2011 IL App (2d) 110103-U
No. 2-11-0103
Order filed November 15, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEMBROKE ESTATES CONDOMINIUM ASSOCIATION, Plaintiff-Appellee, v. EWA GULCZYNSKA, Defendant-Appellant, (Teresa Lipinska, Unknown Owners and Occupants, Defendants.)	)	Appeal from the Circuit Court of Du Page County. No. 10-LM-3830 Honorable Robert G. Gibson, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Bowman concurred in the judgment.

ORDER

Held: Defendant forfeited her argument that section 9-111 of the Code of Civil Procedure (735 ILCS 5/9-111 (West 2010)) violates the Illinois constitution where her argument violated Supreme Court Rule 341(h)(7); the trial court's denial of defendant's motion to dismiss pursuant to section 2-619(a)(3) of the Code of Civil Procedure (735 ILCS 2/619(a)(3) (West 2010)) was affirmed where the record was insufficient for appellate review; the trial court did not err in proceeding to a bench trial where defendant made no valid jury demand; defendant forfeited the argument that she was entitled to discovery by not requesting discovery; defendant's argument that she is entitled to damages in a separate case was forfeited for violation of Supreme Court Rule 341(h)(7).

¶ 1 *Pro se* defendant, Ewa Gulczynska, appeals from the judgment of the circuit court of Du Page County entered against her and in favor of plaintiff, Pembroke Estates Condominium Association, for possession of her condominium unit and fines and fees after a bench trial. For the reasons that follow, we affirm.

¶ 2 On October 26, 2010, plaintiff filed a complaint in forcible entry and detainer (735 5/9-101 *et seq.* (West 2010)) seeking possession of a condominium unit commonly known as 1572 Brittania Way in Roselle, Illinois. The complaint (which also contained a count for breach of contract) alleged that defendant was the owner of the unit and that she failed to pay expenses and fines as provided for in the condominium Declaration and bylaws. Defendant appeared *pro se* on November 22, 2010, and on the same day she filed a motion to dismiss the complaint on the basis that it was barred by *res judicata*. Defendant alleged in the motion that "[t]here is already a pending lawsuit between the parties, arising from the same events as well covering [*sic*] the same time period and covering the same dispute" filed by defendant. Defendant referred by case number to a 2010 law division case she had previously filed. Defendant has not included the complaint in the law division case in the record. Defendant then filed an amended motion to dismiss on the grounds of *res judicata,* plaintiff's alleged inability to bring the action in forcible entry and detainer because defendant retained property rights in the unit, and on the ground that the amount of damages defendant asserted in her law division suit against plaintiff exceeded the amount plaintiff sought in the forcible suit. On December 8, 2010, the trial court denied the motion to dismiss.

¶ 3 On December 29, 2010, defendant filed a "Motion for Involuntary Dismissal" pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2010)). She brought this motion in two counts. "Count I" asserted that on September 14, 2010, she sued plaintiff and its property manager for damages they caused to her unit in excess of $50,000 and that

the forcible entry and detainer action was filed in retaliation. Defendant also contended that her September suit and the forcible suit "complain of the same dispute, arise from the same operative facts[,] and involve the same parties during the same time period." "Count II" of her motion alleged that the forcible action was barred by *res judicata* in that her September suit was pending.

¶ 4 On January 6, 2011, the trial court held a trial on plaintiff's forcible entry and detainer suit. The court first reviewed the pleadings and denied the motion for involuntary dismissal. Defendant then indicated through an interpreter that she would not testify because she was not ready for trial.

¶ 5 Lynn Dee was plaintiff's only witness. She testified that she worked for plaintiff's property manager, Hughes Management, and as part of her duties she inspected Hughes's properties, including defendant's unit. Dee identified photographs she took depicting damage to a garage door at defendant's unit that Dee discovered on her August 2009 inspection. Dee testified that she sent a warning letter to defendant giving her three weeks to repair the door. Dee said she received no response from defendant, nor was the garage door repaired.

¶ 6 Dee testified that she did another inspection. She again photographed the damaged door and sent defendant a letter imposing a $75 fine and explaining the hearing procedure should defendant wish to contest the fine. Dee testified that she received a letter from defendant in response, in which defendant claimed that the condominium association's snow plower caused the damage and the association should be responsible for the repair. According to Dee, defendant did not request a hearing on the fine. Dee testified that the Declaration, bylaws, rules and regulations specify that the repair is the homeowner's responsibility. Dee's next action was to go before the association's board, which approved the $75 fine. The board also informed defendant that she could pursue the snow plower directly for the damage to the garage door.

¶ 7 Dee testified that the garage door was still in a state of disrepair on her next inspection. She again photographed the damaged door and sent defendant another letter, this time assessing a $100 fine. Defendant did not respond. The board approved the fine. Upon Dee's next inspection, the door was still not repaired, and Dee assessed a $150 fine, which the board approved. According to Dee, defendant did not pay the fines or request a hearing but sent another letter stating that it was the association's responsibility to pay for the repair.

¶ 8 Dee testified that she noticed no damage to the garage door prior to her August 2009 inspection. She testified that in her experience garage doors could be damaged by faulty springs, someone backing into them, or being struck by a ball or a bike.

