

No. 1-13-1991

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).

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

2444 W. DIVERSEY CONDOMINIUM, ASSOCIATION,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff, Counter-Defendant,	)	
v.	)	
	)	
2444 W. DIVERSEY, LLC,	)	No. 11 CH 16703
	)	
Defendant, Counter-Plaintiff,	)	
Third-Party-Plaintiff and Appellant,	)	
	)	
(ADAM KABABREC, ERICA LEEZER, and KEVIN KEEFE, all individually,	)	
	)	
Third-Party-Defendants,	)	
	)	
ERWIN ASSOCIATES LLC, WILLIAM CHATT, individually, and JAMES ERWIN, individually,	)	The Honorable
	)	Thomas Allen
Third-Party-Defendants, Appellees).	)	Judge Presiding.
	)	

JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed developer's claim for malicious prosecution against the condominium association's attorneys because the attorneys had probable cause to file

the underlying lawsuit. The trial court's dismissal of the developer's claim for aiding and abetting was proper because the pleadings did not suggest that the attorneys knowingly aided their client in allegedly violating its fiduciary duty to the developer. Affirmed.

¶ 2 This interlocutory appeal arises from the trial court's order granting a section 2-619.1 motion to dismiss filed by third-party-defendants Erwin and Associates, LLC, William Chatt, and James Erwin (collectively the Attorneys) against third-party-plaintiff 2444 W. Diversey, LLC's (the Developer) (735 ILCS 5/2-619.1 (West 2012)). This case pertains to a dispute regarding the number of parking spaces allotted at the condominium property located at 2444 W. Diversey Avenue in Chicago (the Property). The 2444 W. Diversey Condominium Association (the Association) retained the Attorneys to represent the Association in an action against the Developer. On appeal, the Developer contends that the trial court erroneously dismissed the Developer's claim for malicious prosecution against the Attorneys, claiming they had no probable cause to bring the underlying lawsuit. The Developer also contends that the trial court erroneously dismissed the Developer's claim for aiding and abetting because the Attorneys knowingly assisted the Association and its board in breaching their fiduciary duty to the Developer. We affirm.

¶ 3 **BACKGROUND**

¶ 4 In 2006, the Developer purchased the Property and obtained a change in zoning from the City of Chicago (the City) to allow for an eight-unit residential condominium building. The zoning change required the Developer to enter into a restrictive covenant requiring onsite parking for at least ten vehicles. On April 30, 2008, the Developer recorded a declaration of condominium ownership, which attached a plat and survey showing nine parking spaces. On January 12, 2009, however, the Developer recorded a first amendment revising the survey to contain ten parking spaces. The Developer eventually turned over control and management of the Association to the unit owners around November, 2009. The Developer, however, still maintained ownership of unit 4W and its parking space.

¶ 5 In April 2011, when the Developer was in the process of selling the Property's final unit 4W, a dispute arose on whether this unit could actually be sold with a parking space. The Association believed it was unclear whether the City's Municipal Code (Code) would allow for a tenth parking space. In addition, the Association determined that no certificate of occupancy for the Property had been issued as required by the City. Subsequently, on May 6, 2011, the Attorneys filed suit against the Developer on behalf of the Association. The initial complaint alleged in pertinent part, that the Developer failed to obtain a certificate of occupancy and the parking lot failed to comply with the City's Code. Specifically, the alley required to access parking spaces P-4, P-5, and P-6 was too narrow to meet the Code's guidelines, making all three spaces unusable. See City of Chicago Municipal Code, §§ 17-10-1001, 17-10-1004 (amended May 26, 2004). The Association primarily sought an order requiring the Developer to bring the Property into compliance with the certificate of occupancy, to pay any fees imposed by the City, and to enjoin the sale of the final unit until the Developer had brought the Property into compliance with the Code.

¶ 6 On June 2, 2011, the trial court ordered the Developer to complete all work required to obtain the building's certificate of occupancy from the City. The order also enjoined the final unit's sale until the certificate of occupancy had been issued. The certificate of occupancy was finally issued on July 20, 2011. The Developer then filed a motion to dismiss the complaint and a counterclaim, a subject upon which we will later elaborate. Because the trial court could offer the Association no further relief, the court granted the Developer's motion and dismissed the Association's claims with prejudice.

