2015 IL App (4th) 140303-U

NO. 4-14-0303

FILED
February 24, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

DAVID V. DORRIS and LEIGH ANNE DORRIS,	)	Appeal from
Plaintiffs-Appellees,	)	Circuit Court of
v.	)	McLean County
STACEY LYNCH-FORTIER,	)	No. 12LM348
Defendant-Appellant.	)	
	)	Honorable
	)	Michael L. Stroh,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in allowing plaintiffs to recover unpaid rent as part of their complaint for possession brought pursuant to the Forcible Entry and Detainer Act.

¶ 2 In May 2012, plaintiffs, David V. Dorris and Leigh Anne Dorris, filed a complaint against defendant, Stacey Lynch-Fortier, pursuant to the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 to 5/9-321 (West 2012)), seeking (1) possession of a house they rented to defendant and (2) damages for unpaid rent. The trial court granted possession to plaintiffs and entered a judgment against defendant in the amount of $35,546.

¶ 3 Defendant appeals, arguing the trial court erred where (1) plaintiffs were barred from recovering rent under the Act and (2) it ignored the statute of frauds in awarding plaintiffs more than 12 months' rent. We affirm.

¶ 4 I. BACKGROUND

¶ 5 On July 1, 2009, David Dorris, an attorney and partner at the Dorris Law Firm, and his wife, Leigh Anne Dorris, purchased a house in Bloomington, Illinois. Defendant, who had been renting the house from its prior owner, is the sister of plaintiff Leigh Anne Dorris and the sister-in-law of plaintiff David Dorris. According to plaintiffs, on August 1, 2009, defendant entered into an oral lease agreement to rent the house from plaintiffs on a month-to-month basis at a rate of $2,539 per month. Defendant is an attorney and, at the time, worked as a partner at David's law firm.

¶ 6 On March 26, 2012, plaintiffs served defendant with a 30-day notice to terminate the parties' lease agreement. Defendant did not vacate the premises and on May 4, 2012, plaintiffs filed a complaint for forcible entry and detainer against defendant, seeking, *inter alia*, possession of the property and past-due rent. Plaintiffs alleged defendant "failed to pay rent in the amount of $2,539 per month, for June 2011, July 2011, August 2011, September 2011, October 2011, November 2011, December 2011, January 2012, February 2012, March 2012, April 2012, and May 2012." As of May 4, 2012, the amount of rent due and owing was $30,468. Plaintiffs requested a judgment against defendant for $30,468 plus any rent payments due after May 4, 2012.

¶ 7 On September 5, 2012, defendant filed her amended answer to plaintiffs' complaint, denying the existence of a lease agreement or that she failed to pay rent. According to defendant's answer, because "there was never a lease agreement, oral or written, between the parties," there could not be a lease violation. Defendant also argued the lack of any lease

agreement, as well as plaintiffs' failure to mitigate their damages, were affirmative defenses to plaintiffs' complaint.

¶ 8 On August 9, 2012, the trial court held a bench trial on the issue of possession. Following the presentation of evidence by both parties, the court found in favor of plaintiffs and ordered defendant to vacate the premises. The issue of possession is not at issue on appeal.

¶ 9 On June 12, 2013, the trial court held a bench trial on the issue of damages. During the hearing, Patrick D. Busch, the president of Heartland Bank and Trust Company, testified on plaintiffs' behalf. Busch testified defendant inquired about financing to purchase the house at issue, which she had been renting from Dr. Jerald Bratberg. Dr. Bratberg was selling the house and defendant did not want to move. However, Busch told defendant he could not provide her with financing due to her very poor credit score.

¶ 10 David Dorris, who had accompanied defendant to the bank, testified he was surprised by how harsh Busch had been with her. David told Busch they "had to do something. [Defendant] has got to have a place to live. She works for me. She is my sister-in-law. We have got to find a way to keep her in that house." After Busch advised David not to cosign a note for defendant, they discussed the possibility of plaintiffs purchasing the house and renting it to defendant. According to David, defendant could continue to live there until she was able to obtain financing to purchase it herself. Plaintiffs purchased the house for $345,000, with a down payment of approximately $69,000. David testified he believed Dr. Bratberg had been charging defendant $2,000 per month to rent the house. David told defendant he would "figure out a way" to increase her monthly partnership draw from the law firm to make up for the increase in rent. The monthly rent amount was set at $2,539, which was the approximate amount of the monthly

mortgage. It is undisputed the parties did not have a written agreement memorializing this arrangement. However, plaintiffs introduced into evidence copies of a series of monthly checks written over a 19-month period from defendant to David for $2,539 each.

¶ 11 Jill Kallestad, an employee of the Dorris Law Firm, testified she would receive a check from defendant each month to give to David Dorris. According to Kallestad, defendant referred to those payments as "rent checks."

