2022 IL App (5th) 210285-U

NO. 5-21-0285

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

PARROT POINTE MARINE, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 21-LM-72
	)	
HENRY SANDOW,	)	Honorable
	)	Clarence W. Harrison II,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Cates and Wharton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order is affirmed in part where the plaintiff had standing to bring an eviction action against the defendant. However, we vacate the portion of the order that prohibited the parties from publishing or making disparaging comments about each other as an impermissible prior restraint on speech.

¶ 2 The plaintiff, Parrot Pointe Marine, Inc., filed an action in the circuit court of Madison County against the defendant, Henry Sandow, seeking eviction of the defendant's personal property from a boat slip located at the Alton Marina in Alton, Illinois. On July 13, 2021, the court ordered the defendant to remove his property from the boat slip but granted him a 60-day stay of execution allowing him until September 1, 2021, to relinquish

possession of the boat slip. On August 3, 2021, the defendant filed a motion to reconsider, arguing that the plaintiff lacked standing to seek an eviction since the Alton Marina was owned by the City of Alton and not the plaintiff. On September 13, 2021, the court entered an order denying the motion to reconsider and extending the stay of enforcement until October 1, 2021. For the reasons that follow, we affirm in part and vacate in part.

¶ 3 I. BACKGROUND

¶ 4 In July 2015, the defendant entered into a slip rental agreement with the Alton Marina for the boat slip identified as "T of G." The Alton Marina was owned by the City of Alton but operated by the plaintiff. The agreement was signed by an employee of the plaintiff. The original term of the agreement was for a period of six months with a rental fee of $700 per month. Following the expiration of the six-month term, the lease converted to a month-to-month tenancy. On February 28, 2021, the plaintiff served on the defendant a 30-day notice to terminate the tenancy, which gave the defendant until April 1, 2021, to quit the premises and deliver possession to the plaintiff.

¶ 5 Because the defendant did not remove his boat from the slip by the deadline, on April 1, 2021, the plaintiff filed a complaint in forcible entry and detainer, seeking an order of possession of the subject premises. On July 1, 2021, the defendant filed a *pro se* answer to the complaint, asserting that the allegations contained in the complaint were false, he had moved his property from the marina and was no longer in possession of the slip, and he was not in arrearage in rent. That same day, the trial court held a hearing on the complaint, the plaintiff appeared by counsel, and the defendant appeared *pro se*. A transcript of that hearing is not included in the record on appeal.

¶ 6 Thereafter, on July 13, 2021, the trial court entered a judgment for the plaintiff and against the defendant for possession of the subject premises. The court ordered the defendant to remove his property from the marina on or before September 1, 2021. The court also ordered the parties to not "engage in any pattern of conduct that involves the making or publishing of written or oral statements or remarks which are disparaging, deleterious or damaging to the integrity, reputation or good will of the other [p]arty."

¶ 7 On August 3, 2021, the defendant, through counsel, filed a motion to file an answer *instanter*, an answer to the complaint, and a motion to reconsider. In the answer, the defendant indicated that the City of Alton was the party that he entered into a contract with and that owned the marina. Thus, he contended that the plaintiff lacked standing to file the eviction complaint. He also contended that the eviction action was filed in retaliation for perceived criticism by someone associated with the defendant, which was in violation of the defendant's first and fourteenth amendment rights as the plaintiff discriminated against him for expressing constitutionally protected ideas. In the motion to reconsider, the defendant again argued that the plaintiff lacked standing because the plaintiff had no ownership interest in the marina.

¶ 8 On August 25, 2021, the plaintiff filed a response to the motion to reconsider, contending that the motion should be denied because the defendant was attacking the validity of the complaint, which was not a proper postjudgment motion; he failed to present any newly discovered evidence or changes in the law; he did not argue that the trial court erred in applying the current law; and assuming *arguendo* that the motion to reconsider

was proper, the plaintiff had standing to bring the eviction action because it was entitled to possession of the marina.

¶ 9 Attached to the response was a resolution enacted by the City of Alton wherein the City of Alton was authorized to enter into an operation management contract of the Alton Marina with the plaintiff. Also attached was the operation management contract (contract) entered into between the City of Alton and the plaintiff, which indicated that the City of Alton had turned over the operation and management of the marina to the plaintiff and established certain operation standards with regard to, among other things, hours of operation, marketing, personnel, maintenance, the entering into necessary contracts for operating the marina, collecting revenue, and paying expenses. Specifically, section 6 authorized the plaintiff to enter into necessary contracts for the operation of the marina on behalf of the City of Alton and indicated that all contracts relating to the collection of revenue, which included slip rental contracts, would be in the City of Alton's name. In section 5(b), the plaintiff was given the authority to perform all acts with regard to the marina that were necessary to comply with all orders, codes, regulations, or ordinances affecting the marina, which were imposed by any federal, state, or local authority. Further, section 7(a) provided that the plaintiff would collect all revenue and income, on behalf of the City of Alton, which included slip fee rentals.

¶ 10 On September 13, 2021, the trial court entered an order, denying the motion to reconsider but extending the stay of enforcement until October 1, 2021. The defendant appeals.

