2016 IL App (1st) 151454-U

SECOND DIVISION
May 24, 2016

No. 15-1454



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

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| KAROLA J. P. SCOTT, Individually and as Beneficiary of Land Trust No. 8002354405,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>5036-38 SOUTH DREXEL BOULEVARD CONDOMINIUM ASSOCIATION, KURT HAM, WANDA VARNADOE, EVELYN FRYER, and ROSA FRYER,<br><br>Defendants-Appellees. | ) | Appeal from the Circuit Court of Cook County.<br><br>No. 13 CH 20977<br><br>Honorable Rita M. Novak<br>Judge Presiding |

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JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Hyman concurred in the judgment.

**ORDER**

¶ 1 *Held*: Plaintiff's "derivative" claim was properly dismissed because it is improper in form and is defeated by a release. The trial court did not err by dismissing plaintiff's other claims as plaintiff fails to state a cause of action.

¶ 2 Plaintiff filed this case seeking damages for misconduct allegedly committed by members of her condominium board. She also seeks a declaration that a special assessment levied by the condominium association is void as unlawful or void because the board members breached their

fiduciary duties to her when they imposed it. The trial court dismissed the case. We hold that the trial court did not err when it dismissed the case and, accordingly, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff Karola J. P. Scott holds a beneficial interest in a land trust that owns a condominium unit, Unit 3S, at 5036-38 South Drexel Boulevard in Chicago. The condominium is a six-unit building. The defendants are the condominium association for that property and its board members. The Association, by way of its Board, levied a number of "special assessments" over the years and, in 2011, plaintiff contested her obligation to pay the assessments. The Association filed a lawsuit under the Forcible Entry and Detainer Act (735 ILCS 5/9-101 *et seq*. (West 2012)) to evict plaintiff for non-payment of the assessments. Plaintiff responded to the allegations with a counterclaim. The matter proceeded to trial and, at the close of the Association's case, the trial court granted plaintiff's motion for a directed finding and entered a finding of no liability for plaintiff. The trial court concluded that the assessments on which the eviction action were predicated were not lawfully assessed because the Board did not comply with the bylaws and the Condominium Property Act (765 ILCS 605/1 *et seq*. (West 2012)).

¶ 5 With the counterclaim still standing, the trial court ordered plaintiff to refile her claims as a free-standing complaint and to file it in another division of the court. After plaintiff refiled her claims, the parties entered into a settlement agreement that contained a release. The release document is titled "limited release of certain claims only" and expressly contemplates a resolution of the counterclaim plaintiff advanced in the eviction action. Plaintiff received $6,750 in exchange for a release of her claims against the Association and the board members. The release expressly applies to the period from 1989 to its execution—April 7, 2013.

¶ 6 The Board then decided to levy a single special assessment to cover all of the special assessments that had been imposed on the owners from September 2011 to April 2013, but were invalidated by the court. On June 27, 2013, the Board voted to adopt the special assessment. Plaintiff was not present. Under the June 27th assessment, each unit owner was required to pay around $17,000 or $18,000, with all of the unit owners other than plaintiff receiving about a $16,000 credit. The credit represented the amount each owner had already paid in assessments before the assessments were found to be improper by the court. Thus, while each of the owners other than plaintiff was left to pay less than $1,500, plaintiff's balance was $18,190.00.

¶ 7 Plaintiff filed this case. Count I of plaintiff's complaint is labeled as a claim for a "derivative action" and states that the Board has wrongfully caused defendants Wanda Varnadoe and Kurt Ham to be paid a total in excess of $48,000 from the Association in monthly payments. Plaintiff alleges that she seeks recovery for payments made to Varnadoe from January 1993 to the present and for payments to Ham from January 1999 to present. Plaintiff requests that judgment be entered in her favor for the supposed wrongdoing. Plaintiff's complaint had four other counts. The trial court dismissed Count I with prejudice holding that it was barred by the terms of the release that the parties executed. The other counts that are relevant here were dismissed without prejudice. Plaintiff was granted leave to file an amended complaint and then a second amended complaint—the one that is operative here. Plaintiff repled Count I of the original complaint for purposes of appeal and asserted two other claims. In Count II of plaintiff's second amended complaint, plaintiff seeks a declaration that the June 27th assessment is null and void. It is plaintiff's position that the June 27th assessment violates the Association's bylaws and causes her to pay 64% of the "2013 special assessment" while the five other owners share the remaining 36%.

