

No. 1-13-1912

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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RALLA KLEPAK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 M1 702324
	)	
FRANKIE SCINTO,	)	Honorable
	)	Leonard Murray,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Justices Howse and Taylor concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Affirmed monetary award over defendant's contentions that the trial court was without subject matter jurisdiction to enter the order and that the order was a misuse of the court's contempt powers or its inherent authority to enforce of its own orders.

¶ 2 Plaintiff Ralla Klepak filed a complaint against defendant Frankie Scinto under the Illinois Forcible Entry and Detainer (FED) Act (735 ILCS 5/9-101 *et seq.* (West 2012)) seeking possession of the third floor apartment at 5158 North Ashland Avenue, in Chicago, and \$1,700 in unpaid rent. The circuit court subsequently granted defendant's motion for summary judgment on

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the possession issue, and entered a monetary judgment of \$3,750 against defendant for his failure to make use and occupancy payments as ordered. On appeal, defendant maintains that the trial court lacked jurisdiction to enter the monetary judgment against him, that the judgment was a misuse of the court's contempt power, and that the sanction entered was not a valid exercise of its inherent authority to enforce its own orders. Plaintiff has not filed a brief in response; however, we will consider the appeal pursuant to the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 131-33 (1976).

¶ 3 The record shows that on December 10, 2012, plaintiff issued a notice of termination of tenancy to defendant, alleging that he breached the terms of his lease by failing to pay rent in the amount of \$1,700. Plaintiff further notified defendant that he was required to quit and deliver up possession of the property in question within five days from the date of service of this notice, and that defendant had two unknown and unregistered persons residing with him who are not lessees. Through this notice, plaintiff advised defendant that she elected to terminate his present tenancy effective December 15, 2012. In her proof of service, plaintiff stated that she left a copy of this notice with the tenant and deposited it in the mail.

¶ 4 On January 21, 2013, plaintiff issued another notice of termination of tenancy to defendant. Plaintiff claimed therein that defendant had failed to pay the January 2013 rent in the amount of \$1,250, and owed past due rent of \$450, as well as a late charge of \$50. Plaintiff requested that defendant quit and deliver up possession of the property in question within five days from the date of service of this notice, and advised defendant that she elected to terminate his present tenancy effective January 26, 2013. Plaintiff also notified defendant that failure to

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promptly comply with the notice would result in a suit being filed for possession, as defendant was liable for rent due and becoming due, together with costs of the lawsuit.

¶ 5 On January 28, 2013, plaintiff filed an action against defendant, Alan Mora, and John Doe under the FED Act seeking possession of the third floor apartment at 5158 North Ashland Avenue, in Chicago, and \$1,700 in unpaid rent. The affidavit of service provides that on January 31, 2013, substitute service was accomplished by the sheriff who left a copy of the summons and complaint at defendant's usual place of abode with a person who was 13 years of age or older and residing there, informed that person of the contents of the summons, and mailed it to defendant at his usual place of abode. The person served was identified as 29-year-old Brett Shores, who informed the sheriff that Mora was deceased as of July 2012. On February 11, 2013, defendant's counsel filed a general appearance.

¶ 6 Plaintiff subsequently filed a motion for an order granting her use and occupancy payments; however, no copy of this motion is included in the record. Defendant filed a response in opposition to plaintiff's motion and a motion to dismiss plaintiff's complaint. In both, he alleged that plaintiff failed to serve him with a five-day notice as required by the FED Act where she merely slipped the notice under his door, and failed to attach a copy of the written lease he allegedly breached. Defendant maintained that plaintiff failed to confer jurisdiction upon the court because she did not terminate the lease, and further, that plaintiff failed to attach the written agreement upon which her claim is based or explain its absence.

¶ 7 In support of his motion, defendant filed his own affidavit averring that codefendant Mora was deceased, and that on December 10, 2012, he came home and found a notice of

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termination of tenancy on the floor inside his door. He averred that this notice was not personally delivered to him or sent via certified mail.

¶ 8 On March 25, 2013, the court denied the motion to dismiss. In addition, after "being advised in the premises" regarding plaintiff's motion for use and occupancy, the court entered a written order compelling defendant to pay plaintiff \$1,250 for use and occupancy of the premises for March, another \$1,250 for April, and \$1,250 for use and occupancy of the premises per month for each month thereafter commencing May 2013.

¶ 9 Plaintiff subsequently filed a petition for a rule to show cause, alleging that defendant had willfully refused to comply with the court's order of March 25, 2013, and asking the court to hold defendant in contempt of court for his failure to comply with that order. Plaintiff also requested that judgment be entered for her pursuant to the complaint she filed.

