2019 IL App (1st) 180693-U
Order filed: February 15, 2019

FIRST DISTRICT
Fifth Division

No. 1-18-0693

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AIMCO, as Agent for Parkways Preservation, LP,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 2017 M1 702666
	)	
NISHEMA LEE,	)	
	)	
Defendant-Appellant	)	
	)	
(and Unknown Occupants,	)	Honorable
	)	David A. Skryd,
Defendants).	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the order granting summary judgment for plaintiff on its forcible entry and detainer action and remanded for further proceedings, finding questions of material fact as to whether the complaint was filed prematurely and whether defendant tendered payment of her rent within the relevant time-period. We affirmed the denial of defendant's motion to compel discovery, where defendant failed to provide a report of proceedings to support the claim of error.

¶ 2 Defendant-appellant, Nishema Lee, appeals the order of the circuit court granting the motion for summary judgment of plaintiff-appellee, Aimco, on its complaint to recover possession of defendant's rental unit for nonpayment of rent and denying defendant's motion for

summary judgment. Defendant also appeals the court's order denying her motion to compel production of the complete ledger of all rental charges and payments she made during her tenancy. Finding the existence of genuine issues of material fact regarding whether plaintiff's complaint was filed prematurely and whether defendant timely tendered payment of her rent, we reverse the order granting plaintiff's motion for summary judgment and remand for further proceedings. We affirm the denial of defendant's motion for summary judgment and the denial of plaintiff's motion to compel.[1]

¶ 3 I. Plaintiff's Summary Judgment Motion

¶ 4 On February 14, 2017, plaintiff, as agent for Parkways Preservation, LP, filed its forcible entry and detainer complaint against defendant, seeking possession of the premises at 6746 South East End Avenue in Chicago (premises) and unpaid rent. In its motion for summary judgment filed on January 18, 2018, plaintiff alleged that it had leased the premises to defendant for a monthly rent of $96, but that she had failed to pay any rent in November 2016 or January 2017. As of January 9, 2017, defendant owed plaintiff $184 in unpaid rents.

¶ 5 Plaintiff alleged that defendant's tenancy was subsidized and is, therefore, subject to federal regulations set forth in 24 C.F.R. §247.4 (1996). Section 247.4 provides that a notice of termination of the tenancy for unpaid rents in a subsidized housing project "shall be accomplished" by "[s]ending a letter by first-class mail, properly stamped and addressed, to the tenant at his or her address at the project, with a proper return address"; and by "[s]erving a copy of the notice on any adult person answering the door at the leased dwelling unit, or if no adult responds, by placing the notice under or through the door, if possible, or else by affixing the

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

notice to the door." *Id*. Plaintiff's property manager certified that she served the five-day notice of termination (five-day notice) on defendant, pursuant to the federal regulations, by mailing the notice to defendant at her address on January 12, 2017, and by placing a copy of the notice underneath her door. The notice stated that unless payment of $184 was made in five days, defendant's tenancy would be terminated on January 17, 2017.

¶ 6 Plaintiff alleged that defendant failed to pay the $184 within five days of service of the notice and remained in possession of the premises. Plaintiff stated that for purposes of the summary judgment motion, it was only seeking possession of the premises.

¶ 7 II. Defendant's Summary Judgment Motion

¶ 8 In her cross-motion for summary judgment filed on January 22, 2018, defendant alleged that she had occupied the premises at 6746 South East End Avenue, Apartment 2F since 2007 and that her monthly rent was $96. Defendant alleged that the premises were a "project based" building subsidized by the United States Department of Housing and Urban Development (HUD) under section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437f (1991)). Project-based, section 8 housing is specific to the building where the tenant lives; if defendant's tenancy at this building is terminated, she will lose her housing assistance.

¶ 9 Defendant alleged that the manner of service of a five-day notice is provided in state law, specifically, in section 9-211 of the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-211 (West 2016)) [2], which states:

> "Any demand may be made or notice served by delivering a written or printed, or partly written and printed, copy thereof to the tenant, or by leaving the same with some person of the age of 13 years or upwards, residing on or in possession of the premises; or

[2] As of January 1, 2018, the Act is now known as "The Eviction Act" (735 ILCS 5/9-101 *et seq*. (West 2018)).

