

2012 IL App (2d) 101240-U
No. 2-10-1240
Order filed February 23, 2012

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
SECOND DISTRICT

SPECTRUM BUILDERS, INC,)	Appeal from the Circuit Court
)	of Du Page County.
Plaintiff-Appellee,)	
)	
v.)	No. 10-LM-1952
)	
DEBORAH CESZYK, ARNOLD ZOGLAUER,)	Honorable
and UNKNOWN OCCUPANTS,)	Robert Gibson and
)	Neal Cerne,
Defendants-Appellants.)	Judges, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

Held: Where, viewing the pleadings, depositions, and admissions on file, together with the affidavits, in the light most favorable to defendants, there was no genuine issue of material fact, and plaintiff's superior right to possession was established as a matter of law, the trial court's entry of summary judgment in favor of plaintiff on its forcible detainer claim was affirmed.

¶ 1 *Pro se* defendants, Deborah Ceszyk and Arnold Zoglauer, appeal from the trial court's order granting summary judgment in favor of plaintiff, Spectrum Builders, Inc. (Spectrum), on Spectrum's

forcible detainer action pursuant to the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-101 *et seq.* (West 2010)). For the following reasons, we affirm.

¶ 2

BACKGROUND

¶ 3 This appeal finds its genesis in protracted litigation over a vacant lot in Warrenville, Illinois, to which Gregory Hayden, Spectrum's president, obtained a tax deed in October 2001. Ceszyk's homestead property, where she lived with Zoglauer, was located on an adjoining lot, and they had maintained a septic tank and live animals on the vacant lot. In 2006, Ceszyk filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2006)), seeking to vacate as void the order for the tax deed. Following the trial court's dismissal of the petition, Hayden moved for, and was granted, sanctions of \$14,060 in attorney fees pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). To enforce the judgment, Hayden recorded both a memorandum of the judgment and a certificate of levy on Ceszyk's homestead property (the property). Thereafter, the property was sold at a sheriff's sale, and Spectrum was the high bidder. The trial court confirmed the sale, and the sheriff issued a deed to the property to Spectrum on April 13, 2010, which it recorded on May 3, 2010. This court ultimately affirmed the confirmation order. *In re Application of the County Treasurer*, No. 2-11-0102 (2012) (unpublished order pursuant to Illinois Supreme Court Rule 23 (eff. July 1, 2011)).

¶ 4 In the meantime, the case that is the subject of the present appeal began on June 4, 2010, when Spectrum filed its forcible detainer complaint, claiming that it was entitled to possession of the property and that defendants were unlawfully withholding possession from it. In response, defendants, individually and jointly, filed several motions to dismiss, pursuant to both section 2-615 and section 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2010)), as well as section 2-301 of

the Code (735 ILCS 5/2-301 (West 2010)). The trial court denied all of the motions to dismiss and set the matter for jury trial.

¶ 5 Spectrum filed a motion for summary judgment, which the trial court granted on September 8, 2010. The court stayed enforcement of its order until September 30, 2010, at which time defendants filed a motion to reconsider. The court denied the motion on November 24, 2010, and defendants moved to stay enforcement of the order. On December 1, 2010, defendants filed their notice of appeal. On December 8, the court denied defendants' motion to stay. Defendants filed an emergency motion to stay in this court on December 20, which we denied on December 23. On December 27, the sheriff executed the judgment, evicting defendants and putting Spectrum in possession of the property.

¶ 6 ANALYSIS

¶ 7 Defendants raise several arguments on appeal. We begin with their contention that the trial court erred in entering summary judgment in Spectrum's favor. Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, construed strictly against the movant and liberally in favor of the nonmovant, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 948 (2009); 735 ILCS 5/2-1005 (West 2010). The trial court's sole function is to determine whether a question of material fact exists, not to resolve the issue. *Mills*, 393 Ill. App. 3d at 948. "Although summary judgment can aid in the expeditious disposition of a lawsuit, it remains a drastic means of disposing of litigation and, therefore, should be allowed only where the right of the moving party is clear and free from doubt." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). We review the trial court's judgment *de novo*. *Williams*, 228 Ill. 2d at 417.