¶ 9 According to Dee, upon her next inspection, she assessed a $500 fine for the unrepaired door. Dee testified that defendant did not pay the fines but sent another letter saying the repair was the association's responsibility. Defendant did not request a hearing in that letter. When the fines reached $1,150 plus an added $75 fee, the association sent defendant a 30-day notice. Defendant did not pay the fines, but she had continued to send in her monthly assessments, which the association refused to accept because of the unpaid fines. Dee testified that, as of the date of trial, defendant owed $5,312.25.

¶ 10 Defendant attempted, through her interpreter who was not an attorney, to cross-examine Dee regarding the substance of her allegations in the law division case. The trial court barred the cross-examination. Defendant then represented that she was unprepared to dispute the amount owed because plaintiff did not furnish her with pretrial discovery. The trial court "noted" her "question." Defendant then called Dee as an adverse witness but instead of asking Dee questions, defendant's interpreter stated that defendant did not have enough money to pay the fines and fees.

¶ 11 The trial court ruled that, according to the Declaration, defendant was responsible for repairing her garage door and paying the fines. The court found that attorney fees and costs were properly assessed under the Declaration. The court entered a written judgment order granting plaintiff possession of defendant's unit and $5,312.25 plus $2,132 in attorney fees and costs. Defendant filed a timely notice of appeal.

¶ 12 Defendant first argues that section 9-111 of the Code of Civil Procedure (735 ILCS 5/9-111 (West 2010)) violates Article I, § 2 of the Illinois constitution in that it is a denial of equal protection under the law.[1] Section 9-111 provides that a condominium association, subject to the provisions of the Condominium Property Act, shall be entitled to possession of the whole of the premises where the owner of a condominium unit fails to pay his or her proportionate share of the common expenses of the property, or any other expenses lawfully agreed upon, or the amount of any unpaid fine, if the court finds that the expenses or fines are due to the plaintiff. 735 ILCS 5/9-111 (West 2010). Defendant does not cite any authority for her assertion that section 9-111 violates the equal protection clause of the Illinois constitution, and her argument seems to be that the legislature exceeded its authority in enacting section 9-111 because "lawmakers heavily rely on donations and very often pass the laws in favor of the donors in the violation of the best interest of the people of Illinois and in violation of the Illinois Constitution." This is not a cogent or coherent legal argument.

This court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Velocity Investments, LLC v.*

[1]Defendant erroneously states that 735 ILCS 5/9-111 is a provision of the Condominium Property Act (765 ILCS 605/1 *et seq.* (West 2010)).

Alston, 397 Ill. App. 3d 296, 297 (2010). We recognize that defendant is *pro se*, but that does not relieve her of the duty to follow supreme court rules. *Velocity*, 397 Ill. App. 3d at 297-98. In *Velocity*, this court considered the defendant's argument despite the violation of Rule 341(h)(7) because we said we understood the issue the defendant intended to raise, and the merits of the issue could be readily ascertained from the record on appeal. *Velocity*, 397 Ill. App. 3d at 298. Here, we do not understand defendant's equal protection argument. To say that the legislature may have been influenced to pass legislation in favor of condominium associations because of political contributions does not state even the gist of an equal protection argument, and the record does not support defendant's claim. We have authority to hold that defendant has forfeited her argument by failing to develop it or cite any authority to support it. *Velocity*, 397 Ill. App. 3d at 297. Accordingly, we so hold.

¶ 13 Additionally, defendant argues that section 9-111 is unconstitutional because it deprives condominium owners of their right to sue an association in suits such as defendant's pending law division suit. Defendant fails to cite authority for this argument, and we fail to understand it. Apparently, according to the record, defendant sued plaintiff for damages in excess of $50,000 prior to plaintiff's initiation of the instant forcible action. Nothing in the record indicates that defendant's suit was affected by the judgment in favor of plaintiff in the instant suit. Accordingly, this argument is forfeited.

¶ 14 Defendant next argues that section 9-111 is unconstitutional because it "not only violates rights of the condo owners but many times is used to abuse of [*sic*] power to cover up mismanagement and waist [*sic*] of the condo owners [*sic*] money as well grants [*sic*] illegal powers to a small group of people controlling the association board ***." Defendant cites section 18.7(g)(2) of the Condominium Property Act (Act) (765 ILCS 605/18.7(g)(2) (West 2010)) in support of her

argument. Section 18.7(g)(2) provides that the Act "shall not impair any right of action by a unit owner or shareholder against a community association board of directors under existing law." Again, defendant has not developed her argument to tell us how she has been deprived of a right of action against the association, and we cannot glean from the record anything to support her claim. Accordingly, this argument is forfeited.