> by sending a copy of the notice to the tenant by certified or registered mail, with a returned receipt from the addressee; and in case no one is in the actual possession of the premises, then by posting the same on the premises." *Id.*

¶ 10 Defendant argued that plaintiff's sending of the notice via regular mail, and its placing a copy of the notice underneath or affixed to her door while she was still in possession of the premises, did not comply with the service requirements mandated in section 9-211and, therefore, that summary judgment should be granted in her favor.

¶ 11 III. The Trial Court's Order on the Cross-Motions for Summary Judgment

¶ 12 On February 27, 2018, the trial court granted plaintiff's motion for summary judgment and entered an eviction order. The court denied defendant's motion for summary judgment. The transcript of the hearing is not contained in the record on appeal.

¶ 13 IV. The Motion to Compel

¶ 14 During discovery, plaintiff produced a copy of a ledger of defendant's rent charges and payments from January 2016 to October 2017. According to defendant, this partial ledger reveals that in February, March, May, July and August 2016, plaintiff improperly charged her a late fee. The total late fees for 2016 were $47.

¶ 15 On January 10, 2018, defendant filed a motion to compel the production of the full ledger from the inception of her tenancy in 2007 to 2017, so that she could determine whether plaintiff had improperly been charging her late fees prior to 2016. Defendant argued that "[i]t is easily conceivable that [defendant] did not owe any rent in January 2017 because of accumulated excessive late fee[s]. A complete ledger from the time [defendant] moved into the property is clearly relevant to whether she owed rent when [p]laintiff served a notice or filed its complaint."

¶ 16 The trial court denied defendant's motion to compel on January 23, 2018. Defendant filed a motion to reconsider, which the court denied on April 3, 2018. The transcripts of the hearings on the motion to compel and the motion to reconsider are not contained in the record on appeal.

¶ 17 IV. The Appeal

¶ 18 A. Defendant's Appeal From The Summary Judgment Order

¶ 19 Preliminarily, plaintiff argues that defendant's appeal should be dismissed because her statement of facts was argumentative in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017), which requires that a party's statement of facts contain "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." We decline to dismiss the appeal, but we have disregarded any arguments in defendant's statement of facts in violation of Rule 341(h)(6).

¶ 20 Defendant argues on appeal that the trial court erred by granting plaintiff's motion for summary judgment on its forcible entry and detainer action and denying her cross-motion for summary judgment. When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. However, the mere filing of cross-motions for summary judgment does not establish that no issue of material fact exists, nor does it obligate the court to render summary judgment. *Id.*

¶ 21 Summary judgment should only be granted when the pleadings, depositions, admissions and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* ¶ 29. Review is *de novo*. *Id.* ¶ 30.

¶ 22 In a forcible entry and detainer action brought pursuant to the Act, plaintiff bears the burden to prove its right to possession. *Harper Square Housing Corp. v. Hayes*, 305 Ill. App. 3d 955, 963 (1999). To have a right of possession, plaintiff must first serve the tenant with the five-day notice pursuant to section 9-209 of the Act, informing her that she has five days to pay the overdue rent, and if the overdue rent is not paid within those five days, then plaintiff may consider the lease ended and commence an eviction action without further notice or demand. 735 ILCS 5/9-209 (West 2016). Pursuant to section 9-211 of the Act, service of the five-day notice may be made by leaving a copy with the tenant or with a person who is 13 years of age or older who is residing in or in possession of the premises, or by sending copy of the notice to the tenant by certified or registered mail with a returned receipt from the addressee, or where no one is in possession, by posting the notice on the premises. 735 ILCS 5/9-211 (West 2016).

