2013 IL App (2d) 120072-U
No. 2-12-0072
Order filed March 27, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOHN MYALL AND LAURA ANDERSON, Individually and Derivatively on Behalf of FOX MILL MASTER HOMEOWNERS ASSOCIATION, INC.,	)	Appeal from the Circuit Court of Kane County.
Plaintiffs-Appellants,	)	
v.	)	No. 10 L 434
FOX MILL LIMITED PARTNERSHIP, KANE COUNTY LAND COMPANY, B&B ENTERPRISES, B&B LAND SERVICES, INC., BARLOW WOODS, INC., CSC PROPERTIES, INC., 4N645 SCHOOL ROAD PARTNERS, LLC, KEN BLOOD, CHARLES BLOOD, SARAH BLOOD a/k/a SARAH GRIFFIN, GEORGE INSLEE, SANDRA BLOOD, CAROLINE BLOOD a/k/a CAROLINE BRIZUELA, GARY SINDELAR, PATRICK GRIFFIN, JERRY BOOSE, KENNETH KEENON, and MELANIE KEENON,	)	
Defendants-Appellees.	)	
and	)	
FOX MILL MASTER HOMEOWNERS ASSOCIATION,	)	Honorable James R. Murphy,

Nominal Defendant.) Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Plaintiffs, who brought a derivative suit on behalf of their homeowners' association, failed to bear their burden on appeal to establish error in the trial court's dismissal of their complaint.

¶ 2 *Pro se* plaintiffs, John Myall and Laura Anderson, appeal from the judgment of the trial court dismissing their complaint on the motion of defendants, Fox Mill Limited Partnership, *et al*. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 This is the second of two lawsuits naming the same defendants. The first, circuit court case number 10-L-51, was voluntarily dismissed in June 2011 while pending in this court.

¶ 5 Fox Mill is a subdivision in Campton Hills, Illinois, consisting of approximately 700 homes. Fox Mill Limited Partnership (FMLP) and B&B Enterprises (B&B) were Fox Mill's developers. Kane County Limited Partnership was the general partner of FMLP. CSC Properties and Barlow Woods were the general partners of B&B. Also named in both lawsuits was 4N645 School Road Partners LLC. (Collectively, the business entities.) Fox Mill is divided into four neighborhoods. Each neighborhood has its own governing association, but there is also an overarching, or master, association called Fox Mill Master Homeowners Association (FMMHOA). FMMHOA was established in 1994, and it is undisputed that all homeowners within Fox Mill are members of it. From 1994 through July 2008, FMMHOA's board of directors was appointed by the developers, FMLP and B&B.

¶ 6 In February 2010, FMMHOA brought suit in number 10-L-51. In May 2010, FMMHOA filed its nine-count amended complaint. FMMHOA brought its claims "individually and on behalf of" the four neighborhood associations. FMMHOA represented that all of the neighborhood associations had "assigned their causes of action" to FMMHOA. FMMHOA named as defendants several board members who served from 1994 through July 2008 (former members) as well as the business entities, in which some of the former members had financial interests.[1] Counts I through III, and V through VII, alleged that, during their terms on the board, the former members engaged in various forms of self-dealing, breaching their fiduciary duties to Fox Mill for the benefit of the business entities. Count I alleged in particular that there existed within Fox Mill certain parcels of land owned by all homeowners within Fox Mill and advertised on Fox Mill's advertising materials as " 'private open space.' " In 2000, the former members pledged the private open space as security for a mortgage, the proceeds of which were used for the exclusive benefit of FMLP and B&B. Subsequently, the former members arranged for the "sale" of the property to Fox Mill for $250,000, which was used to satisfy the mortgage.

¶ 7 As for the remaining counts, count IV alleged that defendants failed to turn over membership of the board of directors to the homeowners of Fox Mill within the time prescribed in section 18.5(f) of the Condominium Property Act (765 ILCS 605/18.5(f) (West 2008)). Count VIII alleged a civil conspiracy to commit the various acts alleged in the prior counts. Count IX alleged that the defendants violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2008)) by inducing sales of their homes on the promise

[1] Not all counts were brought against all defendants.

of low homeowners' association dues, where in fact the dues were low only because the former members failed to maintain an adequate reserve account.

