2012 IL App (1st) 112315-U

FIRST DIVISION
FILED: JUNE 11, 2012

No. 1-11-2315

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LASALLE BANK NATIONAL ASSOCIATION, a national banking association, as trustee under Trust No. 127632, ANTHONY BRYANT, and UNKNOWN OWNERS/OCCUPANTS,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	No. 10 CH 22955
v.	)	
BOARD OF DIRECTORS OF 420 WEST GRAND CONDOMINIUM ASSOCIATION and PENLAND & HARTWELL, LLC,	)	The Honorable Kathleen M. Pantle,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err in denying motion for substitution of judge or in granting motion to dismiss.

¶ 2 The plaintiffs, LaSalle Bank National Association, Anthony Bryant, and unknown owners and occupants, appeal from the judgment of the circuit court dismissing their complaint against the defendants, the Board of Directors of 420 West Grand Condominium Association (Board) and its

law firm, Penland & Hartwell, LLC (Penland). On appeal, the plaintiffs argue that the court erred in denying their motion for substitution of judge as of right and that the court erred in dismissing their complaint. For the reasons that follow, we affirm the circuit court's judgment.

¶ 3 In May 2010, the plaintiffs filed their verified complaint, which alleged that the defendants had evicted Bryant from his condominium unit without serving him as a party to an underlying forcible entry and detainer suit. The plaintiffs alleged that the defendants thus perpetrated a "tortious breach of fiduciary duties and constructive fraud." After asserting the underlying facts, the plaintiffs stated their claim in a single paragraph:

> "54. The foregoing acts violated the fiduciary duties of the Defendants ***, were knowingly and willfully committed for the unlawful purpose of evicting Plaintiffs from their property without the process of law, as well as depriving them of their property by imposing upon them substantial costs, including improper legal fees charged for unlawful acts in pursuit of the unlawful objectives detailed herein, together with expenses and costs which Plaintiffs have been forced to incur in their effort to defend against the unlawful actions hereinabove described."

The plaintiffs sought damages, punitive damages, an injunction prohibiting further breaches by the defendants, and attorney's fees and costs.

¶ 4 The defendants responded by filing a motion to dismiss the plaintiffs' complaint. In their motion to dismiss, the defendants asserted that they could not have breached a fiduciary duty, because they followed all declarations, bylaws, and statutes applicable to the Board. They also asserted that the Board was protected by the business judgment rule and that Penland owed the

plaintiffs no fiduciary duty. To their motion, the defendants attached copies of documents from the forcible entry and detainer action. Those documents indicate that the court in the forcible entry action vacated orders entered prior to proper service on Bryant.

¶ 5 On April 19, 2011, the circuit court heard arguments on the defendants' motion to dismiss. At that hearing, counsel for the defendants presented argument on their motion without interruption or questions from the judge. However, when plaintiffs' counsel argued that Penland owed them a duty because Penland was the Board's agent, the judge interrupted:

> "You know, I have a question about that. That would kind of turn the attorney-client privilege on its head then because that would mean that the [Board's] attorneys owed a fiduciary duty to your client. ***
>
> How in the world, if I follow your logic here, how is it that opposing counsel would ever be able to fulfill these fiduciary obligations to the other side? And, number two, wouldn't that deprive the [Board] of its right to have a counsel that is loyal ***. *** I'm not saying [your argument] doesn't make some sense on some level but when you talk about the relationship of attorneys and their clients it just doesn't seem to fit at that point ***."

When counsel pressed the argument by asserting that agents are bound by legal constraints placed on their principles, the court again expressed doubt:

> "Right, but the *** remedies are either for Petition for Rule to Show Cause or sanctions or something like that. To say that it becomes a breach of fiduciary duty to your client ***, where does it end? *** That's the problem I'm having here.
>
> *** [T]here are remedies for lawyers who refuse to obey court orders ***. ***

*** But for a cause of action that the lawyer owes a duty to your client, *** that's the part where I'm having difficulty here."

After further argument from plaintiffs' counsel, the court granted leave to file additional authority on the point.