¶ 11 II. ANALYSIS

¶ 12 On appeal, the defendant makes two arguments: (1) the trial court erred in ordering the eviction because the plaintiff lacked standing to file the forcible entry and detainer proceeding, and (2) the portion of the order that prohibited the defendant from making or publishing written or oral statements about the plaintiff was an impermissible prior restraint on speech. In response, the plaintiff contends that the defendant failed to timely raise the plaintiff's lack of standing as an affirmative defense in the trial court. Alternatively, the plaintiff contends that it had standing to bring the eviction action because it was a party to the lease agreement; the eviction action was authorized by the contract that it entered into with the City of Alton; the plaintiff, as a landlord, was entitled to bring an eviction action; and the plaintiff has met the requirements of the eviction statute.

¶ 13 A lack of standing in a civil case is an affirmative defense that will be forfeited if not raised in a timely fashion in the trial court. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 508 (1988). As an affirmative defense, defendant has the burden to plead and prove lack of standing. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 24.

¶ 14 In this case, the defendant did not challenge the plaintiff's standing in his *pro se* answer that was filed on the date of the trial. Instead, the defendant raised the issue of standing in his posttrial filings, which included his subsequent answer filed by counsel. In his reply brief, the defendant contends that, under section 9-106 of the Code of Civil Procedure (735 ILCS 5/9-106 (West 2020)), a defendant, in an eviction action, is permitted to offer into evidence any matter in defense of the action under a general denial of the

complaint's allegations. In other words, a general denial in the answer preserves any affirmative defenses. Also, the defendant contends that where all of the factual material that is necessary to decide the issue is contained in the record on appeal, the doctrine on forfeiture can be relaxed. See *Bell v. Louisville & Nashville R.R. Co.*, 106 Ill. 2d 135, 142 (1985). As the issue of standing was addressed in the trial court in the posttrial proceedings, the record on appeal contains all of the factual material necessary for us to decide this issue. Thus, we will relax the forfeiture rules in this instance.

¶ 15 Next, we turn to the issue of whether the plaintiff had standing to initiate the eviction proceedings. Standing is designed to preclude persons who have no interest in a controversy from bringing suit. *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). This doctrine assures that issues are brought only by parties with a real interest in the outcome of the controversy. *Id.* Standing requires some injury in fact to a legally cognizable interest. *Greer*, 122 Ill. 2d at 492. The injury may be actual or threatened, and it must be (1) distinct and palpable, (2) fairly traceable to defendant's actions, and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Id.* at 492-93. An eviction action may be brought by the "party or parties entitled to the possession of such premises ***, 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." 735 ILCS 5/9-106 (West 2020). The only questions to be answered in an eviction proceeding are which party is entitled to immediate possession, and whether defendant has a defense that is germane to the

distinctive purpose of the action that defeats plaintiff's asserted right to possession. *Subway Restaurants, Inc. v. Riggs*, 297 Ill. App. 3d 284, 287 (1998).

¶ 16 In support of his argument that the plaintiff lacked standing to bring the eviction action, the defendant points to *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184 (2008). There, this court held that a loan servicing company, Bayview Loan Servicing, was not the proper party to bring a foreclosure action. *Id*. at 1187. The court found that Bayview Loan Servicing was not the correct legal entity to bring the action because the mortgage at issue was assigned to Bayview Financial Trading Group, and there was no evidence that Bayview Loan Servicing obtained any legal interest in the subject property. *Id*. at 1187-88. However, although the plaintiff here is not the legal owner of the marina, this case is distinguishable from *Bayview Loan Servicing, L.L.C*. First, the plaintiff was named in the slip rental agreement as the agreement indicated that it was entered into between the Alton Marina, which was owned by the City of Alton and operated by the plaintiff. Also, the agreement was signed by the plaintiff's employee. The defendant acknowledged that the individual who signed the agreement on behalf of the marina was the plaintiff's employee.

¶ 17 Second, the contract entered into between the City of Alton and the plaintiff indicated that the City of Alton was turning over the operation and management of the marina to the plaintiff and, as operator of the marina, gave the plaintiff the authority to collect rents and other income, enter into necessary contracts to operate the marina, maintain the premises, and hire and supervise employees. The contract also gave the plaintiff the authority to perform all necessary acts in compliance with any order, code,

regulation, or ordinance affecting the marina. Thus, in accordance with the slip rental agreement, the defendant paid rental payments to the plaintiff in exchange for the use and possession of the boat slip at the marina. The plaintiff was responsible for collecting those rental fees, maintaining the premises, and other duties required of a landlord in a tenancy relationship. Accordingly, the relationship between the plaintiff and the defendant was similar to that of a landlord/tenant. See *Orthwein v. Davis*, 140 Ill. App. 107, 109-10 (1908) (a landlord can bring a forcible detainer action by alleging the existence of the landlord/tenant relationship, the time for which the premises were rented has expired, and the tenant persists in remaining in the premises after a written demand was made to regain possession). Based on the above, we find that the plaintiff had standing to bring the eviction action because the plaintiff was entitled to possession of the marina.

