2017 IL App (1st) 161556-U

FIRST DIVISION
October 30, 2017

No. 16-1556

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LAMAR BURKS,	) Appeal from the Circuit Court of
	) Cook County, Law Division
Plaintiff-Appellant,	)
	)
v.	) No. 15 L 005414
	)
LEX SPECIAL ASSETS, LLC, and	) Honorable Thomas R. Mulroy,
CARRINGTON REAL ESTATE,	) Judge Presiding
	)
Defendants-Appellees.	)

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing plaintiff's complaint. Plaintiff's causes of action alleging a possessory interest in the subject property were barred by *res judicata* and collateral estoppel. Plaintiff failed to adequately plead any causes of action against defendants.

¶ 2 Plaintiff Lamar Burks appeals an order of the circuit court dismissing his complaint against defendants Lex Special Assets, LLC and Carrington Real Estate (collectively "defendants"). On appeal, Burks contends that the circuit court erred when granting defendants' motion to dismiss because: (1) several issues of material fact existed regarding the validity of the order of possession entered against Burks in an underlying eviction action, and (2) his claims

alleging wrongful eviction, conversion, trespass to chattels, intentional infliction of emotional distress, and the claims based on the violation of the Chicago Residential Landlords and Tenants Ordinance, Chicago Municipal Code § 5-12-010 ("CRLTO"), were sufficiently pled as a matter of law and were not barred by *res judicata* or collateral estoppel. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On May 7, 2007, Lehman Capital, a division of Lehman Brothers Holding, Inc. filed its complaint to foreclose the property located at 4529 South Michigan Avenue, Apt. 3, Chicago, Illinois (“Subject Property”) in the circuit court of Cook County, under case No. 07 CH 12191 (“foreclosure action”). Lex substituted Lehman as the plaintiff in the foreclosure action. On September 12, 2012, the court entered a judgment of foreclosure against the named defendants in that action, Valencia J. Lockett, and any Unknown Owners. Subsequently, the Subject Property was sold to Lex at a judicial sale. The sale was approved by the court on March 6, 2013, and the Subject Property was then conveyed to Lex on March 12, 2013.

¶ 5 On May 14, 2014, Lex filed a complaint in a separate action against “Veronica King and Unknown Occupants” asking for the possession of the Subject Property in the case No. 1710205 (“detainer action”). Attached as exhibits to the complaint were the foreclosure complaint, the judgment and order approving the sale in the foreclosure action. The defendants in this detainer action were served with copies of summons and the complaint by posting at the Subject Property after several attempts to locate and serve defendants were made by both the Sheriff of Cook County and special process server. On July 8, 2014, the court entered an order of possession in favor of Lex and against Veronica King and all Unknown Occupants.

¶ 6 On May 28, 2015, Burks filed his complaint against defendants in the instant case. In relevant part, Burks alleged the following facts. On November 10, 2014, he came home to his residence located at "4529 S. Michigan Ave, Apt. 3, Chicago, Illinois," to find his door kicked in, the locks changed, and a note taped to the door with the name and number of Gerardo Zamudio, an agent of defendants. Burks called the police. Once the police arrived, Burks and an officer called Zamudio, but he refused to return to the residence to allow Burks access to his personal property. The police told Burks that he cannot enter the premises. Burks alleged that, on November 12, 2014, he called the police again when he saw that one of the apartment's windows was broken. The police officer and Burks entered the apartment, and Burks observed that some of his personal belongings were missing. Burks alleged that he called a repair man and paid him to have the window replaced in order to protect his remaining personal property. The police officer told Burks that he cannot stay at the property.

¶ 7 Burks alleged that on November 13, 2014, he saw the lights on in the apartment and called the police. After the police arrived, Zamudio returned to the property but still refused to allow Burks access to the apartment to reclaim his personal property.

¶ 8 Burks' complaint alleged that he moved to the second floor unit of 4529 S. Michigan Avenue in Chicago, in May 2012. He alleged that he rented the apartment through "New Neighborhood Alliance" and renewed his lease twice, in May 2013, and May 2014. When Burks moved into the unit, it was owned by Valencia Lockett. Burks alleged that he had a brain tumor removed in 2010, and that he has cognitive and speech impairments. Burks claimed that his medication and prescriptions were located in the apartment that Zamudio refused him access to, and that he slept in his car for three weeks following the lockout. It took him approximately one month to get a new prescription, and he was without his medication for about two months.