¶ 6 On May 24, 2011, the plaintiffs filed a motion for substitution of judge as of right. The circuit court denied the motion for substitution of judge, and it granted the defendants' motion to dismiss. In granting the motion to dismiss, the court concluded that Penland owed no fiduciary duty to the plaintiffs. It also concluded that the Board had followed all applicable rules and laws in prosecuting its forcible entry and detainer action and, therefore, did not breach any fiduciary duty to the defendants. The court further reasoned that the plaintiffs had failed to show how they had been damaged by the plaintiffs' actions, since Bryant was eventually joined as a party to the underlying forcible entry and detainer action, and any orders of possession entered prior to his joining the case had been vacated. In support of this reasoning, the court noted the documentation from the related suit that the defendants had filed to their motion to dismiss, and it also observed that it could take judicial notice of those documents. The plaintiffs now appeal.

¶ 7 The plaintiffs' first argument on appeal is that the circuit court erred in denying their motion for substitution of judge as of right. Under section 2-1001 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(2) (West 2010)), litigants enjoy the right to one automatic substitution of judge "if the request for substitution is 'presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case.' " *In re Marriage of O'Brien*, 2011 IL 109039 ¶ 30 (citing 735 ILCS 5/2-1001(a)(2)(ii) (West 2006)). There is no dispute that the

plaintiffs filed their motion for substitution of judge before any substantive ruling in the case. The circuit court nonetheless denied the plaintiffs' motion because it came after the plaintiffs were able to "test the waters" to determine the judge's opinions on the case.

¶ 8 Under the "test the waters" exception upon which the circuit court relied, "[e]ven if the trial court did not rule on a substantial issue, a motion for substitution of judge as of right may still be denied, if before filing the motion, the moving party had an opportunity to test the waters and form an opinion as to the court's disposition towards his claim." *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 246, 854 N.E.2d 774 (2006). "The purpose of this exception is to keep parties from 'judge shopping' when they are able to tell which way a judge is leaning on a case." *KIC v. Bianucci*, 2011 IL App. (1st) 100622, ¶ 13. This "test the waters" exception has been applied and repeated in a long line of appellate court cases dating back almost 30 years. See *KIC*, 2011 IL App. (1st) 10622, ¶ 13; *Hoellen*, 367 Ill. App. 3d 240, 246; *In re Estate of Gay*, 353 Ill. App. 3d 341, 343, 818 N.E.2d 860 (2004); *Partipilo v. Partipilo*, 331 Ill. App. 3d 394, 398-99, 770 N.E.2d 1136 (2002); *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 338, 744 N.E.2d 877 (2001); *In re Marriage of Abma*, 308 Ill. App. 3d 605, 611, 720 N.E.2d 645 (1999); *Gilberg v. Toys 'R' US, Incorporated*, 126 Ill. App. 3d 554, 556-57, 467 N.E.2d 947 (1984).

¶ 9 The plaintiffs argue that we should abandon the above line of precedent, because new case law and statutory changes cast doubt on its viability. In so arguing, the plaintiffs face a formidable obstacle in the form of horizontal *stare decisis*. The doctrine of horizontal *stare decisis* expresses the strong policy of courts to stand by their precedents, so that both the people and the bar may rely on court decisions with assurance that they will not be overruled lightly. *Vitro v. Mihelcic*, 209 Ill.

2d 76, 81-82, 806 N.E.2d 632 (2004); see also *O'Casek v. Children's Home and Aid Society of Illinois*, 229 Ill. 2d 421, 454, n. 4, 892 N.E.2d 994 (2008) (Karmeier, J., dissenting) (distinguishing between horizontal and vertical *stare decisis*). Although horizontal *stare decisis* "is not an inexorable command," "any departure from *stare decisis* must be specially justified." *Vitro*, 209 Ill. 2d at 82. That is, a court should not disturb its own precedents absent good cause, compelling reasons, or some showing that " 'serious detriment is thereby likely to arise prejudicial to public interests.' " *Vitro*, 209 Ill. 2d at 82 (quoting *Maki v. Frelk*, 40 Ill. 2d 193, 196, 239 N.E.2d 445 (1968)).

