through an endorsement.

¶ 23 In February 2008, the plaintiffs received two tax bills from the Cook County assessor titled "2007 Omitted Assessment Property Tax Bill," which indicated that the townhome was not assessed as improved land in 2004 and 2005, and sought from the plaintiffs additional

unassessed taxes for those two years. The amount due was for tax year 2007, payable in 2008. The plaintiffs filed a claim against the insurance company seeking a declaration that the title insurance policy covered the unassessed taxes under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)). The trial court granted summary judgment in favor of the insurance company.

¶ 24 On appeal, this court noted that the Property Tax Code (Tax Code) provides that "the taxes upon property *** shall be a prior and first lien on the property *** from and including the first day of January in the year in which the taxes are levied." 35 ILCS 200/21-75 (West 2008). "Thus, property owners are issued a tax bill at the beginning of each year for taxes owed for the preceding year; pursuant to the Tax Code, the tax bill is a lien as of January 1 of the year in which it is assessed." *Rhone*, 401 Ill. App. 3d at 806. This court noted that as a safeguard against unforeseen additional taxes, " 'the legislature has provided that no charge for tax for previous years shall be made against any property prior to the date of ownership of the person owning such property at the time the liability for such omitted tax was ascertained.' " *Id*. (quoting *People ex rel. McDonough v. Birtman Electric Co.*, 359 Ill. 143, 145 (1934)).

¶ 25 Upon receipt of the "2007 Omitted Assessment Property Tax Bill", the plaintiffs paid the unassessed taxes and then sought indemnification from the insurance company. This court held that "had the unassessed taxes given rise to the liens at the time of closing, the insurance company would bear the duty to discover such liens. However, as we made clear, no liens for unassessed taxes would have existed at the time of closing." *Rhone*, 401 Ill. App. 3d at 811. This court concluded that a "property tax bill arising from a reassessment is a tax lien in the year the tax is levied pursuant to the Tax Code; the previously unassessed taxes do not constitute an encumbrance on the title before the tax is levied." *Id*. at 814. The court continued, stating

"unassessed property taxes cannot constitute an encumbrance on title at any point before the tax is levied pursuant to statute, at which point the tax constitutes both a lien and an encumbrance, as each term is used in a title insurance policy." *Id*. at 814-15.

¶ 26 In the case at bar, plaintiff contends that because the unassessed taxes were levied sometime in 2008, despite the fact that they were levied after she closed on the property, they constituted a lien on the property on January 1, 2008. Plaintiff argues that because the unassessed taxes became a lien on the property on January 1, 2008, and she did not close on the property until March 28, 2008, Stewart had the duty to discover the lien. See *Rhone*, 401 Ill. App. 3d at 811 (had the unassessed taxes given rise to the liens at the time of closing, insurance company would bear the duty to discover such liens).

¶ 27 Stewart admits that once levied, the taxes became a lien on the property effective as of January 1 of the levy year, 2008. However, Stewart argues that as of the date the policy was issued, the omitted taxes were not yet due and payable because they were not levied until after plaintiff's deed was recorded on March 28, 2008, the effective date of the policy, and thus it did not have a duty to discover the unassessed taxes. See *Rhone*, 401 Ill. App. 3d at 814-15 (unassessed property taxes cannot constitute an encumbrance on title at any point before the tax is levied pursuant to statute, at which point the tax constitutes both a lien and an encumbrance, as each term is used in a title insurance policy).

¶ 28 The problem here is that the circumstances are slightly different than those present in *Rhone*. In *Rhone,* the unassessed taxes were levied sometime in 2008, and the court stated "[w]e hold by operation of the Tax Code, the bills regarding the unassessed taxes acquired status as tax liens on January 1, 2008", and that therefore the additional tax bills could not have constituted an encumbrance on the title on or before August 31, 2006, which was the date of closing.

¶ 29 In the case at bar, the unassessed taxes likewise acquired status as tax liens on January 1, 2008. However, instead of the closing date occurring before January 1, 2008, the closing date occurred on March 28, 2008. Accordingly, the question becomes whether the unassessed taxes, although levied after the closing date, were discoverable before the closing date. *Rhone* does not answer this question.