¶ 9 Burks' complaint alleged 13 causes of action against defendants: a violation of the CRLTO for the interruption of occupancy; constructive eviction; wrongful eviction; conversion; intentional infliction of emotional distress; a violation of the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS 505/1, *et seq.* (West 2012); failure to return his security deposit and to pay interest on the security deposit; a violation of the CRLTO for abuse of right of entry; breach of the convenant of quiet enjoyment; intrusion into seclusion; trespass to land, and trespass to chattels. On September 4, 2015, defendants filed a motion to dismiss Burks' complaint for legal insufficiency, pursuant to 735 ILCS 5/2-615 (West 2012), and in the alternative, under the doctrines of *res judicata* and collateral estoppel, 735 ILCS 5/2-619(a)(4) (West 2012). The circuit court granted defendants' motion and, subsequently, denied Burks' motion to reconsider. This appeal follows.

¶ 10 ANALYSIS

¶ 11 We review the dismissal of a complaint *de novo. Sandholm v. Kuecker,* 2012 IL 111443, ¶ 55. Defendants' motion to dismiss was brought pursuant to the section of the Code of Civil Procedure that allows a defendant to file a combined motion directed at a pleading. 735 ILCS 5/2-619.1 (West 2012).

¶ 12 A section 2-615 motion attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (2008). All well-pleaded facts must be taken as true and any inferences should be drawn in favor of the non-movant. 735 ILCS 5/2-615; *Hammond v. S.I. Boo, LLC* (In re County Treasurer & Ex–Officio County Collector), 386 Ill. App. 3d 906, 908 (2008). Plaintiffs are not required to prove their case at the pleading stage; they are merely required to allege sufficient facts to state all elements that are necessary to constitute each cause of action in

their complaint. *Visvardis v. Eric P. Ferleger*, *P.C.*, 375 Ill. App. 3d 719, 724 (2007). A section 2-615 motion to dismiss should not be granted unless no set of facts could be proved that would entitle the plaintiff to relief. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008).

¶ 13 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint. 735 ILCS 5/2-619. The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of the litigation. *Henry v. Gallagher* (In re Estate of Gallagher), 383 Ill. App. 3d 901, 903 (2008). Although a section 2-619 motion to dismiss admits the legal sufficiency of a complaint, it raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions, which defeat the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (2008).

¶ 14 Burks argues that the trial court erred when dismissing his complaint as barred by *res judicata* or collateral estoppel. Burks contends that the court erroneously determined that the order for possession entered in the detainer action decided the issue of right of entry and possession between Burks and defendants. According to Burks, in so holding, the court ignored Burks' allegations that he lived in a different unit than the one subject to the detainer action and that he was never properly served in the detainer action.

¶ 15 We find that the record establishes that Burks resided at the Subject Property, and that service was effectuated to him as an "Unknown Occupant." In the detainer action following the foreclosure action, defendants sought and were awarded the right of possession for the Subject Property commonly identified as "4529 South Michigan Avenue, Apt. 3." In support of his claim that he lived in another unit, Burks points to his affidavit where he states that the unit commonly identified as 4529 South Michigan Avenue, Apt. 3, was a third floor unit occupied by an unrelated party, Victoria King, and that the second floor unit Burks occupied was commonly

identified as 4529 South Michigan, Apt. 2. But, in the same affidavit, Burks explains that when he first moved into the Subject Property "my unit on the second floor, was called '2,' " and the top unit was called "3." At that time, there were no numbers labeling any of the doors of the building. Then, according to Burks, starting in early 2013, number "1" was installed on the door of the basement unit, and a "2" was installed on the door of the first unit floor. Logically, although Burks alleged that his unit did not have a number installed at the door, his unit was designated Unit #3. The complaint in the detainer action was filed on May 13, 2014, at least one year after the implementation of this unit numbering format which Burks explicitly acknowledges being aware of in early 2013. Notably, Burks' complaint states that he had a lease for the apartment located at "4529 South Michigan Avenue Apartment 3," identical to the Subject Property identified in the foreclosure action and in the order of possession in the detainer action. He also conceded that his unit was subject "to a foreclosure action *** case number 07 CH 12191."

¶ 16 In sum, Burks' complaint and affidavit establish that he lived at the Subject Property, and his attempts to confuse the unit designation for the Subject Property did not create material issues of fact. His unsuccessful attempt to create issues of fact is merely a subterfuge to avoid the effects of *res judicata* and collateral estoppel arising from the order of possession in the detainer action.

