2019 IL App (1st) 181047-U

FIRST DIVISION
August 12, 2019

No. 1-18-1047



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| BARBARA CZARNIK, | ) | Appeal from the Circuit Court of |
| | ) | Cook County, Municipal Division. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 17 M1 717085 |
| | ) | |
| STEVE S. LEE and MALLORY A. LEE, | ) | Honorable Raymond Funderburk, |
| | ) | Judge Presiding. |
| Defendants-Appellees. | ) | |

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JUSTICE GRIFFIN delivered the judgment of the court.
Presiding Justice Mikva and Justice Pierce concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirm the trial court's dismissal of plaintiff's amended complaint and strike her claims for monetary relief without prejudice.

¶ 2 Plaintiff Barbara Czarnik filed a forcible entry and detainer action (735 ILCS 5/9-101 *et seq*. (West 2016)) (Act) against defendants Steve and Mallory Lee claiming they were holdover tenants and unlawfully remained in possession of her property after the parties' lease agreement expired. Plaintiff sought an order of possession, unpaid rent, monetary relief for property damage and "maintenance and repairs," and an award of attorney fees and costs. The trial court entered an "agreed" order of possession and granted plaintiff leave to amend her complaint.

¶ 3 Plaintiff filed an amended complaint and pleaded two causes based on different theories of recovery. In count I, plaintiff claimed that defendants extended the lease agreement and breached it by failing to pay rent. In count II, plaintiff claimed defendants were holdover tenants and liable for double or triple the amount of rent identified in the lease agreement.

¶ 4 Defendants filed a combined motion to dismiss (735 ILCS 5/2-619.1 (West 2016)) and the trial court dismissed plaintiff's amended complaint with prejudice. Plaintiff appeals, and challenges the trial court's decision as incorrect. We affirm and strike plaintiff's claims for property damage and "maintenance and repairs" without prejudice to her right to bring a separate action against defendants for such relief.

¶ 5 BACKGROUND

¶ 6 On September 29, 2013, plaintiff and defendants executed a lease agreement for a single family home located at 4939 N. Oriole Ave. in Harwood Heights, Illinois. The agreement had a one-year term and the parties renewed the agreement in 2014, 2015 and 2016. At issue in this case is the renewed lease agreement for the October 1, 2016 to September 30, 2017 term.

¶ 7 On September 4, 2017, plaintiff sent an email to defendants offering to extend the lease agreement for six months: "would you consider signing a 6 month lease? I could let you keep the same lease price and then after 6 months, we can go to month to month lease." Defendants sent an email in response indicating they "decided to take [plaintiff] up on the six month lease" and asking plaintiff to "[p]lease forward the extension paperwork and I'll return it promptly." Plaintiff sent a form lease extension agreement to defendants on September 29, 2017. It was never returned or signed by defendants.

¶ 8 On October 6, 2017, defendants told plaintiff they would "not be signing the lease extension" and would vacate the premises by "November 30." Plaintiff responded, asking

defendants to "[p]lease make the rent payment or I need a 30 day notice that you are moving out."

¶ 9 On October 11, 2017, plaintiff filed a joint eviction action in the circuit court of Cook County claiming defendants were holdover tenants. Plaintiff sought an order of possession, "3 times the monthly rent," monetary relief for property damage and "maintenance and repairs," and an award of attorney fees and costs.

¶ 10 Defendants filed their appearance on October 30, 2017 and on the same day, sent plaintiff a "notice to quit" expressing their "intent to vacate the premises on or before 30 November 2017." On November 1, 2017, defendants paid plaintiff $2,000 in rent. The payment was accepted by plaintiff, albeit "under protest."

¶ 11 On November 16, 2017, the trial court entered an "agreed" order of possession and stayed enforcement of the order until November 30, 2017. Defendants vacated the property in accordance with the order on that date.

¶ 12 On December 14, 2017, defendants filed a combined motion to dismiss plaintiff's complaint pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619.1) (West 2016)) (Code), which allows a party to file a single motion challenging a complaint pursuant to sections 2-615 (735 ILCS 5/2-615 (West 2016)) and 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). Defendants argued that plaintiff's complaint failed to state a claim and the order of possession issue was moot. Plaintiff was granted leave to amend her complaint and she filed an amended complaint on February 1, 2018.

¶ 13 In her amended complaint, plaintiff pleaded two causes of action for alleged unpaid rent based on different theories of recovery. Count I alleged that defendants executed a valid and binding six-month extension of the lease agreement in writing and failed to pay rent. Count II

alleged defendants were holdover tenants who failed to vacate the property when the agreement expired on September 30, 2017.

¶ 14 Under count I, plaintiff sought unpaid rent for the full term of the lease, monetary relief for property damages and "maintenance and repairs," and an award of attorney fees and costs. Under count II, plaintiff claimed defendants willfully remained in possession of the property and sought: (1) double the amount of rent pursuant to section 9-202 of the Act (735 ILCS 5/9-202 (West 2016)) or alternatively, (2) triple the amount of rent as provided by the lease agreement's "holdover" provision.