¶ 8 Defendants moved to dismiss the complaint in 10-L-51. The record in this appeal does not contain the motion or any responsive pleadings. The record does contain the transcript of the June 29, 2010, motion hearing before Judge Robert B. Spence. At the hearing, defendants argued that FMMHOA had no authority under its governing articles to bring the suit. Defendants explained that FMMHOA and the four neighborhood associations each had their own governing articles, and that, while FMMHOA's articles did not address the issue of its capacity to file suit, the articles of the neighborhood associations expressly required approval of the majority of homeowners before a suit could be initiated. (We stress that, since the articles of the neighborhood associations are not in the record, we are relying entirely on the representations made about those articles at the motion hearing. Only the bylaws and covenants of FMMHOA are in the record.) Defendants argued that FMMHOA's articles incorporated the litigation restriction in the articles of the neighborhood associations. The parties appeared to agree at the hearing that FMMHOA had not put the question of litigation to the homeowners for approval before filing number 10-L-51. Judge Spence agreed with defendants that, by virtue of FMMHOA's articles, homeowners in Fox Mill "inherit[ed] the rights and obligations of all four of the neighborhood associations." On June 29, 2010, Judge Spence dismissed in its entirety the complaint in 10-L-51. FMMHOA filed its notice of appeal in this court on December 3, 2010. On May 19, 2011, FMMHOA moved to dismiss the appeal because a settlement had been reached. We granted the motion on June 6, 2011.

¶ 9 The record contains a copy of a "Mutual Release and Settlement Agreement," dated May 13, 2011. The agreement purports to be a settlement of claims brought in number 10-L-51.

Accordingly, the parties to the agreement are referred to as "plaintiff" and "defendant." The "plaintiff" is identified as FMMHOA, "an Illinois not-for-profit corporation organized as a homeowners association for the purpose of administering the residential common-interest community known as Fox Mill Subdivision in Campton Township, Kane County, Illinois." The agreement further represents that "each and every lot owner in the Fox Mill Subdivision is a member of the Plaintiff [FMMHOA]." The agreement purports to release all defendants from liability with respect to

> "each and every allegation contained in the Lawsuit [*i.e.*, number 10-L-51], and any allegation and claim which could have been brought in the Lawsuit, whether by Plaintiff, by others derivatively through Plaintiff, by individual owners in the Fox Mill Subdivision, or by any other individual or entity pertaining to the foregoing ***."

As consideration for the release, defendants agreed to (1) convey title to the private open space to FMMHOA; (2) pay FMMHOA $100,000; and (3) assign sewer and water connection permits for certain lots.

¶ 10 The settlement and release further provided:

> "15. Authority: The parties hereto hereby each represent and warrant that each is authorized to execute this Agreement, and that all action necessary to be taken to execute this Agreement has been taken, and that there are no consents or authority required."

The agreement is signed by the president of FMMHOA.

¶ 11 On August 2, 2010, while number 10-L-51was still pending in the trial court, plaintiffs, homeowners in Fox Mill, filed the complaint in the present case, captioned as a derivative action on behalf of FMMHOA, which is named as nominal defendant. The defendants proper are identical to

the defendants named in number 10-L-51. As justification for a derivative action, plaintiffs allege in their complaint that the board of directors of FMMHOA "has been compromised." First, plaintiffs assert that the board, "[d]espite being informed by a Court that [the board] lacks standing without a vote of all members, and being advised by [FMMHOA's] attorneys to call a vote, *** has refused to call a vote ***." (Emphasis in original.). Second, plaintiffs assert the board was "acting *ultra vires*" because it had removed a director in violation of section 108.35 of the General Not for Profit Corporation Act of 1986 (805 ILCS 105/108.35 (West 2008)). Third, plaintiffs allege that "[s]ome or all of the [board members] have a close, personal relationship with some or all of the named [d]efendants (and/or their spouses) herein and refuse to exercise their fiduciary duty to pursue this litigation in an appropriate manner due to these personal relationships."