¶ 10 We dispense quickly with the plaintiffs' assertion that new case law casts doubt on the "test the waters" doctrine. The plaintiffs are correct that, in *Bemis v. State Farm Fire and Casualty Co.*, 388 Ill. App. 3d 687, 905 N.E.2d 285 (2009), this court disavowed the "test the waters" doctrine. However, *Bemis* was later vacated by supervisory order of our supreme court. See *Bemis v. State Farm Fire and Casualty Co.*, No. 108283 (2010). *Bemis* therefore holds no precedential sway over our decision.

¶ 11 *Bemis* notwithstanding, the plaintiffs also assert that the "test the waters" doctrine cannot be justified by the current language of section 2-1001 of the Code. For this argument, the plaintiffs rely on two decisions cited in *Bemis*: *Illinois Licensed Beverage Association, Inc. v. Advanta Leasing Services*, 333 Ill. App. 3d 927, 776 N.E.2d 255 (2002), and *Scroggins v. Scroggins*, 327 Ill. App. 3d 333, 762 N.E.2d 1195 (2002). Because *Advanta* relied exclusively on the *Scroggins* analysis, and added nothing to it, we need address only *Scroggins*.

¶ 12 Relying on 1993 amendments to section 2-1001 of the Code (see P.A. 87-949, eff. Jan. 1,

1993), the *Scroggins* court rejected the "test the waters" doctrine based on the following reasoning:

> "Under prior statutes allowing the automatic substitution of a judge, an inquiry could be made whether the motion was filed simply for delay or whether the movant had an opportunity to test the waters and form an opinion as to the court's reaction to his claim. [Citation.] The present version, however, has adopted a new test. Under the present version, it is not necessary to allege that the judge is prejudiced against the defendant. *Cf.* Ill. Rev. Stat. 1987, ch. 38, par. 114-5(a).[1] Under the present version of section 2-1001(2), the right to a substitution without cause must be 'timely exercise[d].' [Citation.] A party timely exercises his right if his motion 'is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case. [Citations.]" *Scroggins*, 327 Ill. App. 3d at 336.

¶ 13 To the extent *Scroggins* means this reasoning to discredit the "test the waters" doctrine, it mistakes the import of the 1993 amendments to the Code. Prior to 1993, section 2-1001 was titled "Change of Venue," and it contained provisions relating to both a change of forum and a change of judge. See 735 ILCS 5/2-1001 (West 1992). Although *Scroggins* implies otherwise, that section contained no provision "allowing the automatic substitution of a judge." Rather, it required parties to move for a change in judge if they had cause to do so. See 735 ILCS 5/2-1001(a), (c) (West 1992). The 1993 amendments separated the concepts of change of venue and substitution of judge, and they added a provision allowing automatic substitution of judge as of right. The amendments,

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[1]This citation refers to the substitution of judge provision in the Code of Criminal Procedure of 1963. Its relevance to this discussion is not readily apparent, and *Scroggins* does not further explain it.

however, left fully intact the statutory language regarding the timing of motions or petitions for substitution of judge. Under the prior statute, such a petition was to be "presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001(c) (West 1992). Under the current statute, such a motion faces precisely the same time restrictions. See 735 ILCS 5/2-1001(a)(2)(ii) (West 2010) (such a motion "shall be granted if it is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case"). Because the 1993 amendments to section 2-1001 did not change its timing provisions, we disagree with *Scroggins* that the statutory changes cast doubt on the viability of the "test the waters" doctrine. If the doctrine was viable at its outset, it is no less viable now. We reject the plaintiffs' position that statutory changes and case law compel our departure from the "test the waters" doctrine and the line of decisions endorsing it, and we therefore lack the good cause or compelling reasons necessary to justify disregarding *stare decisis* to overturn this law.