¶ 23 Defendant argues that plaintiff failed to properly serve her with the five-day notice as provided for under section 9-211 when it allegedly sent the notice via regular mail, instead of by certified or registered mail with a returned receipt, and placed a copy affixed to or under her door while she was still in possession of the premises. Defendant contends that by failing to properly serve her with the five-day notice in accordance with section 9-211 of the Act, plaintiff failed to prove its right to possession and, therefore, the court should have denied plaintiff's motion for summary judgment and instead granted defendant's cross-motion.

¶ 24 Plaintiff responds that section 9-211 is preempted by the federal regulations set forth in 24 C.F.R. § 247.4 (1996), which provide that a notice of termination of a tenancy in a subsidized housing project "shall be accomplished" by sending a letter by regular mail to the tenant and by giving the notice to an adult answering the door of the premises, or if no adult answers, by placing the notice under or through the door. Plaintiff contends that it served the five-day notice

in accordance with section 247.4 by sending the notice to defendant via regular mail and placing a copy under her door.

¶ 25 Defendant disputes plaintiff's contention that section 247.4 of the federal regulations, rather than section 9-211 of the Act, applies to her section 8 housing subsidy, arguing that "section 247 programs generally concern subsidies based on interest rates or mortgages, not on-going Project-based subsidies," such as defendant's section 8 subsidy.

¶ 26 We need not resolve whether the federal regulations set forth in section 247.4 generally apply to section 8 subsidies, because for purposes of this case, those federal regulations did not preempt section 9-211's requirement for how service of the five-day notice is to be effectuated.

¶ 27 A presumption exists in every preemption case that Congress did not intend to supplant state law. *Scholtens v. Schneider*, 173 Ill. 2d 375, 379 (1996). To overcome that presumption, plaintiff must show that one of the three types of federal preemption exist here: (1) express preemption, shown by a clear expression of congressional intent to preempt state law; (2) field preemption, shown by comprehensive legislation demonstrating a clear congressional intent to occupy the entire regulatory field; and (3) conflict preemption, shown by a conflict between state and federal law. *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 231 Ill. 2d 399, 404 (2008).

¶ 28 Plaintiff makes no argument for the application of express or field preemption, but instead argues only that conflict preemption applies here such that the federal regulations set forth in section 247.4 preempt section 9-211 of the Act for purposes of how the five-day notice is to be served. We disagree. The party raising the defense of conflict preemption must demonstrate that the challenged state law stands as an obstacle to fully achieving the federal objective. *Carter v. SSC Odin Operating Co*., LLC, 237 Ill. 2d 30, 40 (2010). An obstacle to the

congressional objective is found when the state law renders the federal regulations ineffective and frustrates their purpose and intended effects. *Board of Education, Joliet Township High School District No. 204 v. Board of Education, Lincoln Way Community High School District No. 210*, 231 Ill. 2d 184, 196 (2008). To determine the federal interest at stake, and whether it conflicts with the state law, we look to the language of the federal regulations and then compare it to the state statute. See *Dan's City Used Cars, Inc. v. Pelkey*, 133 S. Ct. 1769, 1778 (2013).

¶ 29 In the present case, the federal regulations set forth in section 247.4 are intended to ensure that the tenant is notified of the termination of the tenancy by requiring the landlord to send such notice via regular mail and to serve a copy on an adult answering the door of the leased unit, or if no adult answers, by placing the notice under the door or affixed thereto. Comparing the federal regulations with section 9-211 of the Act, we find that instead of frustrating the federal purpose of ensuring that the tenant is notified of the termination of the tenancy, section 9-211 gives the tenant even greater notification rights by requiring that any mailed notice be sent via certified or registered mail with a returned receipt from the addressee. See *Barrientos v. 1801-1825 Morton LLC*, 583 F. 3d 1197 (9th Cir. 2009) and *Housing and Redevelopment Authority of Duluth v. Lee*, 852 N.W.2d 683 (Minn. 2014) (federal statutes and HUD regulations provide a floor of protection for tenants in public housing, not a ceiling; local laws may enhance the federal protections provided for those tenants). As section 9-211 did not stand as an obstacle to fully achieving the federal objective, section 9-211 was not preempted by the federal regulations and it remains the controlling law here for purposes of determining how the five-day notice was to be served.

