No. 2—09—1293
Order filed March 22, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICHAEL MEYN,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09—LM—1372
	)	
AMANDA SEIDEL,	)	
	)	
Defendant-Appellant	)	Honorable
	)	John J. Scully,
(Unknown Occupants, Defendants).	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

Held: (1) The trial court properly ruled that defendant was not a "tenant" and thus was not entitled to 90 days' notice of plaintiff's forcible entry action after a mortgage foreclosure; defendant's parents had owned the property, and although defendant had lived there she had not had exclusive possession of any part of it; (2) the trial court properly ruled that plaintiff was entitled to possession; although plaintiff's corporation, not plaintiff, was the real party in interest when he filed his complaint, plaintiff was a party in interest by the time of trial, and we did not require the formality of a motion to substitute.

Plaintiff, Michael Meyn, filed a forcible entry and detainer (FED) action in the circuit court of Lake County against defendant, Amanda Seidel, pursuant to article 9 of the Code of Civil

Procedure (Code) (735 ILCS 5/9—101 *et seq.* (West 2008)). Following a bench trial, the trial court entered judgment in plaintiff's favor and defendant brought this appeal. We affirm.

Meyn filed his FED complaint on June 18, 2009. He sought to have Seidel removed from residential property in Lake Forest. Seidel, who was 19 years old when the action was filed, had lived on the property with her parents. Her parents had owned the property, but their interest in the property was terminated in an unrelated mortgage foreclosure proceeding to which Seidel was not a party. Meyn was the successful bidder at the judicial sale of the property. To obtain possession from occupants of mortgaged real estate who have not previously been made parties to the foreclosure action, the purchaser at a foreclosure sale may either (1) file and serve on such occupants a supplemental petition stating the facts upon which the claim for possession is based (see 735 ILCS 5/15—1701(d), (h)(1) (West 2008)) or (2) file a FED action under article 9 of the Code (see 735 ILCS 5/15—1701(d) (West 2008)). However, when Meyn filed the FED action giving rise to this appeal, section 15—1701(h)(4) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) provided, in pertinent part, that "[n]o *** holder of a certificate of sale or deed, or purchaser who fails to file a supplemental petition under this subsection during the pendency of a mortgage foreclosure shall file a forcible entry and detainer action against a tenant of the mortgaged real estate until 90 days after a notice of intent to file such action has been properly served upon the tenant." 735 ILCS 5/15—1701(h)(4) (West 2008). Seidel filed a motion pursuant to section 2—619 of the Code (735 ILCS 5/2—619 (West 2008)) to dismiss the FED action on the basis that she was a "paying tenant" on the property and had not received notice of the FED action. The trial court denied the motion.

At trial, Meyn testified that he purchased the subject property on May 15, 2008, tendered payment within 24 hours of the sale, and received a certificate of sale. A judicial sales deed was issued, conveying the property to First Home Services, Inc. (FHS), a corporation owned by Meyn. Although the record is not entirely clear, it appears that, after issuance of the original judicial sales deed to FHS, the trial court in the foreclosure proceeding vacated the order confirming the sale pursuant to which that deed was issued. The sale was again approved in February 2009, and a new judicial sales deed was issued, naming both Meyn and FHS as grantees. There appears to be no dispute that this deed was executed roughly two weeks before trial.

Seidel testified that she was born in January 1990 and had lived on the subject property for her entire life. She finished high school in June 2008. At the time of trial, she was enrolled at the University of Iowa and lived on campus. Between high school and college, Seidel lived at home with her parents and held several jobs. She had her own room at her parents' home; she did not share the room with anybody. Seidel testified that she paid her parents $150 per month, both while living at home and while away at college. According to Seidel, the money was a contribution to the family's household expenses.

The trial court specifically indicated that it did not believe Seidel's testimony and found that she was not a tenant. Thus, the trial court entered judgment for Meyn, awarding him possession of the property. Seidel unsuccessfully moved for reconsideration, and this appeal followed.

On appeal, Seidel seeks review not only of the final judgment awarding possession to Meyn, but also of the adverse ruling on her section 2—619 motion to dismiss. In a case where the evidentiary support for a section 2—619 motion to dismiss consisted solely of affidavits submitted by the movants, we held that the denial of the motion (like the denial of a summary judgment

motion) merged into the judgment on the merits subsequently entered following a full trial. *In re J.M.*, 245 Ill. App. 3d 909, 919-20 (1993). We explained, "it is not proper to raise the denial of a section 2—619 motion on appeal, as the evidence was completely presented to the trier of fact during trial, and to overturn the judgment on less evidence, that is, in this case only affidavits, would be improper." *Id.* Here, as in *J.M.*, Seidel's affidavit provided the sole evidentiary support for her motion to dismiss. Accordingly, the denial of the motion merged into the judgment on the merits entered following trial. Only that judgment is reviewable in this appeal.