¶ 18 The next contention raised by the defendant is that the portion of the order that prohibited him from making or publishing written or oral statements about the plaintiff was an impermissible prior restraint on speech.

¶ 19 As a preliminary matter, the plaintiff again claims that the defendant has forfeited his right to assert this claim on appeal, since he did not raise it in the trial court. It is well established that issues not raised in the trial court are forfeited and may not be raised for the first time on appeal. *Susman v. North Star Trust Co.*, 2015 IL App (1st) 142789, ¶ 41. This rule applies even to constitutional questions. *Id*. Here, the defendant has failed to preserve this issue for review by raising it for the first time on appeal. However, the forfeiture rules serve as an admonition to the litigants rather than a limitation upon the jurisdiction of the reviewing court, and the reviewing courts may override considerations

of forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent. *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 33. In this case, the constitutional issue has been fully briefed by the parties and concerns an important constitutional right. Thus, we will again relax the forfeiture rules and proceed to consider the merits of the defendant's argument on appeal.

¶ 20 Here, the defendant's constitutional challenge is based on the following language in the trial court's order:

> "The Parties shall not engage in any pattern of conduct that involves the making or publishing of written or oral statements or remarks which are disparaging, deleterious or damaging to the integrity, reputation or good will of the other Party."

The defendant contends that this language represents a prior restraint that violates his right to free speech. Courts have defined a prior restraint as a predetermined judicial prohibition restraining specified expression. *In re A Minor*, 127 Ill. 2d 247, 264 (1989). Prior restraints are considered the most serious and least tolerable infringement on first amendment rights. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Thus, although a prior restraint upon speech is not unconstitutional *per se*, it bears a heavy presumption against its validity. *In re A Minor*, 127 Ill. 2d at 265. The proponent of a prior restraint carries a heavy burden of justifying the restraint. *Same Condition, LLC v. Codal, Inc.*, 2021 IL App (1st) 201187, ¶ 30. Also, our supreme court has held that, generally, content-based laws that target speech on its communicative content are presumed invalid and subject to strict scrutiny review. *Id.* ¶ 33. A regulation is content based if it applies to particular speech because of the topic discussed or the idea or message conveyed. *Id.*

¶ 21 In *Same Condition, LLC*, the First District vacated an order entered by the trial court that restricted plaintiff from posting statements about defendant online after their business relationship soured. *Id*. ¶¶ 34, 50. There, the appellate court concluded that the trial court's order, which prohibited plaintiff from " 'making any additional posts online' " about defendant, was a content-based restriction that must survive strict scrutiny because it intended to regulate the content of speech (*i.e.*, plaintiff's online speech about defendant). *Id*. ¶ 34. Assuming *arguendo* that there was a compelling government interest in prohibiting plaintiff from posting online about defendant, the appellate court found that the trial court's blanket order that plaintiff indefinitely refrain from making additional posts online about defendant was not narrowly tailored to achieve the interest. *Id.* ¶ 36. Although the court recognized that plaintiff had engaged in a relentless and obnoxious social media campaign against defendant on various platforms, it noted that a party may not be enjoined from criticizing others, even though they find the criticism distressing. *Id*. In making this decision, the court noted that the basic principles of the first amendment are that a content-based prior restraint must use the least restrictive means consistent with attaining the goal, and the injunctive power of the judiciary cannot be used to silence critics of the business practices of others. *Id*. ¶ 50. Thus, the court found that the blanket prior restraint imposed by the trial court on plaintiff's speech was clearly not the least restrictive means possible. *Id*.

¶ 22 In this case, the plaintiff indicates that the trial court's prohibition on either party making or publishing any damaging statement against the other was the result of the defendant engaging in a campaign to spread false information about the plaintiff in an effort

to deter business. Like in *Same Condition, LLC*, the trial court imposed a content-based restriction on the parties prohibiting them from making or publishing disparaging, deleterious, or damaging statements about the other. In doing so, the court essentially prohibited the defendant from publicly criticizing the plaintiff and the plaintiff's business practices. Although any negative comments against the plaintiff and the plaintiff's business practices might be offensive and could result in loss of business, the interest of an individual being free from public criticism of his business practices does not warrant the use of the court's injunctive power. *Id.* ¶ 31. Thus, we find that the court's prior restraint imposed on the defendant's speech was not the least restrictive means of attaining its goal as the court's injunctive power should not be used to silence criticism of others' business practices.

¶ 23 The plaintiff contends that it was the trial court's intention to prohibit the parties from publishing any defamatory statement regarding one another during the court proceedings. However, although generally defamatory statements are not constitutionally protected, an injunction is usually not available to prevent actual or threatened publications of a defamatory character. *Id.* ¶ 39. "This general principle of law holds true even if the allegedly defamatory statements could cause a business to suffer financially because the private litigants' interest in protecting their vanity or their commercial self-interest simply does not qualify as grounds for imposing a prior restraint." (Internal quotation marks omitted.) *Id.* Accordingly, paragraph 15 of the trial court's July 13, 2021, order must be vacated.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we vacate paragraph 15 of the trial court's July 13, 2021, order and affirm the remaining provisions of the order.

¶ 26 Affirmed in part and vacated in part.