¶ 15 Plaintiff attached to her amended complaint as exhibits the parties' original lease agreement and renewal agreements for 2014, 2015 and 2016. Also attached was the email exchange between the parties that allegedly supported the breach of lease theory outlined in count I.

¶ 16 On March 22, 2018, defendants filed a section 2-619.1 motion to dismiss the amended complaint pursuant to sections 2-615 and 2-619(a)(9). Defendants argued that count I failed to state a claim and should be dismissed on the following bases: (1) the lease extension was "never consummated"; (2) plaintiff's judicial admissions precluded her from claiming the parties extended the lease agreement; and (3) the trial court lacked subject matter jurisdiction over count I of the amended complaint. Defendants challenged count II on the bases that it (1) failed to state a claim and (2) pursuant to the email exchange between the parties, plaintiff offered a month-to-month tenancy, which defendants accepted. Defendants also challenged plaintiff's claimed entitlement to double or triple rent.

¶ 17 The trial court held a hearing on defendants' motion, granted it and entered an order dismissing plaintiff's amended complaint with prejudice. Plaintiff appeals, and asks us to reverse the judgment of the trial court.

¶ 18 ANALYSIS

¶ 19 We first address defendants' argument that plaintiff failed to serve them with a five-day notice pursuant to section 9-209 of the Act (735 ILCS 5/9-202 (West 2016)) (section 9-209) and as a result, the trial court lacked subject matter jurisdiction over plaintiff's claim for breach of the extended lease agreement in count I.

¶ 20 Section 9-209 requires a landlord to serve a tenant with a five-day demand for rent before terminating a lease agreement and instituting an action for an order of possession. However, there is no statutory requirement that a party serve a five-day notice before suing for rent, which is exactly what plaintiff sought in her amended complaint. See *Graue Mill Country Condominium Association No. 1 v. Gary-Wheaton Bank*, 213 Ill. App. 3d 698, 699 (1991) citing *Sianis v. Kettler*, 168 Ill. App. 3d 1071, 1074 (1988) (an action for rent is founded on an express or implied contract and should not be burdened by a statutory notice that is required in an action for possession). Accordingly, defendant's argument fails.

¶ 21 Section 2-619.1

¶ 22 Plaintiff challenges the trial court's decision to grant defendants' section 2-619.1 motion to dismiss her amended complaint with prejudice. A section 2-619.1 motion to dismiss permits a party to combine, as defendants did here, section 2-615 and section 2-619 challenges in a single motion. 735 ILCS 5/2-619.1 (West 2016). A 2-619.1 motion must be in parts and each part must (1) be limited to and specify the section under which it is made and (2) clearly show the points or grounds relied upon. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶

20. We review the trial court's decision to grant defendants' 2-619.1 motion *de novo*. *United City of Yorkville v. Fidelity & Deposit Co. of Maryland*, 2019 IL App (2d) 180230, ¶ 61.

¶ 23 Section 2-615

¶ 24 A section 2-615 motion to dismiss 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. 735 ILCS 5/2-615 (West 2016); *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 nonmovant. *Jones v. Brown-Marino*, 2017 IL App (1st) 152852, ¶ 19. 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. *Id*.

¶ 25 Section 2-619(a)(9)

¶ 26 A section 2-619(a)(9) motion to dismiss challenges a claim on the basis that it "is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2–619(a)(9) (West 2017). An "affirmative matter" is "something in the nature of a defense which negates the cause of action completely * * *." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003) citing *Illinois Graphics Co. v. Nickum*, 159 Ill.2d 469, 486 (1994). The moving party admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim. *Id*. In reviewing a section 2-619(a)(9) dismissal, we construe all pleadings and supporting documents in the light most favorable to the nonmoving party. *Burns v. City of Chicago*, 2016 IL App (1st) 151925, ¶ 14.

¶ 27 Count I of the Amended Complaint

¶ 28 To state a claim for breach of the extended lease agreement in count I, plaintiff was required to allege the following elements: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) resultant

injury to the plaintiff. *Burkhart v. Wolf Motors of Naperville, Inc. ex rel. Toyota of Naperville*, 2016 IL App (2d) 151053, ¶ 14. Count I must also allege sufficient facts to indicate the terms of the contract. *Nielsen v. United Services Automotive Association*, 244 Ill. App. 3d 658, 662 (1993).

¶ 29 Plaintiff can prove no set of facts that would entitle her to the relief sought in count I. *Jones*, 2017 IL App 152852, ¶ 19. The exhibits attached to plaintiff's amended complaint show that she sent an email to defendants on September 4, 2017 asking them to sign an extension of the lease agreement, defendants responded and asked plaintiff to "[p]lease forward the extension paperwork," plaintiff sent a lease extension agreement to defendants on September 29, 2017 and they never signed or returned it. The parties do not dispute these communications or events.

