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FIFTH DIVISION  
January 22, 2016

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CHICAGO TITLE LAND TRUST COMPANY,	)	Appeal from the
as Trustee u/t/a Dated August 16, 2012, and Known	)	Circuit Court of
as Trust No. 8002360055,	)	Cook County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12 CH 34758
	)	
PAUL R. IVERSON, Personally and Individually	)	
and as Trustee of a Trust Agreement Dated	)	
March 25, 2008, and Known as Trust No. 2926,	)	
RE-VISION INVESTMENT, LLC, an Illinois	)	
Limited Liability Company, MARTA WIDALSKI,	)	
and JOHN D. ZYBURT,	)	The Honorable
	)	Franklin U. Valderrama,
Defendants-Appellees.	)	Judge Presiding.

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

**ORDER**

¶ 1 *HELD:* The quiet title action was properly dismissed where plaintiff failed to establish actual possession of the subject property.

¶ 2 Plaintiff, Chicago Title Land Trust Company, as trustee u/t/a dated August 16, 2012, and known as trust number 8002360055, appeals the dismissal of its claim to quiet title pursuant to

section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)) in favor of defendant, Re-Vision Investment, LLC (Re-Vision). Plaintiff contends the trial court erred in finding it was not in actual possession of the subject property and, therefore, could not bring a quiet title claim. Based on the following, we affirm.

¶ 3

#### FACTS

¶ 4 This case involves a dispute over title to a property located at 2925 N. Wisner in Chicago, Illinois. Plaintiff filed its original complaint on September 13, 2012, seeking, in relevant part, to quiet title, for declaratory judgment, and for money damages. In its original complaint, plaintiff claimed title to the subject property pursuant to a quit claim deed in trust dated August 16, 2012, and recorded on August 17, 2012, as document number 1223016165. According to plaintiff, brothers Henry Zyburt and John A. Zyburt acquired title and ownership to the subject property as joint tenants in August 1956. However, upon the December 13, 1964, death of Henry, John A. became the sole title holder to the property. John A. died intestate on November 24, 1991, leaving his widow and two sons as heirs. When John A.'s widow subsequently died, the two sons, Robert and John D., became tenants in common. Plaintiff claim John D. conveyed his interest in the property to plaintiff in August 2012. The complaint, however, also provided that "Robert Zyburt is not deceased and is an occupant of the subject property."

¶ 5 Plaintiff's original complaint additionally provided that, on March 25, 2008, defendant Paul Iverson forged a deed to the subject property whereby Henry and John A., both then deceased,<sup>1</sup> conveyed the property to a land trust in his name. The land trust was not recorded until March 9, 2011, as document number 1106854000 (Iverson Trust). Thereafter, on July 2, 2012, the Iverson Trust assigned its alleged interest in the subject property to Braddock Investment Group. Then, by trustee's deed dated July 3, 2012, and recorded on August 7, 2012,

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<sup>1</sup> According to plaintiff, Henry died on December 13, 1964, and John died on November 24, 1991.

Braddock Investment Group, with Phillip Forano as the named trustee, conveyed the subject property to defendant Re-Vision.

¶ 6 Iverson, who is not a party to this appeal, filed a section 2-615 motion to dismiss, *inter alia*, plaintiff's quiet title action in the original complaint. The circuit court granted the motion.

¶ 7 Plaintiff filed a first amended complaint on April 23, 2013, alleging claims to quiet title, for slander of title against Iverson, and for declaratory judgment, and seeking money damages. In the quiet title claim, plaintiff again provided that "Robert Zyburt is not deceased and is an occupant of the subject property." In response, Re-Vision filed a section 2-615 motion to dismiss, arguing that plaintiff could not state a cause of action to quiet title because it did not have, and never did have, actual possession of the subject property. Re-Vision additionally alleged the complaint must be dismissed because plaintiff failed to join Robert as a necessary party. Before the circuit court ruled on Re-Vision's motion, plaintiff moved for leave to substitute counsel and for leave to file a second amended complaint. Leave was granted on both requests.

¶ 8 On September 23, 2013, plaintiff filed its second amended complaint, alleging claims to quiet title, for slander of title, for breach of duty as a notary against Marta Widalski, who is not a party to this appeal, as the notary responsible for verifying and confirming the signatures associated with the Iverson deed, and for declaratory judgment. In the quiet title claim, plaintiff provided that Robert died in April 2013 and John D "continue[d] to reside on the property with plaintiff's permission." Re-Vision responded by filing a section 2-615 motion to dismiss, again arguing that plaintiff could not state a claim to quiet title where it never had actual possession of the subject property. Re-Vision additionally argued that the second amended complaint was subject to dismissal because it failed to name John D. as a necessary party. The circuit court

agreed, dismissing the quiet title count and instructing plaintiff to join John D. as a party defendant in its third amended complaint.