¶ 30 We proceed to examine defendant's argument that plaintiff's failure to comply with the service requirements of section 9-211 compels reversal of the trial court's summary judgment

order in favor of plaintiff and requires entry of summary judgment in favor of defendant. Initially, we note that both parties cite unpublished orders under Ill. S. Ct. R. 23 (eff. April 1, 2018), in support of their respective arguments. However, we will not consider those unpublished orders as Illinois Supreme Court Rule 23(e) provides that unpublished orders are "not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppels or law of the case." *Id.* Therefore, we consider only the published opinions cited by the parties.

¶ 31 Defendant cites *American Management Consultant, LLC v. Carter*, 392 Ill. App. 3d 39 (2009), which reversed a judgment in favor of plaintiff on its forcible entry and detainer action, holding that the action should have been dismissed where plaintiff violated section 9-211 by improperly posting its five-day notice on defendant's door while she was still in possession of the premises. *Carter* held that section 9-211 is an *exclusive* list of permissible methods for serving a five-day notice and must be strictly enforced, and that where the five-day notice is not served by one of the methods set forth in section 9-211, the cause of action must be dismissed even if defendant actually received notice of plaintiff's forcible entry and detainer action. *Id*. at 57. However, *Carter* conflicts with an earlier case, *Prairie Management Corp. v. Bell*, 289 Ill. App. 3d 746 (1997), which affirmed a judgment in favor of plaintiff on its forcible entry and detainer complaint, even though it violated section 9-211 by placing a copy of the termination notice under defendant's door while she was still in possession of the premises, and sent another copy to her by regular mail instead of by certified or registered mail. *Id*. at 752. *Bell* held that the methods of service suggested in section 9-211 "are not meant to be exhaustive," and that since the tenant in the case before it had admittedly received actual notice of plaintiff's notice of termination, she could not claim that plaintiff's failure to strictly comply with section 9-211's

service requirements was fatal to its case. *Id*. at 752-53. See also *Ziff v. Frocks*, 331 Ill. App. 353 (1947) (holding that the statutory precursor to section 9-211 "does not purport to restrict the making of a demand or the service of a notice to the particular methods stated in the statute" and that the failure to strictly comply with the statutory service requirements was not fatal where there was no dispute that defendant received the notice).

¶ 32 The holding in *Bell* and *Frocks* are in accordance with our supreme court's decision in *Avdich v. Kleinert*, 69 Ill. 2d 1 (1977), which held that the plaintiff's failure to strictly comply with the service requirements of the statutory precursor to section 9-211 by mailing the five-day notice via certified mail without requesting a return receipt does not invalidate the notice "where receipt of the notice is admitted." *Id*. at 6. Thus, similar to *Bell* and *Frocks*, our supreme court in *Kleinert* recognized that a defective service of a five-day notice in violation of section 9-211 may be cured where defendant actually admits to receiving the notice. Pursuant to *Kleinert*, *Bell*, and *Frocks*, we hold that here, plaintiff's failure to serve the five-day notice in the manner provided by section 9-211 was cured where defendant admittedly found it affixed to her door.

¶ 33 Defendant next argues that even if her actual receipt of the notice cured the defective service, we should still conclude that summary judgment was inappropriate due to a disputed issue of fact as to whether plaintiff filed its complaint prior to the completion of the five-day period for paying the overdue rent. In support, defendant cites *Kleinert*, which held in the case before it that even though plaintiff's defective service was cured when defendant actually received the five-day notice, plaintiff was not entitled to possession of the premises because he filed the forcible entry and detainer action prior to the expiration of the five-day period in which defendant was allowed to pay the rent to avoid termination of the lease. *Kleinert*, 69 Ill. 2d at 6. The five-day period did not begin to run until defendant actually received the notice, which was

January 28, 1976, but plaintiff filed his action eight days prior thereto, on January 20. *Id*. at 9. Plaintiff's premature filing of the suit necessitated reversal of the judgment in his favor and the entry of judgment in favor of defendant. *Id*.

