2018 IL App (1st) 172666-U

FIFTH DIVISION
July 13, 2018

No. 1-17-2666

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

	)	Appeal from the
ALLY FINANCIAL INC.,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellant,	)	
	)	
v.	)	No. 17 M3 000003
	)	
HILLSIDE AUTO BODY & SERVICE, INC.,	)	
	)	Honorable
Defendant-Appellee.	)	Martin C. Kelley,
	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Reversing judgment of the circuit court of Cook County dismissing with prejudice lienholder's first amended complaint against towing company for replevin and conversion of vehicle towed from site of collision at direction of police.

¶ 2 Ally Financial Inc. (Ally) appeals from an order of the circuit court of Cook County dismissing with prejudice its first amended complaint against Hillside Auto Body & Service, Inc. (Hillside) pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)). As discussed below, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 Ally provided lease financing to Lori Figueroa (Figueroa) for a 2014 Cadillac SRX (vehicle) in the fall of 2014, and was the first lienholder on the vehicle. On September 8, 2016, the vehicle was rendered undriveable as the result of a collision in Mount Prospect, Illinois. The Mount Prospect Police Department (police department) directed Hillside, its emergency towing provider, to tow the vehicle from the accident scene to Hillside's storage facility.

¶ 5 The police department sent separate letters to Figueroa and Ally by certified mail on October 19, 2016. The letters provided that after the expiration date of a 10-day period – listed as October 31, 2016 – the "unclaimed" vehicle would be "junked" in accordance with specified provisions of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/4-208 through 5/4-211). Ally was informed it could claim the vehicle by: (1) presenting proof of ownership to the police department vehicle processing officer and requesting a release of the vehicle; and (2) presenting the release to Hillside prior to the expiration date. The letter stated that Ally was responsible for all towing and storage charges.

¶ 6 The police department sent a second letter to Ally, and a separate letter to Figueroa, by certified mail on October 31, 2016. The letter was identical to the earlier letter, except that the expiration date was listed as November 11, 2016.

¶ 7 Ally apparently did not request, receive, or present any release with respect to the vehicle. Hillside subsequently purchased the vehicle at a public sale on November 14, 2016. The certificate of purchase, signed by the vehicle processing officer, provides that the sale was "free and clear of any and all liens."

¶ 8 On January 3, 2017, Ally filed a complaint in the circuit court of Cook County against Hillside seeking an order of replevin. After the circuit court dismissed the complaint without

prejudice, Ally filed a two-count first amended complaint for replevin and conversion. Ally in its amended complaint acknowledged receiving correspondence from the police department on or about October 24, 2016, which indicated that Hillside was the towing and storage facility and that the vehicle would be held until October 31, 2016, and then "junked" in accordance with the Vehicle Code. However, Ally alleged that any lien held by Hillside was capped at $2000 pursuant to the Labor and Storage Lien (Small Amount) Act (625 ILCS 5/4-203 (West 2016); 770 ILCS 50/1 (West 2016)). According to the amended complaint, Hillside rejected Ally's $2000 offer and refused to return the vehicle unless additional fees were paid.[1] As relief, Ally sought possession of the vehicle, or alternatively, a judgment in the amount of $19,350, the retail value of the vehicle at the time of the sale to Hillside.

¶ 9 Hillside filed a motion to dismiss the first amended complaint pursuant to section 2-619(a)(9) of the Code. Hillside included the affidavit of its vice president, Mark Balek (Balek), in support of the motion. Balek averred that Hillside was contacted after the September 8, 2016, collision by Figueroa, who was uninsured with respect to the vehicle damage. Hillside explained that towing and accruing storage fees were owed. Although Hillside prepared a requested estimate of the repair costs, Figueroa never again contacted Hillside.

¶ 10 Balek further averred that on or about November 2, 2016, Nelson Mitten (Mitten) contacted Hillside on behalf of Ally.[2] Mitten inquired regarding the condition of the vehicle and stated that he did not know whether Ally wished to pick up the vehicle. After faxing a copy of an invoice for towing and storage fees and an estimate for repairs to Mitten, Balek did not hear from him again. Balek stated that Hillside had no record that Ally provided any proof of ownership of the vehicle or otherwise contacted Hillside.

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[1] The complaint does not specify the total fees charged by Hillside, but the appellate briefs suggest that the amount was approximately $7000.

[2] Mitten is an attorney representing Ally.

