2014 IL App (2d) 121185-U
No. 2-12-1185
Order filed September 16, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

HAROLD SUSKI and BEVERLY SUSKI, Plaintiffs-Appellants, v. HAZEL D. NUTT, BULLDOG REAL ESTATE DEVELOPMENT, INC., COUNTY LINE ROAD, INC., STATE BANK OF DAVIS, and DIANE NUTT WILBERG, Defendants-Appellees.	)	Appeal from the Circuit Court of Winnebago County. No. 10-CH-2508 Honorable Edward J. Prochaska, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Plaintiffs failed to properly preserve for review a count of their first amended complaint that was dismissed with prejudice because they did not reallege or reference it in their second-amended complaint; (2) *laches* did not apply where plaintiffs failed to record their deed for seven years after they purchased property from the defendant; failure to record deed was not failure to assert a right against the defendant grantor, who subsequently sold the property to another party.

¶ 2 Plaintiffs, Harold and Beverly Suski, appeal from the orders of trial court dismissing various counts of their complaint and second-amended complaint. We affirm in part, reverse in part, and remand.

¶ 3 I. BACKGROUND

¶ 4 In June 1991, plaintiffs entered into an "agreement for deed" to purchase the property commonly known as 16900 County Line Road in South Beloit, Illinois, for $120,000 (at 9% interest) from defendant, Hazel Nutt, and her husband, Virgil.[1] Plaintiffs completed payment under the agreement in August 2001, and Nutt conveyed to plaintiffs a warranty deed to the property on February 16, 2002. Plaintiffs did not record the deed until January 2009.

¶ 5 In the meantime, on March 25, 2008, Nutt quitclaimed any interest she had in the property to defendant, Bulldog Real Estate Development, Inc. The deed contains a handwritten notation that consideration was "less than $100.00." Defendant, Diane Nutt Wilberg, the only child of Hazel and Virgil, similarly quitclaimed to Bulldog any and all rights and interest that she had in the property on April 2, 2008. Bulldog subsequently conveyed the property, via a warranty deed, to defendant, County Line Road, Inc. That deed was recorded in May 2008.

¶ 6 Plaintiffs filed a three-count complaint in December 2010 and a first-amended complaint in August 2011. In the first-amended complaint, count I sought to quiet title as to Nutt, Bulldog, County Line Road, and defendant, State Bank of Davis, which provided a mortgage for County Line Road. Count II sought money damages against Nutt. Count III sought an order of ejectment against "any and all defendants in this cause." Defendants filed various motions to dismiss.

[1] Virgil died in early March, 2008, and is not part of this appeal.

¶ 7 Nutt filed a two-count cross-claim and third-party complaint against Bulldog and an individual named Rhonda Davenport, alleging fraud in the inducement in the sale of the 16900 County Line Road property and her primary residence. Nutt later amended the cross-claim to include County Line Road, State Bank of Davis, and Hazel Nutt House, Inc. Nutt alleged that Davenport approached her and Virgil in 2008 to discuss a potential sale of the 16900 County Line Road property and told Nutt that they still legally owned the property because the Suskis failed to record the warranty deed and pay the property taxes assessed on property in a timely manner. Nutt also alleged fraud in a transaction involving the transfer of her home.

¶ 8 The trial court granted the motions to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2010)) for failure to state a cause of action. The dismissal of count III was with prejudice. The court granted leave to file an amended complaint as to counts I and II.

¶ 9 Plaintiffs filed a two-count second-amended complaint on December 9, 2011, again seeking quiet title against Nutt, Bulldog, County Line Road, and State Bank of Davis in count I and money damages against Nutt in Count II. Following the filing of motions, the trial court dismissed the second-amended complaint with prejudice pursuant to sections 2-615 and 2-619 of the Code "based on *laches*" on February 24, 2011.