¶ 8 The Act provides the complete remedy at law for settling disputes about possession. *Heritage Pullman Bank v. American National Bank & Trust Co. of Chicago*, 164 Ill. App. 3d 680, 686 (1987). In derogation of the common law, the Act contemplates a special and limited proceeding in which the court's inquiry is confined to a determination of the right to immediate possession. *Heritage Pullman Bank*, 164 Ill. App. 3d at 685-86. Although the question of title cannot be litigated, evidence of title may establish a party's right to immediate possession. *Heritage Pullman Bank*, 164 Ill. App. 3d at 685. To defeat a plaintiff's motion for summary judgment under the Act, the defendant must file an "affidavit setting forth with particularity facts upon which his or her defense is based." *100 W. Monroe Partnership v. Carlson*, 319 Ill. App. 3d 761, 767 (2001).

¶ 9 Here, Spectrum attached to its motion for summary judgment Hayden's affidavit, the recorded sheriff's deed, a "notice for immediate possession," and Ceszyk's sworn testimony from the March 2, 2007, citation to discover assets proceeding in the underlying tax deed case. The basis of Spectrum's claim of superior right to possession as to Ceszyk was the recorded deed issued to it by the sheriff following the levy and execution sale of the property. See 735 ILCS 5/9-102(a)(6) (West 2010) (providing for possession where land was sold under court order or judgment and the party to such order or judgment refuses to surrender possession following written demand). Spectrum's claim as to Zoglauer was Zoglauer's peaceable entry years earlier and his unlawfully withholding possession. See 735 ILCS 5/9-102(a)(2) (West 2010) (providing for possession where "a peaceable entry is made and the possession unlawfully withheld"). In his affidavit, Hayden averred that he had personally delivered a notice for immediate possession to Zoglauer when Hayden entered the property on May 25, 2010, and found Zoglauer there. Hayden further averred that Spectrum never gave defendants permission to possess the property and that they refused to relinquish possession to Spectrum.

¶ 10 In their response to the summary judgment motion, defendants argued that there were genuine issues of material fact regarding the validity and enforceability of the sheriff's deed. This was so, according to defendants, because Spectrum prematurely filed its forcible detainer action while Ceszyk's motion to reconsider the court's April 13, 2010, order confirming the sheriff's sale was pending in the underlying proceeding. Attached to defendants' response was an affidavit from Ceszyk, in which she averred that there was no final order confirming the sale, and that the matter was still pending.

¶ 11 Ceszyk's affidavit was insufficient under Illinois Supreme Court Rule 191(a) (eff. July 1, 2002), which requires in relevant part that affidavits submitted in summary judgment proceedings "shall not consist of conclusions but of facts admissible in evidence." Ill. S. Ct. R. 191(a) (eff. July 1, 2002). While we do not doubt that Ceszyk was competent to testify that she had a pending motion to reconsider in the underlying case, whether the order confirming the sale was final does not constitute a fact, but a legal conclusion. We also note the conspicuous absence from Ceszyk's affidavit of any reference to the April 13, 2010, order at issue, in which the court actually confirmed the sheriff's sale.

¶ 12 We determine that the April 13, 2010, confirmation order was final because it disposed of the rights of the parties in the entire controversy. See *In re Estate of Pawlinski*, 407 Ill. App. 3d 957, 962 (2011) (explaining that a final order is one that disposes of the parties' rights either for the entire controversy or for a definite and separate part of it). No further action was required by the trial court; indeed, on the same day that the court confirmed the sale, the sheriff issued the deed to Spectrum, which it recorded on May 3, 2010. Ceszyk's subsequent filing of a motion to reconsider did not render the confirmation order nonfinal. The alleged lack of finality of the confirmation order was the only basis offered by defendants to create a genuine issue of material fact as to the deed's validity

and enforceability. Defendants raised no other issue of material fact, and offered nothing to contradict the facts alleged by Hayden in his affidavit. Accordingly, we conclude that there was no genuine issue of material fact that would have precluded the entry of summary judgment. See *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986) (“[F]acts contained in an affidavit in support of a motion for summary judgment which are not contradicted by counteraffidavit are admitted and must be taken as true for purposes of the motion.”).