¶ 7 On October 12, 2011, the Attorneys then filed a complaint on behalf of the Association seeking a writ of mandamus against the City and its zoning administrator (mandamus complaint).

The mandamus complaint alleged, among other things, that the alley adjacent to the property was the only access to stalls P-4, P-5, and P-6, despite the fact that the alley was too narrow to comply with the Code's dimension and access requirements for off-street parking. In addition, the Attorneys requested that the court issue a writ of mandamus to the City and zoning administrator, instructing them to coordinate an inspection and issue an opinion regarding whether the parking lot complied with the Code. The mandamus complaint was consolidated into the present lawsuit on October 27, 2011, and the trial court granted the Developer's motion to intervene.

¶ 8 On July 11, 2012, the City moved to dismiss the mandamus complaint on the grounds that the City had inspected the parking lot area as requested and could offer no relief. The City attached an affidavit of the zoning administrator, Patricia Scudiero, in which she noted that the City had performed inspections of the Property on January 11, 2012, April 4, 2012, June 7, 2012, and June 28, 2012. She concluded that an alley was not considered to be an access aisle for purposes of the Code, and in her opinion, the parking lot complied with the Code. The trial court granted the City's motion and dismissed the mandamus complaint with prejudice.

¶ 9 Along with its motion to dismiss, as discussed above, the Developer filed a counter-complaint against the Association. The parties briefed the Association's motion to strike the counter-complaint and the trial court granted the Association's motion on January 25, 2012. The Developer, however, was allowed to re-plead some counts in an amended counter-complaint. In essence, the Developer alleged that the Association was fundamentally trying to take over the tenth parking space, which the Developer owned and hoped to sell in conjunction with unit 4W. On November 8, 2012, the Developer filed a second-amended counter-complaint and third-party complaint naming the Attorneys as third-party-defendants in counts IV and V, and sought

recovery from malicious prosecution and aiding and abetting. Specifically, the Developer alleged that the Attorneys lacked probable cause to bring the initial lawsuit. In addition, the Developer argued that the Attorneys assisted the Association and its board members<sup>1</sup> in breaching their fiduciary duties by "concocting a ridiculous interpretation of the Chicago zoning ordinance and delaying the closing of unit 4W in an effort to aid and abet the board members' efforts to unlawfully take the [Developer's] parking space." Furthermore, the Attorneys failed to provide rational sound legal advice and represent the best interests of the Association. The Attorneys then filed their motion to dismiss Counts IV and V, and after briefing, the trial court dismissed those counts with prejudice. The Developer now appeals.

¶ 10

#### ANALYSIS

¶ 11 The Developer contends that the trial court erroneously dismissed the Developer's claim for malicious prosecution against the Attorneys because they had no probable cause to bring the underlying lawsuit. Section 2-619.1 of the Code of Civil Procedure provides that a motion with respect to pleadings pursuant to sections 2-615 and 2-619 may be filed together as a single motion. 735 ILCS 5/2-619.1 (West 2012); *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. A motion to dismiss pursuant to section 2-615 tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts an affirmative defense that defeats the claim. *Solaia Technology LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 587-79 (2006). When reviewing a decision to grant a motion pursuant to section 2-615, our inquiry is whether the allegations of the complaint, construed in the light most favorable to the nonmoving party, are sufficient to establish a cause of action upon which relief

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<sup>1</sup> The Developer also specifically named Association board members Adam Kabarec, Erica Leezer and Kevin Keefe as third-party-defendants in the underlying suit. The claims against these individuals, which generally pertain to the breach of their fiduciary duty to the Developer and the Association, remain pending.

may be granted. *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1086 (2010). When reviewing a section 2–619 motion to dismiss, we must consider whether a genuine issue of material fact exists which precludes dismissal and whether an affirmative matter negates the plaintiff's cause of action completely or refutes critical conclusions of law or conclusions of material unsupported fact. *Turner v. 1212 S. Michigan Partnership*, 355 Ill. App. 3d 885, 892 (2005). Our review under either section is *de novo* and we can affirm on any basis present in the record. *Brooks v. McLean County Dist. Unit No. 5*, 2014 IL App (4th) 130503, ¶ 14.