¶ 12 Plaintiffs also introduced into evidence defendant's April 26, 2011, application to the Internal Revenue Service (IRS) to make installment payments for taxes she owed. The application listed defendant's various assets and expenses, including housing costs. Defendant's signature on the application appeared below a certification, which stated, "Under penalties of perjury, I declare that to the best of my knowledge and belief this statement of assets, liabilities, and other information is true, correct, and complete." Attached to that application was an affidavit signed by David Dorris stating the following regarding defendant's housing costs: "The agreement between [plaintiffs] and [defendant] is an oral month to month agreement and requires that [defendant] pay as rent the sum of $2,539.00 per month." The affidavit was admitted into evidence over defendant's objection.

¶ 13 At the close of plaintiffs' case, defendant filed a motion for a directed finding. Defendant argued section 9-201 of the Act sets forth the only five scenarios in which a landlord may recover unpaid rent in conjunction with a forcible entry and detainer complaint and none of those situations existed in this case. Plaintiffs responded a claim for rent may be joined in a complaint for forcible entry and detainer pursuant to section 9-106 of the Act. According to plaintiffs' argument, section 9-201 only applied to certain limited scenarios where a landowner

could make a claim for rent in the absence of a specific agreement for payment. The trial court reserved its ruling on defendant's motion and allowed the parties to submit briefs on the issue at a later date. The parties had no objection to this procedure.

¶ 14 Defendant testified David had actually purchased the home for her as compensation for work she had performed for the firm. According to defendant's testimony, "[t]he $70,000 [(referring to the down payment amount)] was payment to me, but [David] was going to put it as a down payment on the house. But it was my understanding it was my money, my compensation, my house." Defendant explained David "didn't like my husband at all. And we were going through a divorce. So when—at some point when that was all said and done, we were going to put the house fully in my name. But this was Dave's way of protecting this $70,000 from my husband." Defendant admitted writing checks to David but maintained they were mortgage payments and not rent checks. Defendant also admitted submitting David's affidavit to the IRS as part of her application for installment payments but stated its contents were untrue and she only submitted it because David "forced" her to do so.

¶ 15 On rebuttal, David testified he encouraged defendant to work with the IRS regarding her tax debt. David explained he had his own tax issue and had also submitted an installment-payment application but emphasized defendant had her own personal responsibility to the IRS. According to David's testimony, he provided the affidavit for defendant after the IRS questioned the amount of rent defendant was actually paying per month. David testified defendant was present when he dictated the affidavit and "knew what it was." According to David, the affidavit was provided to protect defendant from the IRS and was of no benefit to

him. David also testified when defendant was able to obtain her own financing on the house, he did not plan to ask for his $70,000 down payment back.

¶ 16 In its detailed September 19, 2013, order, the trial court first addressed defendant's motion for a directed finding and found the following:

> "The defendant relies on Section 9-201 of the [Act]. The defendant believes that section 9-201 sets forth the only instances when rent may be recovered. As the court inferred [during the hearing,] this interpretation seems to fly in the face of common practice under the Act. The court is more persuaded by the plaintiff[s'] argument that [section] 9-201 addresses additional circumstances beyond those addressed in section 9-106. *** Therefore, the defendant's motion for [a] directed [finding] is denied."

¶ 17 Turning to the merits, the trial court determined it was clear from the evidence presented an oral contract for a month-to-month lease of the house existed and the rental rate was $2,539 per month. The court found defendant had breached the parties' agreement by failing to pay rent for a period of 14 months. Accordingly, the court awarded plaintiffs $35,546 in damages for the unpaid rent.

¶ 18 On October 15, 2014, defendant filed a motion to reconsider, arguing the trial court's ruling on her motion for a directed finding was erroneous where plaintiffs failed to prove any of the specific instances in which rent may be recovered under section 9-201 of the Act. Defendant also argued, "[t]he judgment entered against defendant represents 14 months on an 'oral' lease which is contrary to the statute of frauds."

¶ 19 Following a March 18, 2014, hearing, the trial court denied defendant's motion to reconsider.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant argues the trial court erred in finding for plaintiffs where (1) they were barred from recovering rent under the Act and (2) the court ignored the statute of frauds in awarding plaintiffs more than 12 months' rent.