¶ 34 In the present case, the certified statement of plaintiff's property manager, Tameeka Nelson, and the affidavit filed by defendant, raise questions of material fact as to when defendant received the five-day notice for purposes of triggering the notice period, and whether plaintiff's forcible entry and detainer action was prematurely filed prior to the expiration thereof. Ms. Nelson stated that she mailed a copy of the five-day notice, and slid a copy under defendant's door, on January 12, 2017. Ms. Nelson's statement, standing alone, would indicate that the five-day period ran from January 12 to 17, meaning that the February 14 complaint was filed after the expiration of the notice period and, therefore, was not premature. However, defendant attested in her affidavit that she never received the five-day notice in the mail, thereby raising a question as to whether and when the notice was actually mailed. Defendant further attested that instead of receiving the notice which Ms. Nelson claims she slid under the door on January 12, defendant instead saw it "stuck between door and the door handle" on some unidentified date. Defendant explained:

> "I do not know what day I actually first saw the Notice of Termination. My mother, who lives several miles away, was ill and I would spend time with [her]. I also had lost a close friend, so I was busy and upset, which is why I was late with my rent."

¶ 35 Given that the certified statement of Ms. Nelson, and defendant's affidavit, conflict with each other regarding how and when service was made and the date upon which it was received, a question of material fact exists regarding when the five-day notice period began to run and whether plaintiff's complaint was filed before or after the expiration of the notice period.

¶ 36 A question of material fact also exists regarding whether defendant tendered payment of the overdue rent within the five-day period. A landlord is precluded from obtaining a judgment in a forcible entry and detainer action if the tenant tenders rent to the landlord within five days of receiving the notice. *Madison v. Rosser*, 3 Ill. App. 3d 851 (1972). Ms. Nelson stated that no such payment was made here, whereas defendant attested that she tendered payment within five days of receiving the notice.

¶ 37 Given all these genuine issues of material fact, we reverse the grant of summary judgment in favor of plaintiff and affirm the denial of defendant's motion for summary judgment. We remand for further proceedings.

¶ 38 B. Defendant's Appeal from the Denial of the Motion to Compel

¶ 39 Defendant argues that the court erred by denying her motion to compel the production of the full ledger of all her rent charges and payments from 2007 to 2017. Discovery rulings generally are reviewed for an abuse of discretion. *Brown v. Advocate Health and Hospitals Corp*., 2017 IL App (1st) 161918, ¶ 11. The circuit court abuses its discretion when its ruling is arbitrary, unreasonable, fanciful, or where no reasonable person would take the view adopted by the circuit court. *Id*. ¶ 10.

¶ 40 Defendant has failed to provide this court with a transcript of the hearings on the motion to compel and on the motion for reconsideration, so there is no way for us to determine the reasoning underlying the court's decision to deny the motion and no basis for holding that the court abused its discretion.[3] As the appellant, defendant has the burden of providing a sufficiently complete record of the proceedings to support a claim of error, and in the absence of

[3] We note that the missing transcripts of the hearing on the cross-motions for summary judgment did not similarly hamper our review of the trial court's order granting plaintiff's summary judgment motion, as our review there was *de novo*. On *de novo* review, we are not required to defer to the trial court's reasoning (see *Gonnella Baking Co. v. Clara's Pasta Di Casa, Ltd*., 337 Ill. App. 3d 385, 388 (2003)) and, therefore, transcripts of the summary judgment hearing were unnecessary for our review. *Id*.

such a record on appeal, we presume that the order entered by the circuit court was in conformity with the law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts arising from the incompleteness of the record are resolved against the appellant. *Id*. at 392. Accordingly, we affirm the order denying defendant's motion to compel.

¶ 41 For all the foregoing reasons, we affirm the denial of the motion to compel and the denial of defendant's motion for summary judgment. We reverse the order granting plaintiff's motion for summary judgment and remand for further proceedings. As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 42 Affirmed in part, reversed in part, and remanded.