¶ 10 Plaintiffs timely filed a motion to reconsider and also filed a motion to expand the time for filing an amended motion to reconsider on April 10. The trial court denied both motions on April 20, 2012. Plaintiffs filed a notice of appeal, but this court dismissed the appeal for a lack of jurisdiction, as Nutt's cross-claim/third-party complaint still pended. These claims (which are not part of this appeal) were eventually settled, and this appeal followed.

¶ 11 II. ANALYSIS

¶ 12 While the written trial court order mentions section 2-615 as a basis of its dismissal, the court basically relied on section 2-619 "based on *laches*" for its ruling. Section 2-619 provides litigants with a method of disposing of issues of law and easily-proved issues of fact early in litigation. *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶ 16. In a motion to dismiss brought pursuant to section 2-619, all well-pleaded facts are deemed true, and the moving party admits the sufficiency of the complaint. *Wabash County v. Illinois Municipal Retirement Fund*, 408 Ill. App. 3d 924, 929 (2011). However, the moving party asserts an affirmative defense or other matter that defeats the plaintiff's claim. *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 16. A trial court should grant such a motion only if the plaintiff can prove no set of facts that would support a cause of action. *Hascall*, 2013 IL App (4th) 121131, ¶ 17. We review *de novo* a trial court's dismissal of a complaint pursuant to section 2-619. *Id*.

¶ 13 Plaintiffs first contend that the trial court erred in dismissing count III of their first-amended complaint, which sought an order of ejectment against all defendants. However, subsequent to that dismissal, plaintiffs filed their two-count second-amended complaint without including or referencing the ejectment cause of action from count III. Case law is clear and consistent in holding that a party who files an amended pleading waives any objection to the trial court's ruling on any former complaint and that, where an amendment to a pleading is complete in itself and does not adopt or refer to a prior pleading, the prior pleading is, in effect, abandoned and withdrawn, and ceases to be a part of the record for most purposes. See *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17. Plaintiffs have failed to properly preserve for review count III of their first-amended complaint, and we will not consider this issue. See *id*. ¶ 31.

¶ 14 Plaintiffs next contend that the trial court erred in dismissing count I of their second-amended complaint seeking to quiet title. Plaintiffs' argument here is wholly inadequate.

Bulldog filed a motion to dismiss raising six bases for dismissal. County Line and Davis argued that count I should be dismissed on the basis of *laches*. Nutt raised four bases for dismissal. Yet, on appeal, plaintiffs do not address specific defendants, let alone specific arguments put forth by specific defendants. Instead, plaintiffs cite to one case for its "excellent outline of the nature of a suit to quiet title" and make a hyperbolic, fatuous argument regarding a "race to the courthouse" and concealed carry of weapons. A trial court's decision granting a motion to dismiss, pursuant to either section 2-615 or 2-619, may be affirmed on any basis supported by the record. *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1983). Plaintiffs fail to adequately address the asserted bases for dismissal. This argument is insufficient; we deem it forfeited, and we will not address its alleged merits.

¶ 15 Plaintiffs next contend that the trial court erred in dismissing their claim for money damages against Nutt. Again, the trial court granted dismissal under section 2-619 "based on *laches*." *Laches* is "grounded in the equitable notion that courts are reluctant to come to the aid of a party who has knowingly slept on his right to the detriment of the opposing party." *Tully v. State of Illinois*, 143 Ill. 2d 425, 432 (1991). It is an equitable principle that bars an action where, because of a delay in bringing suit, a party has been misled, or prejudiced, or has taken a course of action different from that which it might otherwise have taken absent the delay. *In re Estate of Brown*, 2014 IL App (1st) 122857, ¶ 26. Traditionally, the defense of *laches* applied only in actions arising in equity and was unavailable in actions at law; however, Illinois courts have expanded the application of the defense so that it is routinely applied in lawsuits simultaneously seeking both equitable and legal remedies. *Mo v. Hergan*, 2012 IL App (1st) 113179, ¶ 35.