¶ 12 Plaintiffs' complaint contains ten counts.[2] Counts I through IX restate *verbatim* the corresponding nine counts from the complaint in 10-L-51. The new count, count X, is styled as a direct, not derivative, claim and alleges a violation of the Consumer Fraud Act. Specifically, plaintiffs allege that, while they were deliberating whether to purchase homes in Fox Mill, defendants represented that each owner would own, as part of the purchase price of a home, a share in both the private open space and a proposed community center to be located on private open space. Defendants also represented that they would preserve "natural prairie and ponds to be dedicated and turned over to the Kane County Forest Preserve, to be maintained thereafter by the Forest Preserve for the benefit of the community." Plaintiffs alleged that, contrary to these representations, defendants later informed plaintiffs that a share in the private open space was not included in the purchase price of their homes. Rather, defendants encumbered the private open space with a

[2] Again, as with the complaint in number 10-L-51, not all counts name all defendants.

mortgage, resulting "in an undisclosed additional premium" paid by plaintiffs. Plaintiffs further alleged that defendants failed to maintain the natural space and, consequently, Kane County would not accept the property.

¶ 13 In November 2011, defendants moved to dismiss the complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2008)). Defendants argued that the current suit was barred (1) on grounds of *res judicata*, due to the June 2010 involuntary dismissal by Judge Spence; (2) by the May 2011 settlement; and (3) as an improper collateral attack on the June 2010 judgment of dismissal. Lastly, defendants argued that, even if plaintiffs' claims were not otherwise barred, they lacked "standing" to bring a derivative suit. Defendants maintained that the requisites for a derivative suit, which this court set forth in *Goldberg v. Michael*, 328 Ill. App. 3d 593 (2002), were not met in this case, "where the 10-L-51 [action] was initiated, appealed[,] and eventually settled on behalf of all Fox Mill homeowners."

¶ 14 In their response, plaintiffs argued that the June 2010 dismissal, which they characterized as based on FMMHOA's "lack of standing," was not an adjudication on the merits and, therefore, did not bar the present suit on *res judicata* grounds. Plaintiffs further argued that, if (as Judge Spence determined) FMMHOA lacked standing to sue on behalf of homeowners like plaintiffs, then it lacked "ownership" of the causes of action in number 10-L-51 and, therefore, lacked standing to reach a settlement on behalf of plaintiffs. Therefore, plaintiffs argued, their suit was not barred by the settlement in number 10-L-51.

¶ 15 The trial court held, first, that plaintiffs did not meet *Goldberg*'s requisites for when the decision of the board of directors of a homeowners' association to forgo or settle litigation justifies a derivative suit by a member homeowner. Second, the court held that plaintiffs' action was barred

by the May 2011 settlement and release. Accordingly, the court dismissed the complaint. Though neither at the motion hearing nor in its written order did the court restrict the scope of its ruling, its order includes the language that Illinois Supreme Court Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010)) requires for a party to appeal "from a final judgment as to one or more but fewer than all of the parties or claims." (Plaintiffs suggest to us that the trial court included Rule 304(a) language because it left count X standing.)

¶ 16 Plaintiffs filed this timely appeal.

¶ 17 ANALYSIS

¶ 18 A motion to dismiss brought under section 2-619 of the Code admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that would avoid the legal effect of or defeat a claim. See 735 ILCS 5/2-619 (West 2010). Except where the trial court holds an evidentiary hearing, our review of a dismissal under section 2-619 is *de novo*. *Law Offices of Nye & Associates, Ltd. v. Boado*, 2012 IL App (2d) 110804, ¶ 12. The question on review is whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. *O'Casek v. Children's Home and Aid Society*, 229 Ill. 2d 421, 436 (2008).

¶ 19 Defendants' response brief on appeal advances the same arguments they brought in their motion to dismiss below. We address first their contention that plaintiffs lack standing to bring a derivative suit on behalf of FMMHOA. Though this is a threshold issue, defendants do not treat it as such, but rather present it last in their brief (as they did in their motion to dismiss). Defendants cite *Goldberg*. The plaintiffs in *Goldberg* were homeowners who sought to bring a derivative action on behalf of their homeowners' association after the board decided not to sue certain board members,

but rather entered into settlement agreements with them. 328 Ill. App. 3d at 596. This court analogized derivative suits by members of homeowners' associations to shareholder derivative suits, and held that the plaintiffs did not satisfy the requisites for a derivative action:

> "To maintain a suit on behalf of a corporation, an individual shareholder must allege and prove an equitable basis for such intervention, and a shareholder is no more entitled to challenge by a derivative suit a decision by the directors not to sue than to challenge any other action of the board. [Citation.] There are no allegations that the board in settling with defendants abused its discretion, was grossly negligent, or acted in bad faith or fraudulently. Thus, plaintiffs cannot pursue litigation derivatively on behalf of the Association when the board voted not to proceed with litigation. [Citation.]." *Id.* at 598-99.