¶ 13 We now turn to whether Spectrum was entitled to judgment as a matter of law. Under the Act, the plaintiff is required to plead and prove that it was entitled to possession and that the defendant was unlawfully withholding possession from it. 735 ILCS 5/9-106 (West 2010) (“On complaint ***, stating that such party is entitled to the possession of such premises (describing the same with reasonable certainty), and that the defendant (naming the defendant) unlawfully withholds the possession thereof ***, the clerk of the court shall issue a summons.”); *Chicago Housing Authority v. Walker*, 131 Ill. App. 2d 299, 301 (1970). The forcible detainer plaintiff is also required to provide a description of the property at issue with reasonable certainty. 735 ILCS 5/9-106 (West 2010); *Worley v. Ehret*, 36 Ill. App. 3d 48, 54 (1976).

¶ 14 In the present case, the sufficiency of the property description is not at issue. Spectrum established that it held a sheriff’s deed to the property. Because Ceszyk was the judgment debtor in the underlying proceeding, her title was transferred to Spectrum as the grantee. See 735 ILCS 5/12-148 (West 2010) (“Such deed shall convey to the grantee therein named all the title, estate and interest of the judgment debtor.”). Defendants offered nothing in support of any right to possession by either of them, let alone any evidence of a right superior to that of Spectrum’s. Thus, Spectrum demonstrated its superior right to possession. Moreover, there was no basis whatsoever that defendants’ withholding possession from Spectrum was lawful. Nothing in Ceszyk’s affidavit

contradicted Hayden's allegation in his affidavit that Spectrum did not give defendants permission to remain on the property. Thus, Hayden's allegation was to be taken as true. See *Purtill*, 111 Ill. 2d at 241. Accordingly, Spectrum established that it was entitled to judgment as a matter of law, and the trial court properly entered summary judgment in its favor. See *North American Old Roman Catholic Church v. Bernadette*, 253 Ill. App. 3d 278, 289 (1992) (affirming the trial court's entry of summary judgment for the forcible-detainer plaintiff where the plaintiff "supplied uncontradicted facts demonstrating its right to possession").

¶ 15 Defendants argue that the trial court improperly granted summary judgment based on issues not pleaded in the complaint. They assert that Spectrum failed to include in its complaint that its alleged right to possession was based on the sheriff's deed. In support of their position, defendants rely on *Gold Realty Group Corp. v. Kismet Café, Inc.*, 358 Ill. App. 3d 675 (2005), and *Pagano v. Occidental Chemical Corp.*, 257 Ill. App. 3d 905 (1994).

¶ 16 In *Pagano*, the plaintiff filed a negligence suit, alleging various theories of recovery, for injuries he suffered in a fall from his truck bed while loading barrels of ink on the defendants' premises. The trial court entered summary judgment in the defendants' favor. *Pagano*, 257 Ill. App. 3d at 907-08. On appeal, the plaintiff argued for the first time a theory of premises liability in that the dock plate was slippery from an accumulation of snow. *Pagano*, 257 Ill. App. 3d at 910-11. The appellate court rejected the premises liability argument, noting that (1) the plaintiff failed to include that theory in his complaint, (2) the plaintiff failed to raise the theory at any stage of the proceedings before the trial court, and (3) forfeiture aside, the argument failed on the merits. *Pagano*, 257 Ill. App. 3d at 911. In discussing its first basis for rejecting the argument, the court noted that "the plaintiff will not be heard to complain that summary judgment was inappropriately granted because

of the existence of evidence supporting a theory of recovery that he never pled in his complaint.”

Pagano, 257 Ill. App 3d at 911.