¶ 16 A court should consider four factors to determine if *laches* applies: (1) conduct on the defendant's part giving rise to the situation of which complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had notice or knowledge of the defendant's conduct and the opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases the suit; and (4) injury or prejudice to the defendant if relief is accorded to the complainant or the suit is held not to be barred. *Pyle v. Ferrell*, 12 Ill. 2d 547, 553 (1958); *Department of Natural Resources v. Waide*, 2013 IL App (5th) 120340, ¶ 19. A court must also consider whether the defendant contributed to the delay of which it complains and "whether the defendant knew it was violating a right and went ahead anyway in disregard of the consequences [citation]." *Whitlock v. Hilander Foods, Inc.*, 308 Ill. App. 3d 456, 464 (1999). The burden of pleading and proving the defense of *laches* is on the party claiming that defense. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 822 (2008). We review a trial court's decision on a claim of *laches* for an abuse of discretion. *Id.*

¶ 17 In general, *de novo* review is the appropriate rule for dismissal pursuant to section 2-619. See *Ashley v. Pierson*, 339 Ill. App. 3d 733, 737 (2003). However, every rule has an exception, and this rule has several. See *In re Estate of Brown*, 2014 IL App (1st) 122857, ¶ 28 ("We therefore find the probate court abused its discretion in dismissing Barbara Hoy's amended petition for citation on the ground that she was guilty of *laches*."); *O'Brien v. Meyer*, 281 Ill. App. 3d 832, 835 (1996) (where trial court allowed motion to dismiss based on *laches*, appellate court concluded "that it is proper for us to examine the record to determine whether the judge's finding that the defendants had established the plaintiff's guilt of *laches* was against the manifest weight of the evidence."). See also *Zurich Insurance Co. v. Baxter International, Inc.*, 173 Ill.

2d 235, 243-44 (1996) (trial court's dismissal of complaint pursuant to section 2-619(a)(3) reviewed for abuse of discretion); *Whitlock*, 308 Ill. App. 3d at 464 (applying abuse of discretion standard after summary judgment entered on basis of *laches*). Review for an abuse of discretion is appropriate in this case.

¶ 18 The defense of *laches* clearly does not apply in this situation. Both Nutt and the trial court based their reasoning on plaintiffs' failure to record their deed for seven years. In her motion to dismiss, Nutt stated;

> "Defendant has been prejudiced by plaintiffs' delay in recording the deed to the subject premises. Defendant has been prejudiced because said delay subjects the defendant to potential damages from either the subsequent purchaser or the plaintiffs."

The trial court stated:

> "I think the Suskis have got a big problem with *laches*, because they waited so long, frankly, to file their deed. *** I don't think there's anything that they can do to fix that at this point in time, because before they filed their deed, all these other transactions occur, and a purchaser in good faith bought it and filed their deed timely, as you should."

The court later said:

> "You know, the bottom line is it was really clear to me that *laches* was a dead-bang winner in this case. You can't just wait seven years to file your deed. You just can't do that. And, you know, this is the kind of weird stuff that can happen if you wait seven years to file your deed, and the Suski's are out of luck."

¶ 19 Plaintiffs did not delay in asserting a right against Nutt. The recording of a deed is not an assertion of a right against the prior owner. Therefore, the failure to record the deed is not a failure to assert a right against the prior owner; rather, it is a failure to place third parties on

notice that the plaintiff claims an interest in the property as of the date of the deed. Plaintiffs' ownership of the property was effective upon the delivery of the warranty deed in 2002; a warranty deed conveys a fee simple estate to the grantee, and the grantee's failure to record the deed does not affect the deed's operation as a conveyance. *In re Application of the Cook County Treasurer*, 185 Ill. 2d 428, 433 (1998). A grantee's failure to record a deed may affect his rights *vis-à-vis* a third party who later purchases the property without notice of the grantee's unrecorded interest, but the grantee's failure to record does not resuscitate the grantor's interest in the property. *Id*.