Plaintiff contends that special assessments are reserved for situations where there is an emergency or where work is done to the common elements of the condominium. Count III of the second amended complaint is for the board members' alleged breaches of their fiduciary duties—that they held meetings via email without proper notice and that they conspired to devise a scheme to circumvent the eviction court's order. Plaintiff requests that the June 27th assessment be declared void as a result of defendants' alleged breaches of their fiduciary duties.

¶ 8 Defendants filed a motion to dismiss plaintiff's second amended complaint. The trial court held a hearing on the motion and entered an oral ruling, the transcript of which was made part of the record. The trial court dismissed Counts II and III with prejudice and without leave to replead. As for Count II, the court held that the June 27th assessment was a permissible type of special assessment, finding that there is no requirement that special assessments only be imposed for emergencies and improvements to common elements. As for Count III, the court explained that its disposition of Count II dealt with many of the allegations, but it also explained that the allegations of certain meetings being held without notice to plaintiff were insufficient to state a claim for breach of fiduciary duty. Plaintiff appeals.

¶ 9 ANALYSIS

¶ 10 We review the dismissal of a complaint *de novo*. *Sandholm v. Kuecker,* 2012 IL 111443, ¶ 55. Defendants' motion to dismiss was brought pursuant to the section of the Code of Civil Procedure that allows a defendant to file a combined motion directed at a pleading. 735 ILCS 5/2-619.1 (West 2012).

¶ 11 A section 2-615 motion attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden,* 382

Ill. App. 3d 288, 294 (2008). All well-pleaded facts must be taken as true and any inferences should be drawn in favor of the non-movant. 735 ILCS 5/2-615; *Hammond v. S.I. Boo, LLC* (In re County Treasurer & Ex–Officio County Collector), 386 Ill. App. 3d 906, 908 (2008). Plaintiffs are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state all elements that are necessary to constitute each cause of action in their complaint. *Visvardis v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 724 (2007). A section 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008).

¶ 12 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher* (In re Estate of Gallagher), 383 Ill. App. 3d 901, 903 (2008). Although a section 2-619 motion to dismiss admits the legal sufficiency of a complaint, it raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions, which defeat the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008).

¶ 13 Plaintiff argues that the dismissal of Count I of her complaint was improper because the release that was executed was explicitly a "limited release" and does not cover the claim asserted. Plaintiff further argues that Count I is a "derivative action," which "was not within the contemplation of the parties or the expressed language of the 'limited' release." (Emphasis omitted).

¶ 14 We disagree with plaintiff's contentions. First, the claim is not really a derivative claim. Plaintiff brings the claim on *her own* behalf and the relief requested is that damages be awarded to

*her*. It is a direct action not a derivative action. Second, the release specifically states that it applies to "any alleged wrongful acts, violations, breaches and such other conduct as against the Condominium Board and its members, past and present, from 1989 to the present (April 7, 2013)." The allegations in Count I are directed at Varnadoe's alleged conduct from January 1993 forward and for Ham's conduct from January 1999 forward—claims clearly within the released period and defeated by plaintiff's own relinquishment of them.[1] The trial court properly dismissed Count I with prejudice.