¶ 17 In *Gold Realty*, the plaintiff-lessor filed a forcible detainer action against the defendants-lessees for unpaid rent and possession pursuant to paragraph 19 of the parties’ lease agreement, which provided for termination of the defendant’s right to possession if the rent was not paid. *Gold Realty*, 358 Ill. App. 3d at 679. The plaintiff filed a motion for summary judgment, abandoning its theory of recovery based on unpaid rent, and arguing that it was entitled to possession based on paragraphs 11 and 13 of the lease, which addressed the circumstances of a fire rendering the premises untenable and the defendants’ abandonment of the premises for 10 days. *Gold Realty*, 358 Ill. App. 3d at 677-78. The trial court granted the plaintiff’s motion for summary judgment and awarded it possession. *Gold Realty*, 358 Ill. App. 3d at 678. On appeal, the court relied in part on *Pagano* to reverse the summary judgment because it was based on “an issue entirely absent from the pleadings.” *Gold Realty*, 358 Ill. App. 3d at 679-80.

¶ 18 *Pagano* and *Gold Realty* are inapposite. Unlike the present case, *Pagano* did not address the limited statutory proceeding of a forcible detainer case. Nor did *Pagano* involve a plaintiff changing its theory of relief in a summary judgment motion, but rather, *Pagano* considered an entirely new theory raised for the first time on appeal. Although *Gold Realty* was a forcible detainer case and did involve a plaintiff raising a new theory in its summary judgment motion, what was dispositive in *Gold Realty* was the element of unfair surprise. See *Gold Realty*, 358 Ill. App. 3d at 680 (reversing summary judgment, stating, “The plaintiff argues the facts alleged in the complaint were sufficient to give the defendants notice of the issue. Not really.”). While the defendants in *Gold Realty* prepared to defend the forcible detainer action based specifically on nonpayment of rent and also raised two affirmative defenses based on that theory, on summary judgment, they faced an entirely

different theory of the plaintiff's entitlement to possession, and the claim for unpaid rent had been abandoned. *Gold Realty*, 358 Ill. App. 3d at 677-78.

¶ 19 Here, in contrast, no alternative theories were raised. Spectrum's complaint sufficiently alleged that it was entitled to possession and that defendants were unlawfully withholding possession from it. See *Chicago Housing Authority*, 131 Ill. App. 2d at 301. In their response to Spectrum's motion for summary judgment, defendants did not argue that the complaint failed to provide them notice of Spectrum's theory of the case. On appeal, defendants do not attempt to argue that they were surprised by anything in Spectrum's summary judgment motion. Indeed, given the extended history of litigation involving these parties, defendants could not credibly do so. Accordingly, on the facts of this case, the trial court's entry of summary judgment was not improper based on any alleged deficiency of the complaint.

¶ 20 Defendants also contend that the entry of summary judgment was improper because the trial court relied on inadmissible evidence. Specifically, defendants urge that Ceszyk's testimony from the citation proceedings was inadmissible because it did not qualify as a deposition under Illinois Supreme Court Rule 207 (eff. Jan. 1, 1996), and that Hayden's affidavit was inadmissible because it did not comply with Supreme Court Rule 191(a).

¶ 21 In the transcript of the citation proceedings, the only evidence possibly relevant to the forcible detainer action was Ceszyk's testimony that she had resided at the property with Zoglauer since about 1980 and that, in 1984, Zoglauer transferred title to Ceszyk by a quit claim deed. These facts were not in dispute. In fact, in another motion, defendants attached a tract index search reflecting the quit claim deed. Additionally, the record contains Zoglauer's June 30, 2010, affidavit, in which he averred that he had entered the property "with right and title" in 1970 and had

continually resided there since then. Thus, the transcript from the citation proceedings was not necessary to support the trial court's judgment, and we need not address its admissibility.

¶ 22 With regard to Hayden's affidavit, Rule 191(a) provides that affidavits used in summary judgment proceedings:

"shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. July 1, 2002).

Strict compliance with the rule is necessary given that affidavits in summary judgment proceedings serve as substitutes for trial testimony. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002).