¶ 9 Then, on February 14, 2014, plaintiff filed its third amended complaint, realleging the previous four causes of action and adding a claim, in the alternative, for ejectment against John D. Re-Vision again filed a section 2-615 motion to dismiss. The motion was granted by the circuit court, thereby dismissing the quiet title claim, the declaratory judgment claim, and the ejectment claim.

¶ 10 Finally, on October 1, 2014, plaintiff filed its fourth amended complaint, which underlies the current appeal. Plaintiff realleged its causes of action for quiet title, slander of title, and breach of duty as a notary. Plaintiff, however, abandoned its declaratory judgment and ejectment claims. In its fourth amended complaint, plaintiff again asserted that John D. remained in possession of the subject property "with the permission of and by agreement with Plaintiff." The fourth amended complaint additionally claimed that, at the time John D. transferred his interest by quit claim deed to plaintiff, he "was very fearful that he would be evicted by others claiming ownership of the property. Therefore, plaintiff's representative \*\*\* and [John D.] entered an oral agreement by which [John D.] could remain on the property rent-free as a tenant by sufferance until the controversy over the title was resolved. [John D.] would be responsible for payment of utility bills during the time but otherwise would live rent free."

¶ 11 Re-Vision yet again responded by filing a section 2-615 motion to dismiss, arguing that plaintiff failed to allege it was in actual possession of the subject premises as required by law.

¶ 12 On March 4, 2015, the circuit court granted Re-Vision's motion to dismiss the quiet title claim with prejudice. In its written order, the court stated that plaintiff failed "to plead actual possession of the subject property." The order also contained language pursuant to Illinois

Supreme Court Rule 304(a) (eff. Feb. 26, 2010) providing that there was no just reason to delay enforcement or appeal of the dismissal of the quiet title count. This appeal followed.

¶ 13

#### ANALYSIS

¶ 14 Plaintiff contends the circuit court erred in dismissing its quiet title claim against Re-Vision.

¶ 15 A motion to dismiss pursuant to section 2-615 challenges the legal sufficiency of a complaint as having failed to state a cause of action upon which relief may be granted. 735 ILCS 5/2-615 (West 2014). A section 2-615 motion to dismiss should only be granted if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle the plaintiff to recovery. *In re Estate of DiMatteo*, 2013 IL App (1st) 122948, ¶ 56. When considering a section 2-615 motion to dismiss, a court must construe the allegations of the complaint in a light most favorable to the plaintiff, as well as accept as true all well-pleaded facts in the complaint and any reasonable inferences that may arise therefrom. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. A plaintiff need not set forth evidence in his or her complaint; however, because Illinois is a fact-pleading jurisdiction, a plaintiff must set forth sufficient facts to bring his or her claim within a legally recognized cause of action. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006); *In re Estate of Baumgarten*, 2012 IL App (1st) 112155, ¶ 11. We review the dismissal of a complaint based on section 2-615 of the Code *de novo*. *Id.*

¶ 16 A quiet title action is an equitable proceeding wherein a party seeks to settle a dispute over ownership of a property or to remove a cloud on his title to the property. *Lakeview Trust & Savings Bank v. Estrada*, 134 Ill. App. 3d 792, 811-12 (1985); see also *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 52 (2009). A cloud on title is the semblance of title, either legal or equitable, appearing in some legal form, but which is, in fact, unfounded or for which it

would be inequitable to enforce. *Estrada*, 134 Ill. App. 3d at 812. In order to remove a cloud from title, the plaintiff must demonstrate he actually has title, as well as possession of the property at the time the suit was filed. *Bennett v. Chicago Title & Trust Co.*, 404 Ill. App. 3d 1088, 1100 (2010) (citing *Estrada*, 134 Ill. App. 3d at 812); *Dodge v. Nieman*, 150 Ill. App. 3d 857, 860 (1986). "Where the property is not vacant and is not in the possession of the party seeking to remove the cloud from his title, the proper remedy is not an action to quiet title but rather an action in ejectment." *Estrada*, 134 Ill. App. 3d at 812; see *Dodge*, 150 Ill. App. 3d at 860-61.