¶ 23 A. Recovery of Unpaid Rent Under the Act

¶ 24 "The common law permitted an individual who was rightfully entitled to enter upon land to do so with force and arms and retain possession by force." *Heritage Pullman Bank v. American National Bank & Trust Co. of Chicago*, 164 Ill. App. 3d 680, 686, 518 N.E.2d 231, 236 (1987). The Act ended the practice of self-help and provides the sole means for settling a dispute over possession rights to real property. *Heritage Pullman Bank*, 164 Ill. App. 3d at 686, 518 N.E.2d at 236; *Yale Tavern, Inc. v. Cosmopolitan National Bank*, 259 Ill. App. 3d 965, 971, 632 N.E.2d 80, 85 (1994). While "[m]atters not germane to the issue of possession may not be litigated in a forcible entry and detainer action" (*Yale Tavern, Inc.*, 259 Ill. App. 3d at 971, 632 N.E.2d at 85), "a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due." 735 ILCS 5/9-106 (West 2012).

¶ 25 We review the denial of a motion for a directed finding *de novo*. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 37, 983 N.E.2d 414. Defendant's argument on appeal involves the interpretation of statutory law, which we also review *de novo*. *In re Estate of Lower*, 365 Ill. App. 3d 469, 478, 848 N.E.2d 645, 653 (2006). When construing a statute, this

court's primary objective is to ascertain and give effect to the intent of the legislature. *Barragan v. Casco Design Corp.*, 216 Ill. 2d 435, 441, 837 N.E.2d 16, 21 (2005). "The best indication of legislative intent is the language used in the statute, which must be given its plain and ordinary meaning." *Gillespie Community Unit School District No. 7 v. Wight & Co.*, 2014 IL 115330, ¶ 31, 4 N.E.3d 37. Words and phrases should not be viewed in isolation, but should be considered in light of other relevant provisions of the statute. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 320, 789 N.E.2d 1248, 1252 (2003). "In doing so, we may consider the statute's context, reading the provision at issue in light of the entire section in which it appears, and the Act of which that section is a part." *People v. Lloyd*, 2013 IL 113510, ¶ 25, 987 N.E.2d 386 (citing *People v. Jones*, 214 Ill. 2d 187, 193, 824 N.E.2d 239, 242 (2005) and *In re Marriage of Mathis*, 2012 IL 113496, ¶ 20, 986 N.E.2d 1139).

¶ 26 Defendant argues the trial court erred in awarding plaintiffs rent where the complaint was filed pursuant to the Act, which, according to defendant, only allows for the recovery of rent in five scenarios, none of which are applicable here. However, a plain reading of the Act shows defendant's interpretation is incorrect. While it is true section 9-201 of the Act prescribes five situations involving the recovery of rent, that section pertains to the recovery of rent where the traditional landlord-tenant relationship does not exist. Specifically, section 9-201 states:

> "The owner of lands, his or her executors or administrators, may sue for and recover rent therefor, or a fair and reasonable satisfaction for the use and occupation thereof, by a civil action in any of the following instances:

1. When rent is due and in arrears on a lease for life or lives.

2. When lands are held and occupied by any person without any special agreement for rent.

3. When possession is obtained under an agreement, written or verbal, for the purchase of the premises, and before a deed is given the right to possession is terminated by forfeiture or non-compliance with the agreement, and possession is wrongfully refused or neglected to be given upon demand, made in writing, by the party entitled thereto. All payments made by the vendee, or his or her representatives or assigns, may be set off against such rent.

4. When land has been sold upon a judgment of court, when the party to such judgment or person holding under him or her, wrongfully refuses or neglects to surrender possession of the same, after demand, in writing, by the person entitled to the possession.

5. When the lands have been sold upon a mortgage or trust deed, and the mortgagor or

> grantor, or person holding under him or her, wrongfully refuses or neglects to surrender possession of the same, after demand, in writing, by the person entitled to the possession." 735 ILCS 5/9-201 (West 2012).

¶ 27 An examination of the Act as a whole shows section 9-201 sets forth a narrow category of unique scenarios dealing with situations where no traditional landlord-tenant relationship exists, *i.e.*, it provides an alternative basis to recover rent when there is no rental agreement. It does not, as defendant argues, expressly prohibit a landlord from seeking rent pursuant to a lease agreement under the Act. Indeed, other sections of the Act expressly allow for a plaintiff to join a claim for rent to a claim for possession. Notably, section 9-201 is not referenced as a limitation by these other sections. For example, section 9-106 clearly states a claim for rent may be joined in a forcible entry and detainer complaint. That section, entitled "Pleadings and evidence," provides the following:

> "On complaint by the party or parties entitled to the possession of such premises being filed in the circuit court for the county where such premises are situated, stating that such party is entitled to the possession of such premises (describing the same with reasonable certainty), and that the defendant (naming the defendant) unlawfully withholds the possession thereof from him, her or them, the clerk of the court shall issue a summons.