Seidel argues that Meyn's failure to serve her with at least 90 days' notice of intent to file a FED action bars entry of judgment in his favor. Seidel further argues that Meyn failed to establish his right to possession of the property. In connection with the first argument it is helpful to examine the history of section 15—1701(h)(4) of the Foreclosure Law. Public Act 95—262 §5 (eff. Jan.1, 2008), which originated as Senate Bill 258, added section 15—1701(h)(4). Section 15—1701(h)(4) initially provided only that an order of possession in a foreclosure proceeding must allow a tenant who was current in his or her rent to retain possession of the property "(i) for 120 days following the notice of the hearing on the supplemental petition that has been properly served upon the tenant, or (ii) through the duration of his or her lease, whichever is shorter." 735 ILCS 5/15—1701(h)(4) (West 2008). The requirement that a tenant receive at least 90 days' notice of a foreclosure purchaser's intent to file a *FED action* took effect on August 26, 2008 (see Pub. Act 95—933, §5 (eff. Aug. 26, 2008). One of the sponsors of the bill giving rise to the notice requirement explained:

> "[T]he recently passed legislation [adding section 15—1701(h)(4)] requires a hundred and twenty days' notice to renters who are evicted as part of the foreclosure proceedings, but it does not cover renters who are evicted immediately following foreclosure. And that means

> that, if the renter is not properly named in the foreclosure action, the new owner—and it's often the financial lender—is not interested in serving as the landlord for the property or he wants to sell that property quickly, they can evict that renter without notice. Where [*sic*] this bill ensures the second group of renters is eligible for the notice that we also allowed in Senate Bill 258 last year." 95th Ill. Gen. Assem., Senate Proceedings, April 16, 2008, at 237 (statements of Senator Crotty).

The General Assembly subsequently amended section 15—1701(h)(4) by replacing the word "tenant" with the word "occupant" throughout the provision. That amendment took effect two days after entry of the October 27, 2009, judgment awarding possession of the subject property to Meyn. See Pub. Act 96—111, §5 (eff. Oct. 29, 2009) (amending 735 ILCS 5/15—1701(h)(4) (West Supp. 2009)). Thus, a question that initially arises is which version of the 90-day notice requirement applies to this case: the version requiring notice to "tenants" or the version requiring notice to "occupants"?

Section 4 of the Statute on Statutes provides:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding." 5 ILCS 70/4 (West 2008).

In *Caveny v. Bower*, 207 Ill. 2d 82, 92 (2003), our supreme court stated that "section 4 represents a clear legislative directive as to the temporal reach of statutory amendments and repeals: those that are procedural in nature may be applied retroactively, while those that are substantive may not." This rule of construction applies unless an amendatory act contains a clear indication of a contrary legislative intent concerning the applicability of the amendment. *Id.* at 94. Section 15—1701(h)(4)'s notice requirement is not a procedural protection. The notice requirement has nothing to do with the efficiency or integrity of the judicial process. Rather the General Assembly's objective was to ameliorate the hardship of eviction after a foreclosure sale and provide a measure of protection against homelessness, by affording those entitled to notice with an opportunity to secure new housing in the period before a FED action may be filed. To the extent that the amendment substituting the word "occupant" for the word "tenant" redefines the class of persons entitled to this protection, it is a substantive amendment, not a procedural one.

Seidel insists that the General Assembly used the words "tenant" and "occupant" interchangeably, that under either version of the statute occupancy is all that is required to trigger the notice requirement, and that she was entitled to notice simply because "she was legally upon the premises at the discretion of her parents." Seidel's argument that "tenant" means nothing more than "occupant" is unpersuasive. "An amendment to a statute is presumed to be intended to effect a change in the law as it formerly existed." *People v. Craig*, 403 Ill. App. 3d 762, 768 (2010). Seidel points to nothing to overcome the presumption.

Accordingly, this case is governed by the law in effect when the complaint was filed, and the relevant question is whether Seidel was "tenant" on the subject property. The trial court concluded that she was not, and the evidence supports that conclusion.

For defendant to qualify as a tenant, a landlord-tenant relationship must have arisen between defendant and her parents. Among the defining characteristics of that relationship is that possession and control of the premises passes to the tenant. See *Illinois Central R.R. Co. v. Michigan Central R.R. Co.*, 18 Ill. App. 2d 462, 477 (1958). "The right to possession is normally transferred if the arrangement contemplates that the transferee will assume a physical relationship to the leased property which gives him control over and the power to exclude others from the property." Restatement (Second) of Property, Landlord and Tenant §1.2, Comment *a*, at ___ (1977). In *Illinois Central R.R. Co.*, the plaintiff and defendants, all railroad companies, executed a written instrument by which the plaintiff gave the defendants the right to use, jointly with the plaintiff, the plaintiff's general passenger station and the adjacent grounds in Chicago "*for* '*so long as the said premises shall be used for a general passenger station.*' " (Emphasis in original.) *Illinois Central R.R. Co.*, 18 Ill. App. 2d at 467. The defendants agreed to pay an annual rent of $105,000 for the use of the station. The defendants sought to terminate the arrangement and the plaintiff sought to enjoin the defendants from doing so. The *Illinois Central R.R. Co.* court reversed a judgment in the defendants' favor, which was based on the trial court's conclusion that the instrument in question was a lease giving rise to a year-to-year tenancy and that the defendants had given proper notice of termination. The *Illinois Central R.R. Co.* court noted that, in a number of the cases cited by the defendants, there appeared to have been "exclusive possession in the tenant, either of the entire premises covered by the lease or of a primary part." *Id.* at 480. The court further observed:

> "Sometimes the tenant's possession extended only to a particular use of that land, but in that use the tenant's possessory rights 'were absolute against the whole world, including the lessor.' This is sufficient, although the tenant's possession, as is almost always true, was

> subject to certain restrictions, controls or reservations by the lessor. This does not mean that the lessor shared possession with the lessee." *Id.*

The court added that, "[a]s is shown by the many cases cited by defendants themselves, a leasehold requires that the lessee's possession be more than merely coextensive with the lessor, it must be exclusive against the world *and the lessor*." (Emphasis added.) *Id.* at 482. The court concluded that there was no lease in the case before it, because no specific area had been set aside for the defendant and because the plaintiff maintained "complete control and management of the station and the station grounds." *Id.* at 480.

Similar results have obtained in cases from other jurisdictions involving domestic living arrangements. For instance, in *Drost v. Hookey*, 881 N.Y.S.2d 839, 841-42 (Dist. Ct. 2009), it was held that a property owner's cohabiting girlfriend was a licensee, not a tenant at will, because she shared possession of the entire premises and did not have exclusive control over any part of it. In *Sullivan v. Delisa*, 923 A.2d 760 (Conn. App. Ct. 2007), a married couple, Philip and Charlotte Sullivan, resided for 30 years with Philip's mother, Mary Crowell, in her home. The *Sullivan* court concluded that the trial court did not err in finding that the Sullivans were not Crowell's tenants. The court observed that "[i]n order for a tenancy to form, the parties must have agreed, at least implicitly, that the alleged tenant should have a right to possess the property. [Citation.] Possession of property typically includes, among other things, the power to exclude others from entering the premises. [Citation.]" *Id.* at 768. Although the master bedroom and family room were used primarily by the Sullivans, Crowell and others had access to those rooms. *Id.* at 764. The court reasoned:

> "[T]he [trial] court reasonably determined that the parties were not in actual possession of the property. The court also considered testimony from Crowell that she did not intend to create a tenancy, nor did she believe that the plaintiffs had any right to exclude her from the rooms they claimed to have held. Crowell testified that she occasionally would enter the master bedroom without first obtaining the permission of the [Sullivans]. From this, it was not clearly erroneous for the court to conclude that Crowell did not intend that the [Sullivans] should have the right to exert the power of exclusion and, thus, the right to possession, on September 7, 2000. Therefore, we conclude that the court did not abuse its discretion in determining that there was no landlord-tenant relationship between the parties. *Id.* at 768.

The evidence does not show that Seidel had exclusive control over the subject premises. She was a young adult living with her parents in their home. Although she had her own bedroom, there was no evidence that she had exclusive possession of that room or any other part of the premises. That her possession may have been coextensive with her parents does not make her their tenant. It appears that the trial court discredited Seidel's testimony that she made a monetary contribution to the household expenses, but even if she did, the payments could not create a landlord-tenant relationship in the absence a sufficient transfer of possession of the premises. Accord *Sullivan*, 923 A.2d at 764 (noting that "[t]he [Sullivans] made periodic payments to Crowell in order to assist with household expenses, as did other family members when they stayed in the house"). Because Seidel was not a tenant, she was not entitled to advance notice of Meyn's intent to file a FED action.

Seidel next argues that Meyn failed to prove his own right to possession of the property. There appears to be no dispute that a certificate of sale carries with it the right to possession (see 735 ILCS 5/15—1701(d) (West 2008)) and that a certificate of sale was issued to Meyn. Seidel

maintains, however, that, prior to filing the FED action, Meyn assigned the certificate of sale to FHS. Meyn acknowledges, in his brief, that he assigned the certificate of sale to FHS and that a deed was issued naming only FHS as the grantee. The record indicates, however, that by the time of trial Meyn and FHS *both* held title. Nevertheless, in Seidel's view however, because Meyn did not establish the right to possession as of the date he filed the complaint, he was not entitled to prosecute the suit. When a FED action is brought by a person with no right to possession, the defect may be corrected by substituting the person entitled to possession—in this case FHS—as plaintiff. *First National Bank & Trust Co. of Evanston v. Sousanes*, 66 Ill. App. 3d 394, 395-96 (1978). There is no sound reason why such a defect should not be considered cured when the original plaintiff *becomes* a real party in interest during the course of the proceedings. The same result could presumably have been achieved by successive motions to substitute parties—first, FHS for Meyn, and then Meyn for FHS—but to require these intermediate steps would be an empty ritual symbolizing "arbitrary fealty to procedure over the obvious." *Estate of Butler v. Maharishi University of Management*, 460 F. Supp. 2d 1030, 1040 (S.D. Iowa 2006) (for purposes of rule that certain amended pleadings relate back to the date the original pleading was filed, plaintiff who filed a wrongful death action before being appointed administrator of the decedent's estate would be treated as if he had moved to amend his complaint upon acquiring that status).

For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

Affirmed.