¶ 17 Plaintiff's fourth amended complaint established one essential element for maintaining a quiet title action, namely, actual title to the subject property. Plaintiff pled that John D. conveyed his interest to plaintiff in August 2012 *vis a vis* a quit claim deed in trust. However, the second essential element, namely, actual possession, was not established by the facts of plaintiff's fourth amended complaint. In fact, plaintiff failed to allege it was in actual possession of the subject property. See *Eaton v. Woman's Home Missionary Society of Methodist Episcopal Church*, 298 Ill. 476, 478-79 (1921) (actual possession not established where the plaintiffs pled they had title by terms of a will, but alleged no facts demonstrating actual possession). Instead, in its fourth amended complaint, plaintiff alleged that John D. occupied the property "by agreement" as a "tenant at sufferance." Plaintiff's fourth amended complaint, therefore, failed to establish actual possession. See *Dodge*, 150 Ill. App. 3d at 860.

¶ 18 Notwithstanding, plaintiff argues that, as the legal title holder to the property, its agreement to allow John D. to occupy the property as its tenant did not destroy plaintiff's possession claim. We find *Dodge* is dispositive as to the question before us.

¶ 19 In *Dodge*, this court provided the relevant law:

"It has been uniformly held that the plaintiff bringing the suit in equity to quiet title to real estate must plead and prove that it was in actual possession of the real estate at the time the suit was filed. [Citations]. It appears that possession by an agent or tenant of the plaintiff is generally sufficient to entitle the plaintiff to maintain a suit to quiet title. [Citations.] However, where a party other than the plaintiff is in possession of the real estate, the plaintiff has an adequate remedy at law either by way of a forcible entry and detainer suit or an action in ejectment. [Citations]." *Id.* at 860-61.

Although this court recognized the possibility that a plaintiff's agent or tenant could establish possession sufficient to maintain a quiet title action, the *Dodge* court concluded the facts of that case did not fall within those circumstances. *Id.* at 861. Instead, similar to the facts in the case before us, the plaintiffs in their quiet title claim in *Dodge* did not allege they were in actual possession of the subject property at the time the suit was filed; rather, the plaintiffs' claim alleged a family occupied the property "at the sufferance of the plaintiffs." *Id.* The allegations in the complaint were supported by the defendants' answers insofar as they established that at least the majority of the family members lived at the marital residence, while the husband had moved out during an impending divorce. The court found that, due to the nature of the family's occupancy of the subject property, which had been purchased by them pursuant to an installment contract, the occupancy could not be interpreted as possession by an agent or tenant of the plaintiffs. *Id.*

¶ 20 Here, John D. allegedly transferred title to the subject property, but he, or Robert until his April 2013 death, continuously remained in possession of the property. There were no allegations demonstrating that plaintiff ever occupied the subject property. Moreover, nothing in

plaintiff's fourth amended complaint suggested that John D. was acting as plaintiff's agent or tenant. Instead, the complaint expressly stated that John D. was a "tenant at sufferance."

Tenancy at sufferance is defined as "[a] tenancy arising when a person who has been in lawful possession of property wrongfully remains as a holdover after his or her interest has expired."

Black's Law Dictionary (10th ed. 2014). Although John D. does not fall squarely within the definition because, according to the fourth amended complaint, plaintiff gave John D. permission to remain at the property and John D. agreed to occupy the property rent free other than payment of his utilities, we conclude that tenancy, as contemplated by *Dodge*, was not established in this case. As stated in the fourth amended complaint, plaintiff agreed to allow John D. to occupy the property as a measure of maintaining John D's ownership rights over others claiming ownership of the property. There were no facts establishing John D. was acting as *plaintiff's* agent or tenant. We, therefore, find that plaintiff failed to establish the essential elements of a quiet title action. Accordingly, the quiet title claim in plaintiff's fourth amended complaint was properly dismissed.

¶ 21 We note that *Dempsey v. Burns*, 281 Ill. 644 (1917), as cited by plaintiff to establish possession by a tenant is sufficient to maintain a quiet title action, is distinguishable. In *Dempsey*, the plaintiff obtained a deed for land that was vacant and unoccupied. *Id.* at 646. On the same date the he purchased the land, the plaintiff leased the property to Joseph Davis, who immediately erected a wire fence thereupon pursuant to the plaintiff's instruction. *Id.* The *Dempsey* court found that the plaintiff's "act of possession" was sufficient to maintain his cause of action to quiet title. *Id.* at 650-51. In contrast, in our case, plaintiff failed to provide any allegations demonstrating that John D. occupied the subject property at plaintiff's direction.

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¶ 22 As a final note, we need not determine the propriety of bringing a claim for ejectment against defendant where an ejectment claim was not ruled upon by the circuit court.

¶ 23 **CONCLUSION**

¶ 24 We affirm the dismissal of plaintiff's quiet title claim in its fourth amended complaint.

¶ 25 Affirmed.