¶ 11 When Hillside received the certificate of purchase on or about November 14, 2016, the police department also provided Hillside copies of the title search, notification letters to Figueroa and Ally, and certified mail receipts demonstrating delivery to Figueroa and Ally. Balek averred that Hillside had not previously received the title search or notification letters.

¶ 12 In its motion to dismiss, Hillside argued that the vehicle had been properly towed and stored by Hillside and properly processed and sold to Hillside and therefore, under the Vehicle Code, Hillside's title was free and clear of Ally's security interest, pursuant to section 4-212 of the Vehicle Code (625 ILCS 5/4-212 (West 2016)). Furthermore, Hillside contended that it could not be held liable to the owner or lienholder of a vehicle that was processed as unclaimed in accordance with section 4-213(a) of the Vehicle Code (625 ILCS 5/4-213(a) (West 2016)). Hillside also contended that Ally failed to reclaim the vehicle in accordance with the Vehicle Code or to otherwise demand possession and no longer held any legal interest in the vehicle. Ally responded that the notices from the police department were invalid because they did not strictly comply with the Vehicle Code and that Ally's lien was superior to any claim of Hillside with respect to the vehicle.

¶ 13 In an order entered on September 26, 2017, the circuit court dismissed the first amended complaint with prejudice. Ally timely filed the instant appeal.

¶ 14 ANALYSIS

¶ 15 Ally asserted claims of replevin and conversion in its first amended complaint. Section 19-101 of the Code provides that "[w]henever any goods or chattels have been wrongfully distrained, or otherwise wrongfully taken or are wrongfully detained, an action of replevin may be brought for the recovery of such goods or chattels, by the owner or person entitled to their possession." 735 ILCS 5/19-101 (West 2016). To establish a claim for conversion, a party must

prove: "(1) a right in the property; (2) the right to immediate, absolute, and unconditional possession of the property; (3) defendant's unauthorized and wrongful assumption of control, dominion, or ownership over the property; and (4) a demand for possession." *Stathis v. Geldermann, Inc.*, 295 Ill. App. 3d 844, 856 (1998).

¶ 16 Hillside filed a motion to dismiss the first amended complaint under section 2-619(a)(9) of the Code. 735 ILCS 5/2-619(a)(9) (West 2016). Dismissal pursuant to section 2-619(a)(9) is appropriate when an affirmative matter bars or defeats the plaintiff's claim. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120 (2008). An "affirmative matter" means "some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action.' " *Id.* at 120-21, quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993).

¶ 17 "On a motion to dismiss pursuant to section 2-619(a)(9) of the Code, the defendant, as the movant, 'has the burden of proof on the motion, and the concomitant burden of going forward.' " *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659, ¶ 22, citing 4 Richard A. Michael, Illinois Practice § 41:8, at 481 (2d ed. 2011). When a motion to dismiss is based on facts not apparent from the face of the complaint, the movant must support its motion with affidavits or other evidence. *Philadelphia Indemnity*, 2016 IL App (1st) 151659, ¶ 22. If the defendant can carry this burden of going forward, the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted is either unfounded or requires the resolution of an essential element of material fact before it is proven. *Id.* The plaintiff may establish this by presenting "affidavits or other proof." *Id.*; 735 ILCS 5/2-619(c) (West 2016). "The plaintiff's failure to properly contest the defendant's affidavit by submitting a counteraffidavit may be fatal to his cause of action, as the failure to challenge or contradict supporting affidavits filed with a section 2-619 motion results in an admission of the

fact stated therein." *Philadelphia Indemnity*, 2016 IL App (1st) 151659, ¶ 22.

¶ 18 In sum, a proper section 2-619 motion admits that the complaint states a cause of action and its allegations are true, but "argues that some other defense exists that defeats the claim nevertheless." *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 40. When a court rules on a section 2-619 motion to dismiss, it must interpret the pleadings and supporting documents in the light most favorable to the nonmoving party. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367-68 (2003). We review a dismissal pursuant to section 2-619(a)(9) *de novo*. *Smith*, 231 Ill. 2d at 115.