¶ 15 Defendant next contends that the trial court erred in denying her motion to dismiss the forcible suit on the basis that another suit was pending. She supports her argument with citation to authorities for general propositions of law, and plaintiff does not dispute these general propositions. Section 2-619(a)(3) of the Code provides for dismissal where there is another action pending between the same parties for the same cause. 735 ILCS 2-619(a)(3); *Village of Bensenville v. City of Chicago*, 389 Ill. App. 3d 446, 479 (2009). The crucial inquiry is whether both actions arise out of the same transaction or occurrence, not whether the legal theory, issues, burden of proof, or relief sought materially differs between the two actions. *Bensenville*, 389 Ill. App. 3d at 479. Even when the "same parties" and "same cause" requirements are met, section 2-619(a)(3) does not mandate automatic dismissal, but the decision whether to grant the motion is discretionary with the trial judge. *Bensenville*, 389 Ill. App. 3d at 479-80. In our case, other than reciting general propositions of law and conclusions that the law division suit and the forcible suit involved the same parties and the same transaction, defendant recites no facts, such as the allegations of each complaint, from which we can determine whether the court properly exercised its discretion in denying the motion to dismiss. The record does not contain the pleadings from the law division suit. We are able to determine from the record only that defendant filed a suit against plaintiff (and possibly others) for damages in excess of $50,000. Presumably, the claimed damages related to defendant's condominium unit, but we have to draw inferences from the record to come to that conclusion. Once

we reach that conclusion, we cannot discern from the record whether both cases arose out of the same transaction. In short, the record is insufficient to allow us to review defendant's argument. The appellant has the burden to present a sufficiently complete record to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts that may arise from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d at 392. Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's section 2-619(a)(3) motion to dismiss.

¶ 16 Defendant next urges that the pendency of her law division suit barred the forcible action under the doctrine of *res judicata*. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action. *Corcoran-Hakala v. Dowd*, 362 Ill. App. 3d 523, 526 (2006). The record reflects that defendant's prior lawsuit was pending at the time plaintiff filed the instant action. In the absence of a final judgment in the prior lawsuit, the doctrine of *res judicata* is inapplicable. Consequently, this argument is without merit.

¶ 17 Defendant next contends that the trial court erred in proceeding to a bench trial when she demanded a trial by jury. The common law record contains no filed jury demand. When the case was called for trial, defendant's interpreter stated that defendant had demanded a jury trial but the circuit clerk refused to file the demand. The record reflects that on November 22, 2010, defendant filed an application to sue or defend as a poor person. On January 6, 2011, the court entered an order denying the application. Handwritten on the order is the following: "The applicant's explanation of her income was not credible and the applicant is found to have falsely stated her

income on the application." From defendant's interpreter's statement that the clerk refused the jury demand, we surmise that defendant did not tender the required fee. Jury demands are governed by section 2-1105 of the Code, which provides that a defendant desirous of a trial by jury must file a demand not later than the filing of his or her answer, otherwise the party waives a jury. 735 ILCS 5/2-1105(a) (West 2010). Payment of the fee is mandatory at the time of filing the jury demand, and a resulting bench trial in the absence of a valid jury demand is appropriate. *Schaller v. Weier*, 319 Ill. App. 3d 172, 176 (2001). Accordingly, the trial court in our case did not err in proceeding with the bench trial.

¶ 18 Defendant next argues that she was entitled to discovery pursuant to Supreme Court Rule 222 (eff. Jan. 1, 2011). Rule 222 provides for simplified discovery in cases seeking money damages not in excess of $50,000, exclusive of interest and costs. The rule does not apply to small claims cases. Ill. S. Ct. R. 222. Defendant argues that she requested discovery and the trial court denied her request before it proceeded to trial. The transcript of January 6, 2010, the day of trial, reveals that defendant did not make a discovery request. After plaintiff's witness testified, defendant's interpreter represented to the court that defendant was not prepared for trial because plaintiff never furnished defendant "with any evidence whatsoever." We do not interpret this as an oral discovery request, and there is no written discovery request in the common law record. Consequently, we agree with plaintiff that defendant forfeited this issue by failing to raise it in the trial court. Our supreme court has stated that it is "axiomatic" that questions not raised in the trial court are deemed waived and may not be raised for the first time on appeal. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004). Moreover, this case involved a little over $5,000, which exempts it from Rule 222.

¶ 19 Defendant next argues that Dee lied under oath about the cause of the damage to defendant's garage door, but she does not conclude from this that the trial court's judgment was against the manifest weight of the evidence and make an appropriate argument. Instead, defendant argues that she is entitled to damages in her law division action pursuant to section 18.7(g)(2) of the Act. Section 18.7(g)(2) guarantees that defendant's right of action against the association is not impaired. Nothing in section 18.7(g)(2) entitles a litigant who brings an action against an association to damages. Accordingly, defendant's argument lacks merit.

¶ 20 Defendant's last argument is that "the undisputed material facts that were excluded during the bench trial violated defendant's right to present her counter claims that render [p]laintiff's claims untrue." Defendant filed no counterclaims. It appears that she takes issue with the trial court's rulings that she could not cross-examine Dee about the law division suit. However, the argument is so undeveloped that we are at a loss to understand it. Furthermore, in violation of Rule 341(h)(7) defendant cites no authority, and the argument is forfeited. *Velocity*, 397 Ill. App. 3d at 297.

¶ 21 Because of the deficiencies in defendant's brief and the record on appeal, we are constrained either to hold that the issues she raised are forfeited or lack merit. For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 22 Affirmed.