¶ 30 Stewart maintains that even if the unassessed taxes were discoverable and constituted a lien at the time of closing, the policy specifically lists such taxes as exceptions from coverage, stating "[t]his policy does not insure against loss or damage *** which may arise by reason of *** [g]eneral real estate taxes for the year(s) 2007, 2008 and subsequent years." Stewart maintains that although the unassessed taxes were *for* the years 2003 through 2005, they were not levied against plaintiff until 2008, a year that Stewart specifically excepted from its coverage. In support of this proposition, Stewart relies on the Rhone court's statement that omitted taxes "constitute[] liens *in* the year in which they were levied *** rather than the years *for* which they were levied *** ." *Rhone*, 401 Ill. App. 3d at 807. However, we are not convinced by this argument. While *Rhone* certainly stands for the proposition that omitted taxes constitute liens in the year in which they were levied, the language of Stewart's policy states that general taxes *for* the year 2008 are excepted from coverage. It is silent as to taxes for the years 2004 and 2005. We cannot definitively say that omitted taxes for the years 2004 and 2005, although levied in 2008 and therefore a lien on the property in 2008, constitute general taxes *for* the year 2008 and therefore qualify as an exception under the insurance policy. Any ambiguities in an insurance policy are to be construed against the insurer and in favor of the insured. See *Butera v. Attorneys' Title Guaranty Fund, Inc.*, 321 Ill. App. 3d 601, 604 (2001) (because a title policy is drawn by the insurer, ambiguities and uncertainties in the policy are construed in favor of the

insured). Accordingly, we find that granting Stewart's motion to dismiss was not appropriate. See *Reynolds*, 2013 IL App (4th) 120139, ¶ 31 (when ruling on a section 2-619(a)(9) motion, the court should construe all pleadings in the light most favorable to the nonmoving party and only grant the motion if the plaintiff can prove no sets of facts that would support a cause of action).

¶ 31 Cook County Defendants' Motion to Dismiss

¶ 32 The trial court granted the Cook County defendants' section 2-615 (735 ILCS 5/2-615 (West 2012)) motion to dismiss based on the voluntary payment doctrine. Plaintiff now argues that the voluntary payment doctrine does not apply because the redemption payment she made did not constitute a tax. Alternatively, she argues that if it did constitute a tax, such payment was made under duress, or that she had no basis to challenge the tax at the time she paid redemption.

¶ 33 A section 2-615 motion tests the legal sufficiency of the complaint based on defects apparent on its face. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25. A section 2-615 motion presents the question of whether the facts alleged in the complaint viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted. *Id*. "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall v. Burger King Corp*., 222 Ill. 2d 422, 429 (2006). A section 2-615 motion dismissal is reviewed *de novo*. *Id*.

¶ 34 The voluntary payment doctrine is "simply that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the sole ground that the claim was illegal." *West Suburban Hospital Medical Center v. Hynes*, 173 Ill. App. 3d 847, 855 (1988). "In Illinois it is the general rule that

a taxpayer may not recover taxes which have been paid voluntarily." *Goldstein Oil Co. v. Cook County*, 156 Ill. App. 3d 180, 182 (1987). Plaintiff contends that this general rule does not apply to her because she did not pay a tax, but rather a redemption payment. However, this court has analyzed redemption payments pursuant to the voluntary payment doctrine. See *West Suburban*, 173 Ill. App. 3d at 855 (voluntary payment doctrine found to be inapplicable because the hospital was compelled to redeem its property). See also *Gofis v. Cook County*, 324 Ill. App. 3d 407 (2001) (neither the county nor the treasurer compelled plaintiffs to fail to pay their taxes, so voluntary payment doctrine applied). Accordingly, we find that that the voluntary payment doctrine applies.

¶ 35 Plaintiff argues that if the voluntary payment doctrine applies, then she made such payment under duress. Taxes will be deemed to have been paid involuntarily if: (1) the taxpayer lacked knowledge of the facts upon which to protest the taxes at the time he or she paid the taxes, or (2) the taxpayer paid the taxes under duress. *Geary v. Dominick's Finer Foods, Inc.*, 129 Ill. 2d 389, 393 (1989). Plaintiff contends, relying on *Geary*, that she made her payment under duress because she risked the loss of an entire investment property if she did not make the payment. In *Geary*, the plaintiffs filed a class action challenging taxes on women's sanitary products. The court found that duress precluded the application of the voluntary payment doctrine due to the nature of the products. The court found that these products constituted "necessities of life" for a significant portion of women and that no similar alternative products existed. *Geary*, 129 Ill. 2d at 398. The court found that the plaintiffs sufficiently plead duress in their complaint where they had no meaningful choice but to pay the taxes. *Id*. at 408.