¶ 17 In another attempt to avoid the enforceable order of possession in the detainer action, Burks contends that he was not properly served in the detainer action. In his affidavit, Burks explained that "he was never served with the complaint and summons in the Eviction action," and that prior to the date when defendants enforced the eviction, he was not aware of the foreclosure action, the subsequent change of ownership, or any eviction proceedings.

¶ 18 Burks attempts to distance himself from being designated an "Unknown Occupant" by claiming that he had a leasehold interest in the Subject Property. Specifically, Burks alleged that he was a party to a lease with "New Neighborhood Alliance," and that he renewed his lease on May 1, 2014. He attached a copy of it to his complaint. But Burks failed to allege and to indicate that "New Neighborhood Alliance" had the capacity to lease the Subject Property. At the time that the alleged lease was executed, on May 1, 2014, neither "New Neighborhood Alliance" nor the previous owner, Valencia Lockett, had any right to lease the Subject Property. The record reflects that the order approving the sale in the foreclosure action was entered on March 6, 2013, and the Subject Property was conveyed to defendants by Selling Officer's Deed on March 12, 2013. "New Neighborhood Alliance" could not have conveyed any interest in the Subject Property and Burks could not have obtained any right to occupy the Subject Property by way of the purported lease agreement. See *Cadle Co. II v. Stauffenberg*, 221 Ill. App. 3d 267, 271 (1991) ("an established rule that when a property owner attempts to convey a greater interest in the property than he actually has, that the conveyance is valid to the extent of his interest and void only as to the excess"). Accordingly, Burks could not have obtained any valid interest in the Subject Property in May of 2014.

¶ 19 In addition, Burks did not contend that defendants knew or had any reason to know of his alleged tenancy and lease any time prior to the eviction, or that he made any attempts to inform anyone of same. Accordingly, at the time the detainer action was initiated, Burks was an Unknown Occupant. See 735 ILCS 5/9-104 (West 2012) ("the people in possession are unknown occupants who are not parties to a written lease, rental agreement, or right to possession agreement for the premises"). Burks' claim that the court in the detainer action did not

have jurisdiction over his person fails because he was properly served as an Unknown Occupant in the detainer action.

¶ 20 Courts have no power to adjudicate a personal claim or obligation unless they have personal jurisdiction over the parties. *Vanderbilt v. Vanderbilt,* 354 U.S. 416, 418, (1957). "If a party is not properly served with summons, the trial court does not obtain personal jurisdiction over that party." *In re Marriage of Schmitt*, 321 Ill. App. 3d 360, 367 (2001) (citing *DiNardo v. Lamela,* 183 Ill. App. 3d 1098, 1101 (1989)). Where a trial court does not obtain personal jurisdiction over a defendant, any order entered against him is void *ab initio* and subject to direct or collateral attack at any time. *Schmitt*, 321 Ill. App. 3d at 367. The issue of whether the trial court has personal jurisdiction over a party is also a matter of law to be reviewed *de novo. White v. Ratcliffe*, 285 Ill. App. 3d 758, 764 (1996).

¶ 21 Absent waiver, "personal jurisdiction can be acquired only by service of process in the manner directed by statute." *State Bank of Lake Zurich*, 113 Ill. 2d at 308. According to the Illinois Code of Civil Procedure: "service of summons upon an individual defendant shall be made (1) by leaving a copy of the summons with the defendant personally, [or] (2) by leaving a copy at the defendant's usual place of abode, with some person of the family or a person residing there, of the age of 13 years or upwards, and informing that person of the contents of the summons, provided the officer or other person making service shall also send a copy of the summons in a sealed envelope with postage fully prepaid, addressed to the defendant at his or her usual place of abode." 735 ILCS 5/2–203(a) (West 2012).

¶ 22 In addition, Section 9–107 of the Forcible Entry and Detainer Act, 735 ILCS 5/9–107 (West 2012), allows for constructive service by posting and mailing, or by publication and mailing upon the plaintiff's filing an affidavit stating that the defendant is not an Illinois resident

or has left the state, or "on due inquiry cannot be found, or is concealed within" the state, such that process cannot be served.

¶ 23 The record indicates that defendants filed the appropriate affidavit for service by posting in the detainer action. The affidavit of Jenna Rogers, dated June 17, 2014, indicates that "after diligent inquiry defendants [Veronica King and Unknown Occupants] cannot be served with process." The affidavit indicated that service was unsuccessfully attempted at the Subject Property three times by the Sheriff's Office and six times by special process server.

