FOURTH DIVISION
December 28, 2017

No. 1-16-1552

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

1312 S. WABASH, LLC,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	
	)	No. 13 L 13785
JAY L. STATLAND, STATLAND & VALLEY,	)	
STATLAND LAW OFFICES, LLC, and BURKE,	)	
WARREN, MACKAY & SERRITELLA, P.C.,	)	Honorable
	)	Margaret Ann Brennan
Defendants-Appellees.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's judgment affirmed. Trial court properly granted summary judgment in favor of defendants in plaintiff's action for legal malpractice, as defendants committed no negligent act. Plaintiff's five-day notice to tenant in underlying forcible entry and detainer action, prepared by defendants, was not defective.

¶ 2 Plaintiff, 1312 S. Wabash, LLC, brought this legal malpractice action against defendants, Jay L. Statland, Statland & Valley, Statland Law Offices, LLC, and Burke, Warren, Mackay & Serritella, P.C. Plaintiff claimed that its forcible entry and detainer action was dismissed as a result of a defective five-day notice prepared by defendants.

¶ 3 After hearing argument on the parties' cross-motions for summary judgment in the legal malpractice claim before us, the circuit court denied plaintiff's motion for partial summary judgment and granted defendants' motion for summary judgment. The trial court disagreed with the trial court in the forcible-entry case and determined, as a matter of law, that the 5-day notice did, in fact, comply with the law, and thus defendants could not be liable for legal malpractice as a matter of law. Plaintiff appealed.

¶ 4 We affirm. We agree with the trial court in this case that the 5-day notice was legally valid. Like the trial court before us, we disagree with the trial court in the forcible-entry case that ruled otherwise. Thus, as a matter of law, defendants were not negligent in preparing the notice, and summary judgment in favor of defendants was proper. We affirm the circuit court's decision denying plaintiff's motion for partial summary judgment, and granting summary judgment in favor of defendants.

¶ 5 I. BACKGROUND

¶ 6 Plaintiff owns the building at 1312 South Wabash Avenue in Chicago. In March 2011, plaintiff advised defendants that plaintiff's tenant, Gioco, a restaurant owned and operated by Boutique Hospitality Company-Wabash, LLC (Boutique) had defaulted on the lease. (At the time, defendants were representing plaintiff in a 2007 case in the chancery division against Boutique, and the prior building owners, regarding a dispute over the use of the building's basement.)

¶ 7 On April 7, 2011, defendants drafted, and served on Boutique, a "Landlord's Five Days' Notice" (five-day notice). After Boutique failed to cure the default, defendants filed a forcible entry and detainer action on April 15, 2011 (docket number 2011 M1 707752).[1]

[1] Both parties state the action was filed on April 29, 2011, but cite to the service of

¶ 8 In August 2012, Kent Maynard & Associates, LLC (Maynard), substituted as counsel for plaintiff both in the forcible entry and detainer suit and the chancery suit. In February 2013, Boutique filed a motion to dismiss the forcible entry and detainer action. Boutique argued that the five-day notice, served on April 7, 2011, was defective because it failed to give Boutique five full days to pay the rents demanded where the notice stated that the lease would be terminated on April 12, 2011, but should have said April 13, 2011.

¶ 9 In response to Boutique's motion to dismiss, plaintiff (now represented by Maynard) argued that the notice complied with the relevant statutory requirements in section 9-209 of the Code of Civil Procedure (the Code) (735 ILCS 5/9-209 (West 2012)) where it expressly stated that "*unless payment* [of the rent due and demanded] *is made on or before the expiration of five days after service of this notice* your lease of said premises will be terminated on April 12, 2011." (Emphasis added.) Thus, plaintiff asserted, "the notice gave Boutique exactly the time required by the Statute for payment—a time not less than 5 days after service of the Five Day." Plaintiff additionally noted that Boutique did not claim, in its motion to dismiss, that it paid the rent owed to plaintiff during the statutory period, as required by the notice, nor did Boutique claim that plaintiff filed its suit prematurely.

¶ 10 Nonetheless, with respect to the statement in the notice that the lease would be terminated on April 12, 2011, plaintiff's new counsel, Maynard, stated that it was "in apparent conflict with the requirement that payment be 'made on or before the expiration of five days after service of this notice.' " He additionally characterized this as a "formal defect, the result of a scrivener 's error or mathematical miscalculation in respect of the date for termination," which plaintiff

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summons. The complaint in the record is not date-stamped. According to the circuit court's website, the action was filed on April 15, 2011.

further claimed was "gratuitously set forth" in the notice. But plaintiff also argued that this did not undermine the validity of the five-day notice.