¶ 19 Hillside's primary contention in its motion to dismiss was that its purchase of the vehicle from the police department pursuant to a procedure set forth in the Vehicle Code regarding unclaimed vehicles insulated Hillside from liability to Ally. Hillside supported the motion with, among other things, the Balek affidavit. Balek averred, in part, that the police department, not Hillside, handled the processing of the vehicle. The affidavit does not establish, however, that the notifications transmitted by the police department were, in fact, proper. Furthermore, as discussed below, the certified mail receipts appended to the affidavit indicate that the notifications did *not* comply with the Vehicle Code. See *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 42 (concluding that the defendant's motion pursuant to section 2-619(a)(9) did not properly assert an affirmative matter).

¶ 20 Although it did not file a counteraffidavit in response to the facts stated in the Balek affidavit, Ally argued in its response to the motion to dismiss that the failure to comply with the legal requirements of the Vehicle Code rendered the sale of the vehicle invalid. For the reasons discussed below, we conclude that the failure to comply with the Vehicle Code requirements precludes dismissal of the first amended complaint pursuant to section 2-619(a)(9).

¶ 21 Section 4-205 of the Vehicle Code provides that when a law enforcement agency authorizing the impounding of a vehicle does not know the identity of the registered owner or lienholder, the agency is required to have a search conducted of the Illinois vehicle registration records. 625 ILCS 5/4-205(a) (West 2016). The law enforcement agency is then required to send a notification by certified mail to the "registered owner, lienholder and other legally entitled person" with specified information, including the location of the vehicle. 625 ILCS 5/4-205(b) (West 2016).

¶ 22 Section 4-205(b) provides, in part:

> "Notification shall be sent no later than 10 business days after the date the law enforcement agency impounds or authorizes the impounding of a vehicle, provided that if the law enforcement agency is unable to determine the identity of the registered owner, lienholder or other person legally entitled to ownership of the impounded vehicle within a 10 business day period after impoundment, then notification shall be sent no later than 2 days after ownership of the impounded vehicle is determined." 625 ILCS 5/4-205(b) (West 2016).

The initial notification from the police department to Ally was sent by certified mail on October 19, 2016, approximately 30 business days after the vehicle was impounded. There is no indication in the record that the standard "10 business day" period for sending the notification was expanded due to the inability of the police department to determine Ally's identity.

¶ 23 Section 4-208(b) of the Vehicle Code provides, in part, that when an "unclaimed vehicle 7 years of age or newer remains unclaimed by the registered owner, lienholder or other legally entitled person for a period of 30 days after notice has been given as provided in Sections 4-205 and 4-206 of this Code, the law enforcement agency or towing service having possession of the

vehicle shall cause it to be sold at public auction to a [specified automotive parts recycler, rebuilder or scrap processor] or the towing operator which towed the vehicle." 625 ILCS 5/4-208(b) (West 2016). In the instant case, however, the certificate of purchase was dated November 14, 2016 – less than the required 30-day period under section 4-208(b).

¶ 24 Section 4-208(b) further provides that at least 10 days prior to the sale, "the law enforcement agency where the vehicle is impounded, or the towing service where the vehicle is impounded, shall cause a notice of the time and place of the sale to be sent by certified mail to the registered owner, lienholder, or other legally entitled persons." *Id.* The notices sent to Ally, however, did not state the time and place of sale, as required by section 4-208(b).

¶ 25 Hillside contends that, irrespective of any failure to strictly comply with the foregoing notification requirements, Ally did not timely reclaim the vehicle by taking the steps described in the notification letters. Section 4-207 provides that at "[a]ny time before a vehicle is sold at public sale or disposed of as provided in Section 4-208, the owner, lienholder or any other person legally entitled to its possession may reclaim the vehicle by presenting to the law enforcement agency having custody of the vehicle proof of ownership or proof of the right to possession of the vehicle." 625 ILCS 5/4-207(a) (West 2016). Section 4-204(d) provides that "[u]pon delivery of a written release order to the towing service, a vehicle subject to a hold order shall be released to the owner, operator, or other legally entitled person upon proof of ownership or other entitlement and upon payment of the applicable removal, towing, storage, and processing charges and collection costs." 625 ILCS 5/4-204(d) (West 2016). Ally apparently did not present proof of ownership or a right to possession to the police department, or deliver a written release order to Hillside.