¶ 10 In his response to plaintiff's petition for a rule to show cause, defendant alleged that plaintiff was, in effect, seeking indirect criminal contempt, and had inappropriately shifted the burden of proof to him to show cause as to why he should not be held in contempt. He alleged that a person charged with indirect criminal contempt is entitled to have the charge proved beyond a reasonable doubt, and that the burden is on petitioner. He further alleged that the order for immediate possession requested by plaintiff for allegedly violating an order to pay use and occupancy is not an available sanction because it fails to consider the underlying merits of the possession claim.

¶ 11 On April 22, 2013, defendant filed a motion for summary judgment, alleging that plaintiff failed to provide him with notice as required by section 2-209 of the FED Act. He maintained

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that the notice failed to terminate his tenancy because plaintiff failed to notify him of the rent demanded and to give him at least five days to pay prior to terminating his tenancy as required by the FED Act. He further alleged that even if the notice was proper, the service was not where plaintiff merely slipped the defective notice under his door.

¶ 12 In support of his motion, defendant attached his own affidavit in which he averred that on December 10, 2012, and January 21, 2013, he came home to discover that notices of termination of tenancy had been slipped under his front door, and that neither notice was personally handed to him or sent by mail. He also averred that no one had personally handed him a written notice stating that the rent they are claiming is due and notifying him that he had at least five days to pay the rent or his tenancy would be terminated.

¶ 13 Plaintiff filed a response to defendant's motion for summary judgment and attached the affidavit of Jorge Bautista in support. Bautista averred that on January 21, 2013, he personally handed the notice of termination of tenancy to defendant as he stood in the doorway of his apartment.

¶ 14 On May 13, 2013, the parties appeared before the court through respective counsel. Defendant's counsel pointed out that the notice of termination of tenancy failed to advise defendant that he could pay the rent in five days from the date of service of the notice, and thus, provided defendant no time to "cure," as required by the FED Act. Plaintiff's counsel responded that this time period was implicit in the notice. The court found that the notice was "bad on its face," in that it does not suggest that unless payment is made within five days of service defendant's tenancy will be terminated. The court found that the complaint was filed

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prematurely, and should have been filed on January 29, 2013, instead of January 28, 2013.

Plaintiff's counsel conceded this error, and the court, accordingly, granted defendant's motion for summary judgment.

¶ 15 The court then found, however, that it could grant judgment in plaintiff's favor on the occupancy and use violation. The court noted that defendant owed rent for March, April, and May 2013, and entered judgment for \$3,750, the total of the unpaid rent. Defense counsel interjected that the court was basically holding defendant in contempt. The court disagreed and noted that it could grant use and occupancy without regard as to whether plaintiff prevails. Counsel agreed with that principle, but not the result where there had been no hearing and the court never issued a rule to show cause. The court responded that it had two options to remedy the use and occupancy violation, *i.e.*, either judgment for the unpaid use and occupancy or an accelerated trial. Counsel responded that a hearing is required to show that defendant has the present ability to pay, and the court replied that it is not. The court then entered a written order granting defendant's motion for summary judgment and plaintiff's rule to show cause, and a monetary judgment in the amount of \$3,750 against defendant for failure to pay use and occupancy.

¶ 16 In this appeal from that ruling, defendant first contends that the trial court was without jurisdiction to enter its monetary order on May 13, 2013, because the notice of termination of tenancy was "bad," and not properly served. He further maintains that the suit was prematurely filed.

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¶ 17 Subject matter jurisdiction refers to the power of the court to hear and determine cases of a general class to which the proceeding in question belongs. *The Courts of Northbrook Condominium Ass'n v. Bhutani*, 2014 IL App (1st) 130417, ¶25. Such jurisdiction cannot be waived, stipulated to, or consented to by the parties. *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶28. We review *de novo* whether the trial court had subject matter jurisdiction to hear this case. *The Courts of Northbrook Condominium Ass'n*, 2014 IL App (1st) 130417, ¶25.

¶ 18 Defendant contends that jurisdiction was lacking because the notice of termination of tenancy was defective and the filing of the complaint was premature. Section 9-209 of the FED Act provides that a landlord, at any time after rent is due, may demand payment and notify the tenant, in writing, that unless payment is made within the 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). That section further provides that 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 possession or maintain ejectment without further notice or demand. 735 ILCS 5/9-209 (West 2012).

¶ 19 The supreme court has held that strict adherence to statutory requirements is required in order to establish jurisdiction. *Avdich v. Kleinert*, 69 Ill. 2d 1, 6 (1977). Thus, where, as here, the statute includes a written demand requirement prior to filing a complaint, the demand must be in strict compliance with the statute or jurisdiction will not attach. *Figueroa v. Deacon*, 404 Ill. App. 3d 48, 52 (2010), citing *Nance v. Bell*, 210 Ill. App. 3d 97, 100 (1991).