¶ 11 On March 8, 2013, the trial court granted Boutique's motion to dismiss the forcible entry and detainer action. The order stated that the motion was granted "for the reason that plaintiff's 5-day notice dated April 7, 2011 is defective."

¶ 12 Plaintiff did not move for reconsideration of that order, nor did it appeal that order. Plaintiff did not serve a new five-day notice until January 2014.

¶ 13 Plaintiff filed this legal malpractice action against defendants on December 5, 2013; the operative second amended complaint was filed on April 22, 2014. Plaintiff alleged that the court dismissed the underlying forcible entry and detainer action because defendants drafted a defective five-day notice. Specifically, plaintiff claimed that defendants "carelessly, gratuitously, and negligently insert[ed] an incorrect date-specific deadline for compliance in the Five-Day Notice, which insertion rendered the Notice defective."

¶ 14 On October 28, 2015, defendants filed a motion for leave to file a third-party complaint against Maynard (who had withdrawn as plaintiff's counsel on June 1, 2015). Defendants claimed that the trial court had dismissed plaintiff's forcible entry and detainer case, because Maynard had incorrectly conceded that the five-day notice drafted by defendants had a "scrivener's error" and "mathematical miscalculation," which were both not true.

¶ 15 Plaintiff filed a motion for partial summary judgment as to the defective five-day notice. Defendants filed a response and cross-motion for summary judgment. Defendants contended that they were neither negligent nor the proximate cause of any damage. Defendants argued that the notice was proper, and they could not be liable for the forcible-entry court's acceptance of a legally unsound argument. Defendants further noted that plaintiff's successor counsel (Maynard)

had filed another forcible entry and detainer action in 2014, Boutique had brought the identical motion to dismiss based on a defective five-day notice, and that time, the forcible-entry court *denied* the motion to dismiss, finding that the notice—substantially the same as the one previously declared invalid—was legally sufficient. Defendants further asserted that superseding events had broken the causal connection to the alleged acts of negligence.

¶ 16 After hearing argument, the circuit court entered summary judgment in favor of defendants and denied plaintiff's cross-motion for partial summary judgment. The court found the notice legally sufficient, and thus ruled that plaintiff could not demonstrate negligence as a matter of law. This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 A. Jurisdiction

¶ 19 We have a duty to consider our own jurisdiction, even when the parties have not raised any jurisdictional objection. *Almgren v. RushPresbyterian-St. Luke's Medical Center*, 162 Ill. 2d 205, 210 (1994).

¶ 20 Ordinarily, the denial of a motion for summary judgment is unreviewable, because it is not a final order; it leaves a claim still pending and undecided. *Clark v. Children's Memorial Hospital*, 2011 IL 108656, ¶¶118-19. But when, as here, cross-motions were filed on the same topic—the validity of the 5-day notice—and the court granted one motion and denied the other, "the resulting order became final because it entirely disposed of the litigation" and the "cause was thus appealable in its entirety," including the denied cross-motion for summary judgment. *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 494 (1987); see also *Arangold Corp. v. Zehnder*, 187 Ill. 2d 341, 358 (1999) (when underlying action involves "opposing motions for summary judgment on the same claim, where one party's motion was

granted and the other party's motion was denied *** [a]n appellate court may properly review the denial of a summary judgment motion ***.").

¶ 21 We thus have jurisdiction to consider both the denial of plaintiff's motion for partial summary judgment as well as the granting of defendants' cross-motion for summary judgment.

¶ 22 B. Motion to Strike Taken With the Case

¶ 23 We took with the case a motion filed by plaintiff, pursuant to Illinois Supreme Court Rule 341(h) (eff. Feb.6, 2013) to strike defendants' response brief, claiming the Statement of Facts section contained improper argument and the Argument section contained irrelevant, unsupported and untrue factual statements. Plaintiff also argued the record citations did not afford the statements any support. Plaintiff further claimed that defendants' record citations to the transcript of the deposition of Kevin Thornton in the supplemental record could not be considered by this court, that the trial court erred in granting defendants' motion to supplement the record, because the deposition was not filed in the trial court or considered by the trial court.[2]

¶ 24 We first address plaintiff's arguments regarding Thornton's deposition transcript and the supplemental record. Defendants first claim that plaintiff has forfeited the issue because it never objected to their motion to supplement the record filed before this court and did not raise the argument in its opening brief. But they further note that Thornton's deposition "was discussed and quoted no less than twenty times in [their] underlying motion for cross-summary judgment and supporting briefs." Also, plaintiff never challenged the accuracy of the quotes and "the hearing on the motions for summary judgment contained considerable discussion and argument based on Thornton's testimony." Finally, as defendants note, in its February 14, 2017 order granting their motion to supplement the record, the trial court directed the clerk of the court to