Defendants claim that this criteria was not met here, "where the 10 L 51 [action] was initiated, appealed[,] and eventually settled on behalf of all Fox Mill homeowners." Defendants do not elaborate. To state simply that a settlement was reached "on behalf of all Fox Mill homeowners" does not advance any argument under *Goldberg*, for that case permits homeowners to file a derivative suit *despite* the board's settlement if the homeowners allege abuse of discretion, gross negligence, bad faith, or fraud. *Id.* at 598-99. Defendants simply assume that the settlement was not tainted by the types of misconduct listed in *Goldberg*. They have failed, therefore, to generate any argument that plaintiffs lack standing to bring this derivative action.

¶ 20 We move to plaintiffs' contentions on appeal, and note the cardinal rule of appellate review that, while the trial court may have erred, and even erred seriously, the appellant has the burden to establish the error. See *Behrstock v. Ace Hose & Rubber Co.*, 147 Ill. App. 3d 76, 86 (1986) ("it is well settled that all reasonable presumptions are in favor of the action of the trial court and that the

burden is on the appellant to show affirmatively the errors assigned on review; he has the burden of overcoming the presumption that the trial court's judgment was correct"). Plaintiffs challenge the validity of the settlement and release. We narrow their challenge by noting what contentions they have either (1) failed to raise on appeal, (2) forfeited for appeal by neglecting to raise them below; or (3) forfeited for appeal by failing to properly develop them.

¶ 21 First, plaintiffs do *not* contest that, facially, the settlement applies to them. A party to the agreement is FMMHOA, of which, the agreement recites, "each and every lot owner within the Fox Mill Subdivision is a member." Furthermore, the parties "represent and warrant that each is authorized to execute this Agreement, and that all action necessary to be taken to execute this Agreement has been taken, and that there were no other consents or authority required."

¶ 22 Plaintiffs do make a narrow argument about the *claims* covered by the settlement and release (which applies to "each and every allegation" that was, or could have been, brought in number 10-L-51 "by others derivatively through [FMMHOA], [or] by individual owners in Fox Mill Subdivision"). We note that the argument section of plaintiffs' opening brief is mostly a *verbatim*, reformatted copy of the argument section of their response in the court below to defendants' motion to dismiss. Plaintiffs have added one entirely new argument subsection, in which they specifically address count X of their complaint in this action. While plaintiffs insist that the trial court did not dismiss count X,[3] they assume the dismissal *arguendo*, and contend that the settlement and release

[3] Plaintiffs claim this follows from the trial court's inclusion of Rule 304(a) language and from the fact that defendants' motion to dismiss "did not even seek dismissal of Count X." We express no opinion on whether count X was dismissed, for plaintiffs have not preserved any argument with regard to count X specifically.

did not encompass the claims brought in count X. Plaintiffs forfeited this point by failing to raise it below. See *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000) ("Questions not raised in the trial court cannot be argued for the first time on appeal.").

¶ 23 Both plaintiffs' pleading below and their opening brief here contain a subsection entitled, "The Settlement Itself is Void." On appeal, plaintiffs have added the following lines to the beginning of that subsection:

> "[T]here is nothing in the record to indicate that the settlement agreement was ever voted upon by the Board of Directors for [FMMHOA], nor is there any evidence that the community of Fox Mill ever voted upon the settlement. The plaintiffs, as residents of Fox Mill, are not aware of any such vote, and defendant didn't provide any affidavit or minutes of any meeting to support this contention."