¶ 15 Plaintiff argues that the dismissal of Counts II and III was improper because defendants violated the bylaws and the Condominium Property Act (765 ILCS 605/1 *et seq*. (West 2012)) when they voted to impose a special assessment with the aim of reversing the effect of the eviction court's ruling. The arguments advanced by plaintiff are difficult to distill from her brief, but, consistent with her position in the trial court, one argument appears to be that the assessment is improper because it does not relate to an emergency or an improvement to the common elements.[2] There is nothing in the bylaws or in the Condominium Property Act that limits special assessments to only emergency situations or to improvements to common elements. Instead, special assessments consist of "any common expense not set forth in the budget or any increase in

[1] To the extent plaintiff is seeking to hold defendants liable for causing money to be distributed to Varnadoe and Ham from the time the release was executed until this case was filed, the claim is forfeited. See *People ex rel. T-Mobile USA, Inc. v. Village of Hawthorn Woods*, 2012 IL App (2d) 110192, ¶ 39 (issues not raised in the trial court are forfeited on appeal). Plaintiff did not specifically raise that issue in the trial court and has likewise not done so here. Instead, plaintiff still stands by its argument that the release does not apply to its claim at all.

[2] In its ruling on the motion to dismiss, the trial court addressed the issue of whether it was permissible that the Board voted on the assessment rather than the unit owners. The trial court also addressed the issue of whether plaintiff stated a cause of action for breach of fiduciary duty based on allegations that defendants improperly conducted business outside formal meetings or failed to give plaintiff notice of meetings. These issues are not raised on appeal and are waived. *Luperini v. County of Du Page*, 265 Ill. App. 3d 84, 92 (1994).

assessments over the amount adopted in the budget" that are "assessed against all unit owners." 765 ILCS 605/18(a)(8)(iii). Our courts have never limited special assessments to such situations. *See, e.g.*, *Washington Courte Condominium Association-Four v. Cosmopolitan National Bank*, 169 Ill. App. 3d 1059, 1061 (1988). Plaintiff failed to plead facts that would establish that the special assessment was not valid.

¶ 16 Plaintiff never argues that the underlying assessments were substantively improper. Plaintiff did not even address the subject matter of the special assessment in her complaint or in her brief here. The eviction case was all about procedural propriety, and the eviction court held solely that the underlying assessments were procedurally invalid.[3] When the allegations in the operative complaint are taken as true, there is nothing that would establish that the assessment at issue here was unlawful. At bottom, plaintiff was given three opportunities to plead a claim that would entitle her to relief. Based on the record and on the arguments raised here, plaintiff has not set forth any legally coherent claim nor has she stated facts to support the elements necessary to constitute a cause of action.

¶ 17 Another argument that plaintiff seemingly attempts to interpose is that defendants acted improperly by "forbearing" the assessments of other unit owners. The Condominium Property Act states that "[t]he association shall have no authority to forbear the payment of assessments by any unit owner." 765 ILCS 605/18(o). However, there is no indication that the bylaws or the Act forbid crediting owners for assessments already paid. This is not a situation where a particular unit owner is exempted from paying an assessment entirely or benefitting at the cost of

[3] This is not a precedential order and, based on the arguments presented, we are not asked to decide the general issue of whether a condominium association can take a second bite at the apple and impose a special assessment essentially directed at one owner to make up for prior attempted assessments that were found to be procedurally improper.

the other owners. The June 29th assessment simply evens out the amount that all unit owners have paid in common expenses. Plaintiff has not set forth any facts to explain why she should be excused from paying years worth of assessments altogether.

¶ 18 In her reply brief, for the first time, plaintiff argues that the defenses interposed by defendants cannot be asserted because they are barred by the doctrine of *res judicata*. Arguments raised for the first time in a reply brief are forfeited. *Bohne v. La Salle National Bank*, 399 Ill. App. 3d 485, 503 (2010). Regardless, *res judicata* does not apply. The trial court did not commit reversible error when it dismissed the case.

¶ 19 CONCLUSION

¶ 20 Based on the foregoing, we affirm.

¶ 21 Affirmed.