> The defendant may under a general denial of the allegations of the complaint offer in evidence any matter in defense of the action. Except as otherwise provided in Section 9-120 [(dealing with leased premises used in furtherance of a criminal offense)], no matters not germane to the distinctive purpose of the proceeding shall be introduced by joinder, counterclaim or otherwise. *However, a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent found due.*" (Emphasis added.) 735 ILCS 5/9-106 (West 2012).

¶ 28 Likewise, section 9-209 of the Act plainly states a landlord may pursue both a claim for possession *and* unpaid rent in a forcible entry and detainer complaint. *Brannen v. Seifert*, 2013 IL App (1st) 122067, ¶ 49, 1 N.E.3d 1096 (citing *Campana Redevelopment, LLC v. Ashland Group, LLC*, 2013 IL App (2d) 120988, ¶ 14, 993 N.E.2d 1095). Section 9-209, entitled, "Demand for rent—Action for possession" states, in relevant part, the following:

> "A landlord or his or her agent may, any time after rent is due, demand payment thereof and notify the tenant, in writing, that unless payment is made within a time mentioned in such notice, not less than 5 days after service thereof, the lease will be terminated. If the tenant does not within the time mentioned in such notice, pay the rent due, the landlord may consider the lease ended, and sue for the possession under the statute in relation to forcible entry and detainer, or maintain ejectment without further notice or demand. *A claim for*

*rent may be joined in the complaint *** and a judgment obtained for the amount of rent found due, in any action or proceeding brought, in an action of forcible entry and detainer for the possession of the leased premises, under this Section.*" (Emphasis added.) 735 ILCS 5/9-209 (West 2012).

¶ 29 While section 9-209 of the Act contains certain notice requirements, neither section 9-209 nor section 9-106 is limited, expressly or otherwise, by the language contained in section 9-201. Accordingly, section 9-201 does not function to prohibit a landlord from seeking unpaid rent pursuant to a lease agreement in a claim brought under the Act. In construing a statute, "[e]ach word, clause and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous." *Prazen v. Shoop*, 2013 IL 115035, ¶ 21, 998 N.E.2d 1 (citing *Chicago Teachers Union, Local No. 1 v. Board of Education of the City of Chicago*, 2012 IL 112566, ¶ 15, 963 N.E.2d 918). Defendant's interpretation, which implies rent may never be recovered in a traditional landlord-tenant situation under the Act, would impermissibly render the parts of sections 9-106 and 9-209 allowing for the recovery of rent superfluous. As a result, defendant's argument fails.

¶ 30 B. Statute of Frauds

¶ 31 Defendant argues the trial court erred by ignoring the statute of frauds. Specifically, defendant contends "[t]he statute of frauds is implicated in this case" because plaintiffs' complaint requested "a judgment for an amount over 12 months." Defendant maintains "[t]he agreement should have been in writing and because it is not, the trial court's award of rent for an amount that represented over 12 months was incorrect."

¶ 32 Section 2 of the statute of frauds provides the following:

> "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." 740 ILCS 80/2 (West 2012).

¶ 33 However, as plaintiffs correctly point out, the statute of frauds is an affirmative defense, which must be specifically pleaded by the party raising it. *Chapman v. Brokaw*, 225 Ill. App. 3d 662, 665, 588 N.E.2d 462, 465 (1992); *Harmon Insurance Agency, Inc. v. Thorson*, 226 Ill. App. 3d 1050, 1052, 590 N.E.2d 920, 921 (1992) ("Section 2-613(d) of the Code of Civil Procedure requires that affirmative defenses, including the [s]tatute of [f]rauds, must be plainly set forth in the answer."). Where, as here, the party fails to plead the statute of frauds, the defense is waived and cannot be considered. *Harvey v. McKinney*, 221 Ill. App. 3d 140, 142, 581 N.E.2d 786, 788 (1991); *Haas v. Cravatta*, 71 Ill. App. 3d 325, 328, 389 N.E.2d 226, 229 (1979) (statute of frauds cannot be considered *sua sponte* by the trial court where is has not been specifically pleaded). This is true even where the evidence suggests the existence of the defense. *McKinney*, 221 Ill. App. 3d at 142, 581 N.E.2d at 788; *Shugan v. Colonial View Manor*, 107 Ill. App. 3d 458, 464, 437 N.E.2d 731, 736 (1982) (statute of frauds does not act *sua sponte* to invalidate oral contracts).

¶ 34 While defendant argues waiver is inapplicable here because she presented the

statute of frauds defense to the trial court in her motion to reconsider, "[a]ffirmative defenses raised for the first time in a motion for reconsideration are considered waived." *Harmon Insurance*, 226 Ill. App. 3d at 1052, 590 N.E.2d at 921. Here, defendant failed to properly plead the statue of frauds as an affirmative defense. Accordingly, the court did not err in declining to consider it.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment.

¶ 37 Affirmed.