[2] Kevin Thornton owns, manages, and operates plaintiff, a single member limited liability company.

supplement the record on appeal to include "the entire deposition (both sessions) of Kevin Thornton as the court finding it *was considered and before it* when ruling on Defendants cross-motions for summary judgment." (Emphasis added.) Thus, we reject plaintiff's argument that the trial court did not consider the deposition. And we reject plaintiff's argument that we should ignore the supplemental record.

¶ 25 As to the complaints regarding defendants' brief, we do not disagree that the Statement of Facts was rather argumentative, but we do not think it rises to the level that we should strike the brief. That is a drastic remedy, particularly given that the most of the statements challenged by plaintiff played no role in our disposition of this matter, which ultimately rests entirely on a question of law. We deny the motion to strike defendants' response brief.

¶ 26 C. Standard of Review

¶ 27 We review *de novo* a circuit court's ruling on a motion for summary judgment. *State Bank of Cherry v. CGB Enterprises, Inc*., 2013 IL 113836, ¶ 65. Summary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id*. To survive a motion for summary judgment, a plaintiff need not prove its case but must present some evidence that would arguably entitle it to judgment. *Bruns v. City of Centralia,* 2014 IL 116998, ¶ 12.

¶ 28 When, as here, the parties file cross-motions for summary judgment, they agree that no factual issues exist and the case turns solely on legal issues subject to *de novo* review. *Gaffney v. Board of Trustees of the Orland Fire Protection District*, 2012 IL 110012, ¶ 73. But a court is never obligated to render summary judgment, and if it finds the existence of a question of material fact, summary judgment is improper. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. We agree

with the parties here, however, that this case involves only a question of law, the interpretation of the five-day notice.

¶ 29 D. Legal Malpractice

¶ 30 To prevail in a legal malpractice action, a plaintiff must plead and prove the following elements: (1) an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of the attorney's duty; (3) proximate cause; and (4) damages. *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 290 (2009). "The basis of a legal malpractice claim is that, absent the former attorney's negligence, the plaintiff would have been compensated for an injury caused by a third party." *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 12. Where the alleged legal malpractice involves litigation, no malpractice claim exists unless the attorney's negligence resulted in the loss of an underlying cause of action. *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 200 (2006); see also *Webb v. Damisch*, 362 Ill. App. 3d 1032, 1037-38 (2005) (plaintiff must show proximate cause by establishing that "but for" the attorney's negligence, plaintiff would have prevailed in the underlying action). "Thus, a legal malpractice plaintiff must litigate a 'case within a case.' " *Judge*, 221 Ill. 2d at 200; accord *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 226 (2006).

¶ 31 D. Plaintiff's Motion for Partial Summary Judgment

¶ 32 In its motion for partial summary judgment, plaintiff sought a ruling that the five-day notice prepared by defendants was defective as a matter of law. This issue concerns the second element of its legal malpractice claim—whether defendants breached their duty by committing a negligent act or omission.

¶ 33 Section 9-209 of the Code (Forcible Entry and Detainer) states:

> "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." (Emphases added.) 735 ILCS 5/9-209 (West 2012).

As can be seen above, Section 9-209 does not require that the date for lease termination, or that any date certain, be included in the five-day notice. The statute requires only that the tenant be notified that it has five full days, after service of the notice, to pay the overdue rent. *Id*.

¶ 34 It is undisputed that the five-day notice that defendants drafted and sent to plaintiff stated, in relevant part, as follows:

> "And you are further notified that payment of [the amount of rent due] has been and is hereby demanded of you, and that unless payment thereof is made on or before the expiration of five days after service of this notice your lease of said premises will be terminated on April 12, 2011."

¶ 35 The parties agree that the notice was served on April 7, 2011. They agree that the five days Boutique, the tenant, was allowed to make payment began with the day *after* the five-day notice was served, and included April 8, April 9, April 10, April 11, and April 12, 2011. See 5 ILCS 70/1.11 (West 2012) (time for doing act is computed by excluding first day and including last day). And they agree that, pursuant to section 9-209, Boutique had until the end of that fifth and final day, April 12, 2011, to pay the rental amount due. See *Richardson v. Ford,* 14 Ill. 332,

333 (1853) ("Where an act is to be done on a particular day, the party has the whole of that day in which to perform it.").