Based on these circumstances, contrary to Burks' self-serving statements, we cannot say that defendants did not conduct a due inquiry when serving Valencia Lockett and any Unknown Occupants. See *Freund Equipment, Inc. v. Fox,* 301 Ill. App. 3d 163, 166 (1998) ("A defendant's uncorroborated testimony that he was never served is insufficient to overcome the presumption of service."). The circuit court properly concluded that Burks was adequately served in the detainer action.

¶ 24 In so holding we again reject Burks' argument that there was a genuine issue as to whether the Subject Property was considered Unit #2 or Unit #3, since Burks' own affidavit and complaint explain that he lived at the Subject Property and service by posting was properly effectuated at Unit #3. Accordingly, since service by posting pursuant to 735 ILCS 5/9-107 was sufficient, the court in the detainer action had personal jurisdiction over Burks, and Burks was subject to the order of possession entered in the detainer action.

¶ 25 Next, we need to determine whether the court erred when finding that the doctrine of *res judicata* and collateral estoppel barred Burks' complaint. The doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action. *Rein v.*

David A. Noyes & Co., 172 Ill. 2d 325, 334 (1996). For the doctrine of *res judicata* to apply, three requirements must be met: (1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies. *Id.* at 335. Where all three requirements are met, *res judicata* extends not only to every matter that was actually determined in the prior suit, but to every other matter that might have been raised and determined in it." *Id.* at 339.

¶ 26 The requirements for application of collateral estoppel are: (1) identity of issues; (2) assertion of estoppel against a party who was a party or in privity with a party to the prior litigation; (3) final judgment on the merits in the prior adjudication; and (4) actual litigation and determination of the factual issue against which the doctrine is interposed. *Peregrine Financial Group, Inc. v. Ambuehl*, 309 Ill. App. 3d 101, 110 (1999).

¶ 27 Here, the issue of whether or not defendants were entitled to possession of the Subject Property was entirely and finally resolved in the detainer action where defendants were granted possession over the Subject Property. See *Jaworski v. Skassa*, 2017 IL App (2d) 160466, ¶ 12 ("[a] final order or judgment is a determination by the court on the issues presented by the pleadings which ascertains and fixes absolutely and finally the rights of the parties to the litigation"). Both defendants and Burks, as an "Unknown Occupant," were parties in the detainer action. There is also an identity of causes of action, as the question of the right of possession was at issue in both cases. The entire premise of Burks' complaint rests on the allegation that defendants acted unlawfully in evicting Burks from the Subject Property when he had a valid leasehold interest in the Subject Property. But not only did Burks fail to raise his alleged leasehold interest as a defense in the detainer action, but, as noted above, he also failed to plead the existence of a valid lease.

¶ 28 In any event, Burks' claim that he had a valid possessory in the Subject Property disputed defendants' possessory interest in the Subject Property, a right which was decided in the foreclosure case and the detainer action. Any defenses to the detainer action should have been brought in the detainer action. Burks failed to appear in the detainer action and all his claims derived from any alleged possessory interest in the Subject Property including the claims based on the CRLTO were barred by *res judicata* and collateral estoppel.

¶ 29 Furthermore, Burks claims that his causes of action for wrongful eviction, conversion, trespass to chattels, and intentional infliction of emotional distress could not have been barred by *res judicata* or collateral estoppels because they alleged facts that occurred after, or, as a result of the enforcement of the order of possession.

¶ 30 Burks claims for the first time on appeal that the court improperly dismissed his wrongful eviction claim based on the fact that there was a dispute as to whether the eviction occurred without force and through the use of the Sheriff's Office. But, nowhere in his complaint against defendants did Burks allege any facts indicating that defendants engaged in self-help or that the Sheriff's Office was not involved in the eviction. In the wrongful eviction count, Burks solely alleged that defendants evicted him without a "judgment for eviction" and that Burks was therefore entitled to "possession use and control of the premises." This court has consistently held that issues not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 453 (2007). Therefore, Burks' claim of wrongful eviction as argued on appeal is forfeited since it rests on allegations not raised in the complaint.

¶ 31 Next, Burks claims that he sufficiently pled a cause of action for conversion and trespass to chattels when he owned the personal property located at the Subject Property at the time he

was evicted. To properly plead a cause of action for conversion, a plaintiff must establish the following elements: (1) he has a right to the property; (2) he has an absolute and unconditional right to the immediate possession of the property; (3) he made a demand for possession; and (4) the defendant wrongfully and without authorization assumed control, dominion, or ownership over the property. *Cirrincione v. Johnson*, 184 Ill. 2d 109, 115 (1998). Trespass to chattel is an unlawful exercise of authority over the property of another, even without the use of physical force. See *Loman v. Freeman*, 375 Ill. App. 3d 445, 458 (2008).

