2019 IL App (2d) 180748-U
No. 2-18-0748
Order filed July 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LINDA LEE, as Executor of the Estate of William R. Murray, Deceased,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No.18-CH-244
KATHLEEN A. MURRAY,	)	Honorable Paul M. Fullerton,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting plaintiff a default judgment, as plaintiff's complaint was insufficient to support the relief awarded and defendant had essentially articulated that defect; we thus reversed and remanded for the trial court to dismiss plaintiff's complaint, without prejudice.

¶ 2 Defendant, Kathleen A. Murray—the daughter of William R. Murray, now deceased—appeals a default judgment in a suit that plaintiff—Linda Lee, William's executor—labeled as one to quiet title. Kathleen argues that, because her proposed motion to dismiss raised a meritorious defense, the court did not do "substantial justice" when it entered the default judgment. We conclude that the default judgment—and the associated order to remove allegedly

encroaching structures—was not merely an abuse of discretion, but was improper as a matter of law. We therefore reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 On February 21, 2018, Lee filed a complaint relating to blocks 6, 7, and 8 in the Roosevelt Crest subdivision of Lombard. Kathleen owned a house built on block 7. William's estate owned the vacant lots on either side. Structures associated with the house encroached on both lots. Lee asked that the court "enter an order finding the encroachment on both parcels renders those parcels to be unmarketable as a result of the encroachments" and either order Kathleen to remove them within 14 days or to allow the estate to remove them.

¶ 5 On April 30, 2018, Lee filed a motion for a default judgment based on Kathleen's failure to either appear or file a responsive pleading despite proper service of the complaint. Kathleen appeared through counsel on May 15, 2018, and the court granted Kathleen until July 6, 2018, to file her motion to dismiss; Lee withdrew the motion for a default judgment. On August 8, 2018, Lee filed a second motion for a default judgment; Kathleen had not filed her motion. Lee asserted that the delay was the product of Kathleen's ill will against William.

¶ 6 Kathleen filed a "Motion for Leave to File Motion to Dismiss Pursuant to Section 2-619 of the Code of Civil Procedure [(Code) (735 ILCS 5/2-619 (West 2016))], Instanter" on August 22, 2018. Kathleen's counsel represented that he had determined that making a proper response to the complaint required him to research the history of the construction on lot 7, a process to which he encountered significant obstacles, which counsel detailed in the motion. The proposed motion to dismiss was appended. In it, Kathleen detailed the history of the three lots, asserting that William had constructed the claimed encroachments when he owned all three lots. Lot 7 became separately owned when, during divorce proceedings between William and Patricia

Murray, West Suburban Bank foreclosed on the mortgage on Lot 7, and then Patrick Quinn and Kathleen bought the property from West Suburban. The footprints of the claimed encroachments were unchanged from the time William built them, but the structure of one, a deck, was new. Kathleen argued that, because William had created the claimed encroachments, his successors in interest could not complain of them.

¶ 7 Kathleen also filed a response to the motion for a default judgment, in which she restated the barriers that she had encountered in assembling her defense. She further argued that William's estate "already has what [it] is entitled to, namely the real property of the estate [in] exactly *** the condition it was in the hands of the decedent." She argued that Lee was asking for an injunction in circumstances in which the court's granting of it would be inequitable.

¶ 8 On August 24, 2018, the court granted the motion for default judgment, denied Kathleen's motion to file her motion to dismiss, and ordered Kathleen to remove the structures at issue within 14 days. Kathleen moved for a stay of the injunction pending appeal; the court denied the motion, and Kathleen timely appealed.

¶ 9 II. ANALYSIS

¶ 10 In this appeal, Kathleen argues that the court did not do "substantial justice" when it entered the default judgment. She states that our review is for an abuse of discretion. Her argument centers on the merits of what she presents as her defense: that William's estate, as William's successor in interest, cannot assert a claim that William, who built the encroachments when he owned all three lots, could not himself have asserted.

¶ 11 Lee has not filed an appellate brief, but we deem the issues sufficiently straightforward that we may decide the issues on the merits. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 12 We start by addressing the applicable law. We conclude that the label that plaintiff gave her claim—an action to quiet title—did not match the relief that the court granted. Instead, as we will discuss, that relief was proper to an action in ejectment, but ejectment has an element that Lee did not plead.

¶ 13 "An action to quiet title in property is an equitable proceeding in which a party seeks to remove a cloud on his title to the property." *Hoch v. Boehme*, 2013 IL App (2d) 120664, ¶ 41. Here, rather than removing a cloud, Lee received an order requiring Kathleen to "remove all encroachments from Defendant's real property on to the real property of the Estate." In an action in equity, such an order is a mandatory injunction. A "mandatory injunction," also called an "affirmative injunction," is an "injunction that orders an affirmative act or mandates a specified course of conduct." Black's Law Dictionary 904 (10th ed. 2014). Although *prohibitory* injunctions may be part of the relief granted in an action to quiet title (see *Alsop v. Eckles*, 81 Ill. 424, 428 (1876); *Eldridge v. Eldridge*, 246 Ill. App. 3d 883, 884, 888-89 (1993)), Illinois authority contains no support for the imposition of a mandatory injunction in an action to quiet title.

¶ 14 Further, a mandatory injunction would not be proper under the circumstances here, even if it were a proper remedy in an action to quiet title.