¶ 20 In this case, plaintiff failed to advise defendant in the notice of termination of tenancy that his lease would be terminated unless the delinquent rent was paid within a certain time

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period, as required under the FED Act (735 ILCS 5/9-209 (West 2012)), and filed a complaint for possession before the supposed termination of the lease (735 ILCS 5/9-102(a)(4) (West 2012)). Plaintiff's counsel asserted that the time period was included in the note, but conceded that the filing of the FED action was one day premature. *Fifth Third Mortgage Co. v. Foster*, 2013 IL App (1st) 121361, ¶13. Since filing a proper notice and a timely FED complaint are jurisdictional requirements and plaintiff failed to comply with these requirements, the circuit court had no jurisdiction over the FED matter. *Fifth Third Mortgage Co.*, 2013 IL App (1st) 121361, ¶13; *cf. Prairie Management Corp. v. Bell*, 289 Ill. App. 3d 746, 752 (1997), citing *Morris v. Martin-Trigona*, 89 Ill. App. 3d 85 (1980) (holding that failure to comply with the FED statutory notice requirements may serve as a defense but does not deprive the court of subject matter jurisdiction). Consistent with *Fifth Third Mortgage Co.*, we find here that the circuit court did not have jurisdiction over the FED matter.

¶ 21 That said, we consider whether the monetary judgment for use and occupancy may stand. Defendant contends that it cannot because it was a misuse of the court's contempt power and an invalid exercise of its inherent authority to enforce its own orders. We note, initially, that the court explicitly denied defendant's suggestion that it was entering a contempt finding and asserted that it could grant use and occupancy without regard as to whether plaintiff prevailed.

¶ 22 There is no question that a claim for *rent* may be joined in a complaint for possession under section 9-209 of the FED Act. 735 ILCS 5/9-209 (West 2012). In addition, however, section 9-201 of the Act provides that a landlord may sue for rent or *use and occupation* in a civil action if certain conditions are met, such as when the lands are held and occupied by a

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person without any special agreement for rent (735 ILCS 5/9-201 (West 2012)), for example, a current, valid lease (*People ex rel. Dept. of Transportation v. Cook Development Co.*, 274 Ill. App. 3d 175, 179-80 (1995)). Accordingly, defendant's application of the requirements of section 9-209 of the Act appears misplaced where a separate civil action for use and occupancy is pursued under section 9-201 of the Act.

¶ 23 When one party occupies the premises of another without any agreement for the payment of rent, the law implies a promise on the part of the occupant to pay the owner for use and occupation thereof at a reasonable rental value. *Board of Directors of Warren Blvd. Condominium Ass'n v. Milton*, 399 Ill. App. 3d 922, 926 (2010), citing *Jackson v. Reeter*, 201 Ill. App. 29, 32 (1915). Defendant concedes that when a plaintiff properly terminates a lease, defendant is holding and occupying the premises without any special agreement for rent and the court may order use and occupancy payments. Under these circumstances, the lessor is entitled to a monetary judgment for the lessee's use and occupation of the premises from the date the lease expired (735 ILCS 5/9-201(2) (West 2012)), at a reasonable rental value (*Board of Directors of Warren Blvd. Condominium Ass'n*, 399 Ill. App. 3d at 926).

¶ 24 Here, plaintiff first filed a complaint under section 9-209 of the FED Act for rent and possession. Thereafter, she filed a separate motion for use and occupancy, a copy of which is not included in the record. There is also no copy of the written lease between the parties in the record. On March 25, 2013, the court, after being "advised in the premises," granted plaintiff's motion and entered a written order awarding use and occupancy of \$1,250 for March, April and each month thereafter commencing in May. Then, on May 13, 2013, the court entered a written

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order for \$3,750, representing three months of use and occupancy that defendant had failed to pay.

¶ 25 The propriety of the monetary judgment is dependent on whether there was a special agreement for rent; however, whether there was a current, valid special agreement for rent is unclear as the record does not contain a copy of plaintiff's motion requesting use and occupancy nor the written lease entered between the parties. Defendant, as appellant, has the responsibility of providing this court with a complete record on appeal. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Under these circumstances, we invoke the presumption that the court's order entered, after being advised in the premises, was correct. *Foutch*, 99 Ill. 2d at 393-94.

¶ 26 In light of the foregoing, we affirm the order of the circuit court of Cook County.

¶ 27 Affirmed.