¶ 23 Here, the averments in Hayden's affidavit were based on personal knowledge and set forth with sufficient particularity (*e.g.*, Hayden himself entered the subject property on a specific date, found Zoglauer there, and served the demand notice). Where Hayden relied on documents, they were attached (*e.g.*, the recorded sheriff's deed and the demand notice for possession). Although the affidavit did not include an express statement that Hayden "if sworn as a witness, can testify competently thereto," such magic language was not necessary. *Rinchich v. Village of Bridgeview*, 235 Ill. App. 3d 614, 623-624 (1992) ("Compliance with the requirement that an affidavit must affirmatively show that the affiant is qualified to testify at trial is to be determined from the contents of the affidavit itself, and an express statement to that effect is neither helpful nor required."). Notwithstanding defendants' conclusory arguments to the contrary, Hayden's affidavit was sufficient under Rule 191(a). See *Jackson v. Graham*, 323 Ill. App. 3d 766, 777 (2001) (stating that Rule 191(a) is satisfied if it appears from the affidavit as a whole that it is based on the affiant's personal

knowledge and there is a reasonable inference that the affiant could competently testify to its contents). Accordingly, the trial court's entry of summary judgment was not dependent upon inadmissible evidence.

¶ 24 Defendants further argue that the trial court lacked subject matter jurisdiction based on their conclusion that plaintiff lacked standing to bring the forcible detainer complaint because there was no final order confirming the sheriff's sale. Putting aside the fact that this court has repeatedly instructed defendants as to the sole source of subject matter jurisdiction (the Illinois constitution), given our holding that the trial court's April 13, 2010, order confirming the sheriff's sale was final, we need not address this argument. Suffice it to say that issues of standing and ripeness do not implicate a court's subject matter jurisdiction. *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252 (2010).

¶ 25 Defendants next contend that the trial court erred in denying their motions to dismiss pursuant to sections 2-615 and 2-619 of the Code. Under either section, our review is *de novo*. *Olson v. Hunter's Point Homes, LLC*, 2012 IL App (5th) 100506, ¶ 7. With respect to the section 2-615 motion, defendants argue that the complaint was insufficient as a matter of law because it failed to comply with section 2-606 of the Code (735 ILCS 5/2-606 (West 2010)), which requires a plaintiff to attach to its complaint any written instrument upon which it is founded. As Spectrum points out, the sheriff's deed was evidence of its superior right to possession, not a document upon which the complaint was founded. See *Heritage Pullman Bank*, 164 Ill. App. 3d at 685 (noting that evidence of title may establish a party's right to immediate possession); 735 ILCS 5/12-150 (West 2010) (The deed is "prima facie evidence that the provisions of the law in relation to the sale of the property for which it [wa]s or may be given were complied with."). Defendants' section 2-619

motion was based on their argument that the trial court lacked subject matter jurisdiction, which we have already rejected. Accordingly, the trial court did not err in denying the motions to dismiss.

¶ 26 Defendants finally maintain that they were denied due process when the trial court entertained the forcible detainer complaint while Ceszyk's motion to reconsider the order confirming the sheriff's sale was pending because they were deprived of the opportunity to be heard at a meaningful time. We disagree. Although defendants requested that the trial court continue the forcible detainer case until the motion to reconsider was decided, they did not raise a due process argument. Thus, they forfeited the argument on appeal. *People ex rel. Madigan v. Leavell*, 388 Ill. App. 3d 283, 290 (2009) ("A party may not raise constitutional issues for the first time on appeal, and a reviewing court will deem such issues forfeited."). Moreover, not only was the confirmation order final, but the trial court subsequently denied Ceszyk's motion to reconsider, and this court affirmed (*In re Application of the County Treasurer*, No. 2-11-0102 (2012) (unpublished order pursuant to Illinois Supreme Court Rule 23 (eff. July 1, 2011))). Consequently, even if the trial court had delayed its ruling, the result would be the same—Spectrum was entitled to possession.

¶ 27 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 28 Affirmed.