¶ 14 Anticipating that we might refuse to upset the "test the waters" doctrine, the plaintiffs argue in the alternative that, even if the doctrine survives, it should not apply under the facts of this case. According to the plaintiffs, the circuit court judge's colloquies with their counsel indicated only her interest in an "extended dialogue" in which she could "raise[] [a] question" without "declaring a position." We disagree. During the hearing, the judge allowed counsel for the defendants to argue uninterrupted, but, during plaintiffs' counsel's argument, she interrupted several times to raise serious doubts about the plaintiffs' arguments. She stated that the plaintiffs' position would "turn the attorney-client privilege on its head," that she could not see "[h]ow in the world" the plaintiffs' theory

was workable, and that she was "having difficulty" with the plaintiffs' theory. She also explained at length why the plaintiffs' theory could not work, and she refuted fundamental tenets of the plaintiffs' argument. Although she stopped short of issuing an explicit ruling, the tenor of her comments previewed her inclination very clearly for the plaintiffs. After that hearing, an attentive listener would have known that the judge stood fully poised to reject the plaintiffs' claim, absent some strongly persuasive authority to indicate she could not. The plaintiffs' filing of a motion for substitution on the heels of gaining this information is just the type of action the "test the waters" doctrine is designed to prevent. Accordingly, we conclude that the circuit court did not err in rejecting the plaintiffs' motion for substitution of judge.

¶ 15 The plaintiffs' second argument on appeal is that the circuit court erred in granting the defendants' motion to dismiss their complaint. A motion to dismiss may be brought under either section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)) or section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). A dismissal under section 2–615 admits all well-pleaded facts and attacks the legal sufficiency of the complaint. 735 ILCS 5/2–615 (West 2010); *La Salle National Bank v. City Suites, Inc.*, 325 Ill. App. 3d 780, 790, 758 N.E.2d 382 (2001). A motion to dismiss under section 2–619, on the other hand, admits the legal sufficiency of the complaint but raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569–70, 778 N.E.2d 1153 (2002); 735 ILCS 5/2–619(a)(9) (West 2010). Although the defendants' motion was nominally filed pursuant to section 2-619, the circuit court relied both on affirmative matter and on the idea that the plaintiffs had not pled damages. In

any event, a motion to dismiss under either section 2–615 or section 2–619 admits all well-pled allegations in the complaint and reasonable inferences to be drawn from the facts. *In re Chicago Flood Litigation*, 176 Ill.2d 179, 184, 680 N.E.2d 265 (1997). Our review of a dismissal under either section is *de novo*. *Van Meter v. Darien Park District*, 207 Ill.2d 359, 368, 799 N.E.2d 273 (2003).

¶ 16 Here, the circuit court dismissed the plaintiffs' complaint, because, among other reasons, the plaintiffs had failed to plead any valid damages arising from the defendants' failure to effect proper service on them in the underlying forcible entry and detainer action. Indeed, "[t]o establish a cause of action for breach of fiduciary duty, a plaintiff must prove (1) a fiduciary duty on the part of the defendant, (2) a breach of that duty, (3) damages, and (4) a proximate cause between the breach and the damages." *Carter v. Carter*, 2012 IL App (1st) 110855, ¶ 25.

¶ 17 In ruling that the plaintiffs did not plead damages, the circuit court relied on documentation indicating that Bryant was eventually joined in the forcible entry and detainer action and that orders entered prior to his joinder were vacated. On appeal, the plaintiffs challenge neither the authenticity of those documents nor the court's authority to take judicial notice of them. We therefore accept as true the circuit court's observations regarding the forcible entry litigation. Given those observations, we also cannot discern how the plaintiffs were damaged or injured by the plaintiffs' alleged initial failure to serve them. The plaintiffs' complaint's only description of damages is its general reference to attorney's fees and costs accrued as a result of the forcible entry action. The plaintiffs, however, do not explain how those fees were proximately caused by a prior failure to serve them in a case in which they were eventually joined and any prior adverse orders vacated. Accordingly, we agree with the circuit court's decision to dismiss the plaintiffs' complaint for failure to allege damages.

¶ 18 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 19 Affirmed.