This point is forfeited because plaintiffs did not raise it below. See *id.*

¶ 24 Plaintiffs have also added to what they argued below a contention that defendants, based on their grounds for urging dismissal in number 10-L-51, are judicially estopped from claiming that the settlement and release bars the present action. Likewise, this point is forfeited. *See id.*

¶ 25 Third, plaintiffs contend, as they did below, that the provisions in the settlement and release relating to the transfer of the private open space are invalid. Plaintiffs assert that the settlement and release purports to "dedicate" the private open space to FMMHOA, "which is in violation of the county ordinance which allowed the development to be built in the first place." Plaintiffs further assert that the ordinance, "of which this court may take judicial notice, provides that [the private open space] will be dedicated to a public entity, not a private one like [FMMHOA]." Plaintiffs do not elaborate, and do not even provide a citation to the ordinance in question. Accordingly, this

argument is forfeited for failure of development. See Ill. S. Ct. R. 341(h)(7) ("[a]rgument *** shall contain the contentions of the appellant and the reasons therefor, with citations of the authorities *** relied on"). There is a similar infirmity in plaintiffs' contention that the "the cost of upkeep, repair[,] and maintenance of the kind which defendants seek to dedicate is a liability, of no value to [FMMHOA], and [FMMHOA's] acceptance of this makes the settlement agreement illusory, of no value, despite the promised deposit of One Hundred Thousand ($100,000.00) Dollars, which itself carries contingencies." Besides citing no legal authority here, plaintiffs do not elaborate on how the responsibilities FMMHOA assumed with respect to the private open space are "a liability, of no value" nor how, if true, this would render the entire settlement and release illusory.

¶ 26 Finally, we proceed to plaintiffs' contention that "if, as the defendants argued successfully before Judge Spence, [FMMHOA] had no standing [in number 10-L-51] to bring the cause of action, it defies logic to believe that they had the authority to settle a cause, not only on their own behalf, but on behalf of individual owners (with individual claims) as well." Plaintiffs offer the following hypothetical:

> "P is struck by D while crossing the street. Before P has an opportunity to file suit, P's neighbor, N, filed suit for P's injuries. D, realizing that N has no standing to file the suit, successfully has the case dismissed on the basis of lack of standing. P, who does have standing, files suit, but D settles with N, and then argues that P's case is barred by the doctrine of *res judicata*, standing, prior release, etc. If the party has no standing to bring the cause of action (which is the position that the defendants here took before Judge Spence)[,] then how can N have standing to settle the case[?]"

The analogy is incomplete. Plaintiffs do not describe what legal relationship existed between P and N before the settlement was reached, or what the settlement provided. Here, plaintiffs were undisputedly members of FMMHOA when the settlement was reached, and the settlement provided that FMMHOA had all "consents" and "authority" necessary to enter into the settlement.

¶ 27 Plaintiffs' argument also fails for multiple other reasons. Essentially, they ask us to afford preclusive effect to Judge Spence's ruling on standing,[4] yet they cite no legal authority on the issue. Moreover, we cannot afford that ruling preclusive effect without knowing its grounds and scope. Judge Spence's ruling involved the interplay of FMMHOA's bylaws and covenants with the governing documents of Fox Mill's neighborhood associations. Only the bylaws and covenants of FMMHOA, however, are in the record. We do not know what, if anything, the articles of the neighborhood associations provided as to FMMHOA's authority to settle disputes. Therefore, we cannot ascertain if Judge Spence's ruling on whether FMMHOA needed homeowner approval to instigate litigation can be extended to whether FMMHOA needed homeowner approval to settle a matter. Finally, even if we were persuaded that Judge Spence's ruling encompassed the question of whether FMMHOA needed the approval of homeowners to settle a dispute, there remains the possibility that, between June 29, 2010 (the date of the dismissal) and May 13, 2011 (the date of the settlement and release), FMMHOA secured whatever authorization was necessary for a settlement and release. As noted, plaintiffs do assert that the record contains no indication that FMMHOA obtained such authority, but this contention is waived for failure to raise it in the court below.

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[4] Hence, while plaintiffs disagree with defendants that Judge Spence's dismissal on grounds of standing was an adjudication on the merits for purposes of *res judicata*, plaintiffs claim the ruling on standing itself had preclusive effect.

¶ 28 Plaintiffs, therefore, have failed to sustain their burden on appeal to show that their current claims are not encompassed by the May 2011 settlement and release. As the settlement and release is sufficient of itself to sustain the judgment of the trial court, we need not address plaintiffs' remaining contentions on appeal.

¶ 29 For the foregoing reasons, we affirm judgment of the circuit court of Kane County dismissing plaintiffs' complaint.

¶ 30 Affirmed.