¶ 36 So the legal issue before us is this: If April 12, 2011 was the last day of the 5-day cure window, and Boutique had until the end of that day to cure the rent deficiency, was it legally incorrect for the 5-day notice to say that, absent a timely cure, the lease would be "terminated on April 12, 2011?"

¶ 37 Plaintiff says that the notice was defective, because it was legally impossible to terminate the lease during the window of time for curing the rent deficiency; the termination could not occur until *after* the cure window had closed. Because the date of termination was listed as April 12, plaintiff reasons, in effect the notice only gave Boutique *four* days to cure (April 8 through 11), in violation of section 9-209. And as we have noted, the first time the forcible-entry action was brought, the trial court there apparently agreed with plaintiff's argument here, finding the notice defective.

¶ 38 Defendants argue that, under prevailing law, the time for termination of the lease was at the end of April 12, and would occur only if—as the notice clearly stated—Boutique had not yet cured the deficiency by that time. Thus, defendants claim, they committed no malpractice in the drafting of the legally sufficient notice. The trial court below agreed with defendants, finding the notice legally sufficient, and finding that the forcible-entry court's ruling was in error.

¶ 39 For the reasons that follow, we agree with the trial court's judgment below and affirm.

¶ 40 We begin by reiterating that section 9-209 of the Code does not mandate any particular form but does require that the tenant be notified 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." 735 ILCS 5/9-209 (West 2012). And there is no question that the notice properly informed the

tenant, Boutique, of this fact, when it stated that "unless payment [of the outstanding rent] is made on or before the expiration of five days after service of this notice your lease of said premises will be terminated ***." The only question, then, is whether the words that followed the word "terminated"—*i.e.*, that the lease would be terminated "on April 12, 2011"—rendered the notice invalid, because April 12 was the last day of the 5-day of the cure window.

¶ 41 We agree with defendants and the trial court that this language did not render the notice invalid. In *Davidson v Whitman*, 336 Ill. App. 333 (1949), this court explained that, when a notice is given to terminate a periodic tenancy, the tenant is entitled to possession of the premises through the entire last day of the period. There, the notice stated, in pertinent part, as follows: "termination to take effect on the 30th day of September *** and you are hereby required to quit and deliver up to [the landlord] possession of said premises on that day." (Emphases added.) *Id*. at 335.

¶ 42 The defendant tenant argued, just as plaintiff argues here, that the notice was invalid because it purported to terminate his lease on September 30, 1947, which was the last day of his lease—a day in which he was entitled to reside at the premises. He argued that he was being kicked out a day early, a day to which he was entitled to stay, a day for which he had paid his rent to stay. *Id*. at 336. This court disagreed, holding the notice legally sufficient:

> "The notice terminated the tenancy on September 30th. It also 'required' defendant to quit and deliver up possession to plaintiff on that day. Defendant could comply with the notice by quitting and delivering up possession at the close of the day, which is a reasonable interpretation of the notice. A notice terminating the tenancy at the close of a day and requiring the tenant to quit and deliver up possession at that time would be more precise, but not more informative as to the intent." *Id*. at 337-38.

¶ 43 Thus, under *Davidson*, the termination of a lease takes effect at the end of the day specified in the notice of termination. The court there relied in large part on the decision in *Hoefler v. Erickson*, 331 Ill. App. 577 (1947)—the case on which the trial court below relied—that interpreted a related section of the Code, section 9-207, requiring landlords to send tenants a 30-day notice to terminate a tenancy of less than one year. See 735 ILCS 5/9-207 (West 2012). In *Hoefler*, 331 Ill. App. at 583, the court noted "the general rule that a tenancy from month to month expires at midnight on the last day of the month, and that notice should call for vacation of the premises on that date, although the tenant has the right of occupancy to the very end at midnight, and the landlord the right of occupancy on the next day."

¶ 44 Likewise, in *Sheldon v. Sutherland*, 222 Ill. App. 598 (1921), this court held (consistent with *Davidson* and *Hoefler*) that when a month-to-month tenancy is terminated by proper notice, the tenant is entitled to possession of the premises until midnight of the last day of the lease. *Id.* at 602-03. As the court further explained: "And we do not think that the use of the words 'on or before May 1st' [in the termination notice] makes any difference. Defendant was not required to vacate before the expiration of that day, May 1st." *Id.* at 602-03.

¶ 45 Based on this case law, the termination date specified in the lease—April 12, 2011—did not become effective until the end of that day. The tenant, Boutique, retained all rights as a tenant until April 12 ended. And as defendants correctly note, we cannot ignore the remainder of the notice, which clearly informed the tenant that it had "five days after service of this notice"—which included *all* of April 12, as both parties agree—to cure the rent deficiency.