¶ 36 Here, plaintiff cannot show that she would have been deprived of an essential service or a necessity if she did not make the redemption payment. She cites to no cases that state an

investment property constitutes a "necessity[y] of life." Accordingly, we find that plaintiff's claim of duress would not preclude the application of the voluntary payment doctrine.

¶ 37 Plaintiff contends, however, that even if she did not make the payment under duress, she had no basis upon which to protest the tax at the time the redemption was paid. Plaintiff contends that she had no notice of the tax sale, she was never given notice of the tax bills for the years at issue, and that all prior notices of omitted assessments and final results were given to third parties. While payment under protest is the typical means by which a taxpayer signifies her contention that a tax is improper, the absence of a protest alone does not require application of the voluntary payment doctrine. *Getto v. City of Chicago*, 86 Ill. 2d 39, 49 (1981). The voluntary payment doctrine does not apply unless it is shown that the taxpayer had knowledge of the facts upon which to frame a protest. *Id*. Plaintiff argues, relying on *Illinois Institute of Technology v. Rosewell*, 137 Ill. App. 3d 224 (1985), that if she had knowledge of the basis for delinquent taxes, she could have protested them.

¶ 38 In *Rosewell*, an educational institution sought a refund from the county and its officials of excess real estate taxes paid on exempt property. The circuit court initially ordered a refund, but later found that the voluntary payment doctrine barred the institution from receiving a refund. The institution appealed, arguing that it lacked knowledge of facts upon which to frame its protest, and thus the voluntary payment doctrine did not apply. The court noted that the institution had received notice of a significant increase in the assessed valuation of its property, but the property record cards which contained the basis for calculating the increased assessments were maintained by the defendants but were not made available for plaintiff's inspection. The court found that without the information contained in the record cards, the institution lacked knowledge of the facts upon which to frame a protest. *Rosewell*, 137 Ill. App. 3d at 226.

¶ 39 However, the court in *Goldstein Oil Company v. Cook County*, 156 Ill. App. 3d 180 (1987), distinguished *Rosewell*. It noted that while the plaintiff in *Rosewell* had attempted to ascertain the basis of the tax but was unable to do so because it was unable to obtain the permanent record card which contained the information it required, the plaintiff in *Goldstein* reflected no effort to obtain the relevant information which was available. *Goldstein*, 156 Ill. App. 3d at 186.

¶ 40 In the case at bar, plaintiff alleged in her first amended complaint that upon receiving the notice of right to redeem in May of 2012, she "made due inquiry at various offices in Cook County, Illinois, including those of the Assessor and Treasurer/Collector, but was not provided any information as to how the property was taxed, when its status was changed, how the tax was calculated, or who received notice." However, we note that in order to survive a motion to dismiss pursuant to section 2-615, a complaint must be both legally and factually sufficient. *Edelman, Combs & Latturner v. Hinshaw & Culbertson*, 338 Ill. App. 3d 156, 167 (2003). "Illinois is a fact-pleading jurisdiction." *Id*. Conclusions of fact are insufficient to state a cause of action regardless of whether they generally inform the defendant of the nature of the claim against it. *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 519-20 (1989). Rather, under Illinois fact pleading, the pleader is required to set out ultimate facts that support his or her cause of action. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 22. Here, plaintiff failed to allege in her first amended complaint who she spoke to in the "various offices," on what dates, what those individuals told her, and what specifically prevented her from gaining access to the information she sought. Accordingly, we find that plaintiff did not plead a lack of knowledge from which to base her protest with enough specificity as required to survive a section 2-615

motion to dismiss. We therefore find that the trial court's grant of the Cook County defendants' motion to dismiss was appropriate in this case.

¶ 41 For the foregoing reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County.

¶ 42 Affirmed in part; reversed in part.