> "A mandatory injunction is an extraordinary remedy which may be granted when a plaintiff establishes that his remedy at law is inadequate and that he will suffer irreparable harm without the injunctive relief. [Citation.] Mandatory injunctions are not favored by the courts and are issued only when the plaintiff has established a clear right to relief and the court determines that the urgency of the situation necessitates such action." *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 234 (1999).

Here, Lee did not allege anything showing true urgency; she alleged that the lots belonging to the estate had been for sale for "some time," and that the uncertainty about property rights had inhibited the sale, but she did not allege anything to explain why the matter was now urgent. She did not set out any basis on which the court could conclude that any remedy at law—such as money damages—would be inadequate. Finally, Lee's right to relief could not be "clear" when the complaint lacks any history of the structures that would allow one to infer that the encroachments are wrongful.

¶ 15 Although the relief that Lee obtained was not available in an action to quiet title, on proper pleadings such relief is available in an action in ejectment: the purpose of an action in ejectment is to obtain possession of land (*Dagit v. Childerson*, 391 Ill. 611, 614 (1945)), and a plaintiff may properly use the action to force the removal of an encroachment. See *Rosenthal v. City of Crystal Lake*, 171 Ill. App. 3d 428, 433-34 (1988) (a plaintiff could bring an ejectment action for the removal of a storm sewer). But a complaint stating a cause of action in ejectment was needed for a default judgment: "a default judgment *must* be reversed when the complaint upon which that judgment is premised fails to state a cause of action." (Emphasis added.) *Suttles v. Vogel*, 126 Ill. 2d 186, 193 (1988). The sufficiency of a complaint is an issue of law, and our review of it is *de novo*. *Suburban 1, Inc. v. GHS Mortgage, LLC*, 358 Ill. App. 3d 769, 772 (2005).

¶ 16 Lee's complaint failed to state a cause of action in ejectment. Under section 6-109 of the Code (735 ILCS 5/6-109 (West 2016)), a plaintiff cannot state a claim for ejectment unless he or she can plead that, "after his or her title accrued," "the defendant afterwards *** entered into [the] premises, and that [the defendant] unlawfully with[eld] from the plaintiff the possession thereof, to [the plaintiff's] damage." This court has held that, that particular language

notwithstanding, a plaintiff can assert an ejectment claim that accrued to his or her predecessors in interest. *Rosenthal*, 171 Ill. App. 3d at 433-34. Nevertheless, for an ejectment claim to be possible, if the claim did not arise during the plaintiff's ownership, it must have passed from a predecessor in interest during whose time of ownership the defendant *did* enter into the premises. See *Rosenthal*, 171 Ill. App. 3d at 433-34 (the plaintiff could state an ejectment claim based on an encroachment that the defendant allegedly created before the plaintiff inherited the encroached-upon land from his father). In other words, although an ejectment claim can pass from owner to owner, it nevertheless must have arisen from an unauthorized entry by the defendant onto the plaintiff's land. Lee's complaint contains no such allegation. She pled only that the structures on Kathleen's land crossed onto the lots that the estate owned. Thus, Lee did not state a claim in ejectment.

¶ 17 We also reverse the default judgment as such. We agree with Kathleen that our review is for an abuse of discretion. Section 2-1301(d) of the Code (735 ILCS 5/2-1301(d) (West 2016)), concerning the entry of default judgments, does not expressly state whether the court is to use its discretion in entering an order of default. However, section 2-1301(e) of the Code (735 ILCS 5/2-1301(e) (West 2016)), concerning the vacatur of default judgments, provides that the court acts in its discretion when, within 30 days of a default judgment's entry, it decides whether to vacate that default. Similarly, "[a] trial court's refusal to vacate a default judgment [under section 2-1301(e)] may be reversed because of a denial of substantial justice or for an abuse of discretion." *Rockford Housing Authority v. Donahue*, 337 Ill. App. 3d 571, 574 (2003). Furthermore, "default judgment is a drastic measure, not to be encouraged and to be employed with great caution, only as a last resort." *Biscan v. Village of Melrose Park Board of Fire & Police Commissioners*, 277 Ill. App. 3d 844, 848 (1996).

¶ 18 We deem that the court failed to exercise its discretion properly when it failed to recognize that Lee's complaint did not support the relief awarded. We also conclude that the default judgment amounted to a denial of substantial justice. The missing element in Lee's complaint is the same matter that Kathleen asked for leave to raise as an affirmative defense in her proposed section 2-619 motion. Kathleen argued that William, having built the encroaching structures, could not complain of its presence on the property that he retained; as William lacked a right to force removal of the structures, so would any successor in interest. The proposed section 2-619 motion suggests the plausible defense that Lee was attempting to exercise a supposed right that William never had. Finally, in contrast to the usual case in which a defendant seeks to vacate a default after its entry, Kathleen contested the default before the court entered it. If a default judgment is a drastic measure, a contested default judgment is even more so. Entering a contested default judgment when Kathleen raised a plausible defense did not provide substantial justice.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated above, we reverse both the order of default and the order requiring Kathleen to remove the structures from the land belonging to the estate. Although we found Lee's complaint insufficient, we are unwilling to hold, especially in her absence, that she could not possibly state a valid claim. Thus, we remand the cause with instructions that the trial court dismiss Lee's complaint without prejudice and set a deadline for her to file an amended complaint if she so chooses. See *Blazyk v. Damen Express, Inc.*, 406 Ill. App. 3d 203, 208-09 (2010).

¶ 21 Reversed and remanded.