¶ 46 Thus, read as a whole, the notice informed the tenant, Boutique, that it had five full days, up to and including the end of April 12, 2011, to pay the unpaid rent and cure the deficiency.

And the notice further stated, correctly so under the case law, that "unless" the tenant did so, the lease would be terminated at the end of April 12.

¶ 47 We agree with our statement in *Davidson*, 336 Ill. App. at 338, that it might have been preferable for the notice to state that it would terminate the lease "at the close of" April 12, as it "would be more precise." But we cannot say, in light of the case law we have cited, that defendants drafted a legally insufficient notice. See *DeSeno v. Becker*, 291 Ill. App. 3d 421, 430 (1997) (in legal malpractice case, conduct of lawyer "should be judged according to the controlling cases" at relevant time; because defendant attorney's conduct was consistent with controlling case law, he could not be held liable for legal malpractice, and complaint was properly dismissed).

¶ 48 We recognize that the trial court in the forcible entry and detainer action ruled that the five-day notice was defective, apparently agreeing with the argument made by plaintiff here. Defendants are quick to add, of course, two caveats to that ruling by the forcible-entry court invalidating the notice: (1) the substitute attorney representing plaintiff in that action *conceded* (incorrectly) that the date of April 12 was erroneous, a "scrivener's error;" and (2) when that substitute attorney filed a second 5-day notice in 2014, that notice contained the same essential flaw, yet the second forcible-entry court did *not* invalidate the notice.

¶ 49 But the important point here is that our review is *de novo*. Thus, we owe no deference to the ruling of the trial court below, much less to the ruling of the court in the forcible-entry action that is not directly before us. *Shulte v. Flowers*, 2013 IL App (4th) 120132, ¶ 17. Nor was the trial court below bound by the ruling in the forcible entry and detainer action. See *Cedeno v. Gumbiner*, 347 Ill. App. 3d 169 (2004).

¶ 50 In *Cedeno*, the plaintiff's underlying personal injury action against the Chicago Transit Authority (CTA) had been dismissed with prejudice based on a defective notice. *Id*. at 171. (The notice incorrectly stated that plaintiff's accident occurred on April 30, 1999, instead of the actual date of April 29, 1999.) The plaintiff filed a legal malpractice action against the defendant attorneys, contending they were negligent for preparing a defective written notice. *Id*. at 171. The circuit court dismissed the plaintiff's legal malpractice action after determining that the defendants' negligence did not proximately cause the plaintiff's defeat in her personal injury action against the CTA. *Id*. at 170. This court affirmed.

¶ 51 We held that the defendants could not be accountable in legal malpractice for the original trial court's acceptance of a legally unsound basis for entering judgment against plaintiff. *Id*. at 176. Although the notice was admittedly defective, it was sufficient nonetheless to trigger the CTA's duty (to furnish the plaintiff with a copy of the relevant statute). *Id*. at 175. Because the CTA failed to meet its duty, it "should not have been permitted to avail itself of the formal notice requirements as proper grounds for dismissal as a matter of law." *Id*. Similarly here, the trial court in the plaintiff's underlying forcible entry and detainer action accepted a legally unsound basis for dismissal of the original forcible-entry action. Defendants cannot be held liable for the incorrect ruling by that court.

¶ 52 We conclude that the five-day notice was sufficient as a matter of law. Thus, defendants were not negligent in preparing the notice. The trial court correctly denied plaintiff's motion for partial summary judgment.

¶ 53 E. Defendants' Cross-Motion for Summary Judgment

¶ 54 In their cross-motion for summary judgment, defendants argued that: (1) the five-day notice was proper and plaintiff could therefore not establish that defendants breached their duty

of care; and (2) no act of defendants was the proximate cause of plaintiff's alleged damages. We have already agreed with defendants' first argument. Because plaintiff cannot establish that defendants breached their duty, summary judgment in favor of defendants was proper. See *Bagent v. Blessing Care Corp.*, 224 Ill. 2d 154, 163 (2007) (summary judgment for defendant is proper if plaintiff fails to establish any element of cause of action).

¶ 55 III. CONCLUSION

¶ 56 Because defendants committed no negligent act, the trial court properly granted summary judgment in favor of defendants in plaintiff's action for legal malpractice. We affirm the judgment of the circuit court denying plaintiff's motion for partial summary judgment and granting defendants' cross-motion for summary judgment.

¶ 57 Affirmed; motion denied.