¶ 30 We find that the communications between the parties fail to show an agreement to be bound to a six-month extension of the lease agreement. Simply put, the parties contemplated the execution of a lease extension agreement and it never happened. Plaintiff sent a proposed agreement and defendants never signed or returned it. See *Chicago Title & Trust Co. v. Ceco Corp.*, 92 Ill. App. 3d 58, 69 (1980) ("if the clear intent of the parties is that neither will be legally bound until the execution and delivery of a formal agreement, then no contract comes into existence until such execution and delivery"). Accordingly, plaintiff can prove no set of facts that would establish the existence of a valid and binding lease extension between the parties (*Burkhart*, 2016 IL App 151053, ¶ 14) and the dismissal of count I pursuant to section 2-615 was warranted. *CITGO Petroleum Corp. v. McDermott International*, 368 Ill. App. 3d 603, 606 (2006) (we may affirm on any basis in the record).

¶ 31 Count II of the Amended Complaint

¶ 32 We find that plaintiff's acceptance of a $2000 rent payment from defendants on November 1, 2017, after the lease agreement expired, precluded her from claiming in count II that defendants were holdover tenants. Pursuant to the lease agreement, plaintiff's "[a]cceptance of rent after expiration or termination of the Lease will constitute a renewal on a month to month basis." Defendants were required to "pay monthly rent to Landlord via direct deposit." Monthly rent was defined as "$2,000 a month."

¶ 33 The record is replete with statements evidencing plaintiff's acceptance of the $2000 rent payment: (1) plaintiff's request for relief in count II of the amended complaint incorporated a "credit" for $2000 paid "directly to Plaintiff's bank account on November 01, 2017"; (2) plaintiff attested in her counter-affidavit filed in support of her response to defendants' section 2-619.1 motion to dismiss that "[d]efendants made an electronic direct payment that was received by plaintiff"; and (3) plaintiff's reply brief on appeal indicates that defendants "made an electronic payment to Plaintiff's account."

¶ 34 Plaintiff argues that she was free to claim in count II that defendants were holdover tenants because she accepted the rent payment "under protest." We disagree. Merely labeling the acceptance of a rent payment as "under protest" did not allow plaintiff to keep the $2000 payment, ignore a binding provision of the lease agreement and deny any resultant change in the parties' legal relationship that she deemed undesirable. Accordingly, the dismissal of count II pursuant to section 2-619(a)(9) was warranted. *CITGO Petroleum Corp.*, 368 Ill. App. 3d at 606 (we may affirm on any basis in the record).

¶ 35 Claims for Monetary Relief

¶ 36 In addition to her claims for unpaid rent, plaintiff sought monetary relief for property damage and "maintenance and repairs" in 2014, 2015, 2016 and 2017. Though the trial court did not reference these claims, its dismissal of plaintiff's amended complaint with prejudice included them. We find the dismissal of these claims with prejudice was not warranted.

¶ 37 The purpose of the Act (735 ILCS 5/9-101 *et seq*. (West 2016)) is to provide a speedy remedy to allow a person who is entitled to the possession of real property to be restored to possession. *Wells Fargo Bank, N.A. v. Watson*, 2012 IL App (3d) 110930, ¶ 14. Because forcible entry and detainer actions are summary in nature, matters that are not germane to the issue of possession may not be raised. *Id*., § 9-106.

¶ 38 Matters germane to such a proceeding are those that are closely connected with and relevant to the issue of possession, and fall into one the following four categories: (1) claims asserting a paramount right of possession; (2) claims denying the breach of the agreement vesting possession in the plaintiff; (3) claims challenging the validity or enforceability of the agreement on which the plaintiff bases the right to possession; and (4) claims questioning the plaintiff's motivation for bringing the action. *Avenaim v. Lubecke*, 347 Ill. App. 3d 855, 8621074 (2004). The Act does, however, expressly provide that "a claim for rent may be joined in the complaint, and judgment may be entered for the amount of rent due." 735 ILCS 9-106 (West 2016).

¶ 39 We find plaintiff's claims for property damage and "maintenance and repairs" are purely contractual matters that do not fall within any of the enumerated categories above. In other words, they are not are not germane to the forcible entry and detainer proceeding. See *Miller v. Daley*, 131 Ill. App. 3d 959, 961755 (1985) (finding that the plaintiff was not entitled to recover

damages for the damage to his property and mental distress as those claims not are related to the question of which party was entitled to rightful possession). Accordingly, the trial court erred when it dismissed these claims with prejudice.

¶ 40 In the exercise of our power under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we strike from plaintiff's amended complaint the monetary claims for property damage and "maintenance and repairs," without prejudice to her right to bring a separate action against the defendants for such relief. To be clear, our decision to strike the claims is not adjudication on the merits. See Ill. S. Ct. R. 273 (eff. Oct. 14, 2005).

¶ 41 CONCLUSION

¶ 42 For the foregoing reasons, we affirm the trial court's dismissal of counts I and II of plaintiff's amended complaint with prejudice and strike plaintiff's claims for property damage and "maintenance and repairs" without prejudice to her right to bring a separate action against defendants for such relief.

¶ 43 Affirmed; claims stricken.