¶ 26 While Hillside's observations regarding Ally's failure to reclaim the vehicle may be true,

Hillside did not establish that the notification procedures set forth in the Vehicle Code pertaining to unclaimed property were strictly followed. *Van Meter*, 207 Ill. 2d at 367-68 (noting that a court must interpret the pleadings and supporting documents in the light most favorable to the nonmoving party when ruling on a section 2-619 motion to dismiss). As discussed above, the timing and content of the notices transmitted by the police department did not meet the requirements of the Vehicle Code. Furthermore, to the extent that the initial notification was sent approximately 20 business days later than required by the Vehicle Code, Ally would potentially be liable for significantly higher accrued storage fees than it would otherwise owe, given that the release of the vehicle would be contingent upon payment of the fees. *E.g.*, 625 ILCS 5/4-207(b) (West 2016) (providing that "[n]o vehicle shall be released to the owner, lienholder, or other person under this Section until all towing, storage, and processing charges have been paid"). See also 625 ILCS 5/4-203(g)(2) (West 2016) (providing that "[w]hen a vehicle removal from either public or private property is authorized by a law enforcement agency, the owner of the vehicle shall be responsible for all towing and storage charges").

¶ 27 Hillside further contends that dismissal was proper because under the Vehicle Code its purchase of the vehicle was "free and clear" of liens, as stated on the certificate of purchase. Hillside also argues that the dismissal was proper because section 4-213 of the Vehicle Code provides, in part, that a towing service shall not be liable for damages in any action brought by a lienholder "when the vehicle was processed and sold or disposed of as provided by this Chapter." 625 ILCS 5/4-213 (West 2016). However, Hillside's defenses to the action are dependent on compliance with the Vehicle Code. For the reasons discussed above, Hillside did not establish as a matter of law that the vehicle was sold "*as provided by this Chapter*." (Emphasis added.) *Id.* See also *Bell Leasing Brokerage, LLC v. Roger Auto Service, Inc.*, 372 Ill. App. 3d 461, 472

(2007) (rejecting towing company's contention that it was immune from liability based on its non-compliance with the provisions of the Vehicle Code). Although we understand Hillside's concern regarding its potential liability for the procedural missteps of another entity, *i.e.*, the police department, we cannot affirm the dismissal on these grounds.

¶ 28 Furthermore, we do not consider herein Hillside's contention that no "demand" was made – for purposes of Ally's claims of replevin and conversion – because Hillside implicitly admitted that the first amended complaint stated such causes of action as part of its section 2-619(a)(9) motion. See *Doe*, 2015 IL App (1st) 133735, ¶ 40. We solely conclude that dismissal of the first amended complaint pursuant to section 2-619(a)(9) was improper.

¶ 29 Although we have reversed the dismissal, Hillside may raise any of the foregoing defenses and any additional defenses in its answer. See 735 ILCS 5/2-619(d) (West 2016) (providing that "[t]he raising of any of the foregoing matters by motion under this Section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them by motion does not preclude raising them by answer").

¶ 30 For the first time on appeal, Ally argues that the Labor and Storage Lien Act (770 ILCS 45/1, *et seq.*) and the Labor and Storage Lien (Small Amount) Act (770 ILCS 50/1, *et seq.*) imposed certain notification requirements on Hillside. We note that arguments may not be raised for the first time on appeal. *E.g.*, *Navistar Financial Corp. v. Allen's Corner Garage & Towing Service, Inc.*, 153 Ill. App. 3d 574, 579 (1987) (argument regarding statutory lien was considered waived when it was not argued before the trial court). Furthermore, as expressly acknowledged by Ally in its complaint, there is no indication that Hillside claimed a lien with respect to the vehicle. We recognize that amendments to the foregoing lien statutes, effective as of November

22, 2017, would now require Hillside to provide specified notice to Ally prior to the assessment and accrual of storage fees, irrespective of whether Hillside sought to enforce a lien. Pub. Act 100-311, § 10 (eff. Nov. 22, 2017) (amending 770 ILCS 45/1.5 (West 2016)) (requiring a private corporation seeking to impose fees in connection with the furnishing of storage for a vehicle in the corporation's possession to provide written notice by certified mail to the lienholder of record prior to the assessment and accrual of such fees, "*regardless of whether it enforces a lien under this Act*" (emphasis added)); Pub. Act 100-311, § 15 (eff. Nov. 22, 2017) (amending 770 ILCS 50/1.5 (West 2016) (same). Such requirement, however, was not yet in effect during the events at issue in this case, and thus the revised statute does not affect our analysis herein.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Cook County dismissing Ally's first amended complaint with prejudice is hereby reversed, and the matter is remanded to the circuit court for further proceedings consistent with this order.

¶ 33 Reversed; remanded.