¶ 32 Here, the order of possession in the detainer action permitted defendants and its agents "to remove all personal property from the subject premises without further delay." Accordingly, defendants were authorized to remove Burks' personal property. Furthermore, defendants did not have any duty of care towards the personal property left behind by Burks. See *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 182 (2004) (noting that several jurisdictions have held that a landlord assumes no duty to care for the property that a former tenant has left behind when the landlord exercises control over the premises after the tenancy has been terminated by lawful eviction) citing *Banks v. Korman Assoc.,* 218 N. J. Super. 370, 372 (N.J. App. Ct. 1987); *Ringler v. Sias,* 68 Ohio App. 2d 230, 232 (1980); *Conroy v. Manos,* 679 S.W. 2d 124, 127 (Tex. App. Ct. 1984). We also note that, contrary to Burks' argument in his reply brief, since Burks failed to allege sufficient facts to establish that he was a tenant with a valid lease, the provisions of the CRLTO do not apply. See Chicago Municipal Code § 5-12-030(c). Accordingly, because Burks failed to establish that defendants acted "wrongfully and without authorization," the circuit court properly dismissed this count.

¶ 33 Burks also argues that he properly stated a claim for intentional infliction of emotional distress (IIED). According to Burks, defendants' agent refusal to allow Burks to access his

personal property and needed medication caused him to suffer emotional, physical distress, and memory loss. Burks further alleged that he became homeless and suffered from shame and embarrassment in interactions with his neighbors, family and law enforcement. Burks argues that such conduct "that might otherwise be considered merely rude, abrasive, or inconsiderate, may be deemed outrageous" considering Burks' disabilities which made Burks particularly susceptible to emotional distress.

¶ 34 To state a claim for IIED, a plaintiff must allege each of the following: (1) that conduct by the defendant was "truly extreme and outrageous," (2) that the defendant intended his conduct to cause severe emotional distress or knew there was a high probability that it would cause severe emotional distress, and (3) that the conduct did in fact cause the plaintiff severe emotional distress. *Schweihs v. Chase Home Finance, LLC*, 2016 IL 120041, ¶ 50 citing *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988).

¶ 35 Here, the circuit court concluded that Burks failed to state sufficient facts to meet the first element—allegations that defendants had engaged in conduct that was "truly extreme and outrageous." The determination of whether conduct meets this standard is made "in view of all the facts and circumstances pleaded and proved in a particular case." *McGrath*, 126 Ill. 2d at 90. "[T]o qualify as outrageous, the nature of the defendant's conduct must be so extreme as to go beyond all possible bounds of decency and be regarded as intolerable in a civilized community." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 274 (2003). Our supreme court recently laid out several factors that should be considered by a court in determining whether a defendant's conduct can be deemed extreme and outrageous. See *Schweihs*, 2016 IL 120041, ¶ 52. These factors include whether the defendant was in a position of power to affect the plaintiff's interests and abused that power, whether the defendant reasonably believed that the conduct was done to

achieve a legitimate objective, and whether the defendant was aware that the plaintiff was "particularly susceptible to emotional distress." *Id.*; see also *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 21 (1992) ("Behavior that might otherwise be considered merely rude, abrasive or inconsiderate, may be deemed outrageous if the defendant knows that the plaintiff is particularly susceptible to emotional distress.").

¶ 36 We find that defendants' conduct was not extreme and outrageous. Defendants acted pursuant to a valid order of possession ordering eviction. There are no allegations in the complaint to support any claim that the manner in which the eviction took place was "extreme and outrageous." Moreover, there are no allegations in the complaint that defendants were aware of Burks' mental and physical disability. Indeed, Burks' own allegations establish that defendants had no interaction with Burks until after the eviction on a very limited basis through Gerardo Zamudio. Based on the record, defendants' conduct was merely that of a property owner engaging in his legal rights to take possession of the Subject Property and did not give rise to the level of extreme and outrageous conduct required for a claim under IIED.

¶ 37 Finally, Burks alleges that he had a valid lease for purposes of establishing his rights as a tenant under the CRLTO because defendants assumed title to the property subject to Burks' rental agreement and defendants took no action under the Illinois Foreclosure Law to extinguish Burks' possessory rights. But as established above, Burks failed to allege the existence of a valid lease and his claim fails as a matter of law.

¶ 38 CONCLUSION

¶ 39 Based on the foregoing, we affirm the circuit court order granting defendants' motion to dismiss Burks' complaint.

¶ 40 Affirmed.