¶ 20 In addition, plaintiffs' seven-year delay in recording the deed did not mislead Nutt or cause her to take a course of action different from that which she might otherwise have taken. In her cross-claim/third-party complaint, Nutt alleged that Rhonda Davenport approached her and Virgil to discuss a potential sale of the 16900 County Line Road property. According to Nutt, Davenport:

> "represented and told Ms. Nutt that the land located at 16900 County Line Road, South Beloit, Illinois was still legally owned by Ms. Nutt as a result of the Suski's failure to both record the warranty deed issued on 2001[*sic*] and pay the property taxes assessed on property in a timely manner."

Nutt further alleged that she was "misled regarding her legal status as owner of the property" and that Davenport "had knowledge or believed that those statements were false" and "intended to induce Ms. Nutt to sell the property." Thus, it was not the failure of plaintiffs to record the deed that misled Nutt or caused her to take the course of action that she did. Nutt relied on the incorrect and allegedly fraudulent legal opinion of Davenport, who is never even identified as an attorney.

¶ 21 Further, Nutt failed to demonstrate "injury or prejudice *** if relief is accorded to the complainant or the suit is held not to be barred." *Pyle*, 12 Ill. 2d at 553. In her motion to dismiss, Nutt claimed that plaintiffs' alleged delay "subjects the defendant to potential damages from either the subsequent purchaser or the plaintiffs." Nutt sold a piece of property twice, once each to two different parties; having to return the proceeds of one of the sales is not injury or prejudice; it is justice.

¶ 22 Nutt acknowledged that she and her husband conveyed the property to plaintiffs in 2002 and that she subsequently quitclaimed her "interest" in the property to Bulldog in 2008. It was Nutt's reliance on bad information from Davenport, not plaintiffs' failure to record their deed (as foolish as that may have been) that put Nutt in the predicament in which she found herself. We conclude that the trial court abused its discretion in finding that count II was barred by *laches* and erred as a matter of law in dismissing count II on that basis.

¶ 23 The trial court granted all of the defendants' motions to dismiss "pursuant to sections 2-615 and 2-619 on the basis of *laches*" and pursuant to statutory bases raised by parties other than Nutt. The trial court did not address other bases for dismissal pursuant to section 2-619 raised by Nutt. However, these bases are as unavailing as the *laches* defense. Nutt argued that plaintiffs (1) forfeited their right to record their interest in the property by waiting seven years to do so; and (2) "intentionally relinquished or abandoned their right to be adjudged the legal owner of the subject property" by allegedly failing to pay property taxes every year since they were deeded the property. However, neither of these bases asserts an affirmative defense or other matter that defeats the plaintiff's claim; Nutt still quitclaimed her nonexistent interest in the property to another party after she had sold the property to plaintiffs and kept the proceeds from the sale. Plaintiffs' tardy recording of their deed and their subsequent property tax payment history do not

affect their warranty deed's operation as a conveyance and do not resuscitate Nutt's interest in the property. The trial court erred in dismissing plaintiffs' claim for money damages against Nutt based upon *laches*; the cause must be remanded for further proceedings on count II of plaintiffs' second-amended complaint.

¶ 24 Plaintiffs also contend that the trial court erred in denying their motion to reconsider and their motion for time to file an amended motion to reconsider. As we reverse the portion of the trial court's judgment regarding the dismissal of Count II, this contention is moot as to that point. As to the other defendants, plaintiffs merely contend that "[a]s demonstrated above the trial court totally misapprehended the issue of the application of *laches* to the case at bar." Further, while acknowledging that the trial court has discretion to allow time to amend a motion to reconsider, plaintiff merely asserts such an abuse of discretion with nothing more. Again, this argument is insufficient, and we will not address its alleged merits.

¶ 25 IV. CONCLUSION

¶ 26 For these reasons, the judgment of the circuit court is affirmed in part, reversed in part, and remanded for further proceedings.

¶ 27 Affirmed in part, reversed in part, and remanded for further proceedings.