¶ 12 To prevail on a claim for malicious prosecution, the plaintiff must plead and prove that (1) the defendant brought the underlying suit maliciously and without probable cause, (2) the underlying suit was terminated in favor of the plaintiff, and (3) the plaintiff suffered “special injury” beyond the usual expense, time and annoyance involved in defending a lawsuit. *Independence Plus, Inc. v. Walter*, 2012 IL App (1st) 111877, ¶ 19. Illinois courts look with disfavor on malicious prosecution suits because public policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect. *Farewell v. Senior Services Association, Inc.*, 2012 IL App (2d) 110669, ¶ 23. While this privilege is not absolute, a plaintiff carries the burden of overcoming this privilege by pleading malice, meaning that the attorney intended to harm, which is independent of, and unrelated to, his desire to protect his client. *Id.*

¶ 13 Here, the record shows that the trial court properly dismissed the Developer's claim for malicious prosecution because the existence of probable cause was an affirmative matter that defeated the claim. Specifically, at the time the initial complaint was filed, the Developer had yet to obtain the certificate of occupancy for the Property. The filing of the complaint allowed the trial court to enter an order requiring the Developer to bring the Property into compliance and

obtain the certificate of occupancy, which the City required. In addition, the record suggests that at the time the lawsuit was filed, there was a genuine issue of material fact as to whether parking stalls P-4, P-5, and P-6 complied with the City's Code. Thus, the Attorneys reasonably filed a judiciable claim against the Developer. See *Johnson v. Target Stores, Inc.*, 341 Ill.App.3d 56, 73 (2003) ("if it appears that there was probable cause to institute the proceedings, such fact alone constitutes an absolute bar to an action for malicious prosecution"); *Keefe v. Aluminum Co. of America*, 166 Ill. App. 3d 316, 318 (1988) (in the context of a civil action, probable cause has been defined as that set of facts that would lead a person of ordinary caution and prudence to believe that he had a justifiable claim against the defendant.) Furthermore, while we question whether the Developer has standing to bring a malicious prosecution claim regarding the mandamus complaint since it was filed against the City, the mandamus complaint allowed the Association to obtain an adjudication from the City regarding whether the parking lot complied with the zoning ordinance. Accordingly, we find that the trial court did not err in dismissing the Developer's claim for malicious prosecution, as the presence of probable cause was an absolute bar to its claim.

¶ 14 The Developer next contends that the trial court erroneously dismissed its claim for aiding and abetting because the Attorneys knowingly assisted the Association and its board in breaching its fiduciary duty to the Developer by obstructing the sale of the property's final unit. In Illinois, a claim for aiding and abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation. *Thornwood, Inc. v. Jenner & Block*, 344 Ill. App. 3d 15, 27-28 (2003).

¶ 15 Initially, we note that the Developer's brief suffers from deficiencies and fails to comply with the requirements of Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). Specifically, the Developer fails to provide citations to allegations in the record to support their contentions in respect to this issue. See *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 208 (2007). This court is entitled to clearly defined issues, cohesive legal arguments and citations to relevant authority. *County Mutual Insurance Co. v. Styck's Body Shop, Inc.*, 396 Ill. App. 3d 241, 254-55 (2009). Accordingly, the Developer has forfeited their contentions on appeal. See *TruServ Corp. v. Ernest & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007).

¶ 16 Forfeiture aside, we find that even if the Association and its board breached their fiduciary duties, and even if the Attorneys helped them to do so, the allegations in the complaint are insufficient to establish that any such actions were performed *knowingly*. Cf. *Thornwood, Inc.*, 344 Ill. App. 3d 15 at 29 (the court denied the complaint's dismissal when the attorney firm knowingly assisted the defendant in breaching his fiduciary duty by actively helping the defendant deceive his partner in contract negotiations with a third-party). Furthermore, we are unable to consider the Developer's new arguments set forth on appeal, including the Developer's contention that the Attorneys advised the Association and board to issue two false disclosures that no parking was included in the sale of unit 4W and that special assessments would be required due to the Property's "shoddy construction," as well as a paid assessment letter in violation of the Illinois Condominium Property Act (765 ILCS 605/18(i), 26 (West 2012)). See *Weidner*, 402 Ill. App. 3d at 1086. (when considering a motion to dismiss, a reviewing court may only consider whether the allegations in the complaint are sufficient to establish a cause of action upon which relief may be granted). Therefore, the trial court did not err in dismissing the Developer's claim for aiding and abetting.

¶ 17

CONCLUSION

¶ 18 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 19 Affirmed.