

2021 IL App (1st) 192072-U

No. 1-19-2072

Order filed March 4, 2021

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

6154 NORTH OAKLEY, LLC f/k/a 6154 Oakley, LLC) Appeal from the
(Secretary of State File Number 01918591),) Circuit Court of
) Cook County.

Plaintiff-Appellant,)

v.)

No. 18 CH 8434

6154 OAKLEY LLC (Secretary of State File Number)
066770202), BEN MIHAI, OLIMPIA MIHAI,)
DRYSDALE ESTATES, LLC, BELMONT BANK and)
TRUST COMPANY, STEWART TITLE GUARANTY)
COMPANY, FINANCE OF AMERICA COMMERCIAL,)
LLC, and Other Unknown Claimants to the Ownership of)
the Property with Street Address of 6154 North Oakley,)
Chicago, IL,) Honorable
) Anna M. Loftus,

Defendants-Appellees.)

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The plaintiff limited liability company’s complaint for declaratory relief was subject to dismissal with prejudice because the defendant member had authority to

sell the plaintiff's property to satisfy its creditors while the plaintiff was administratively dissolved and the plaintiff ratified that sale when the plaintiff's status as a limited liability company was reinstated.

¶ 2 6154 North Oakley, LLC f/k/a 6154 Oakley, LLC (Plaintiff LLC) contended that it was the victim of a scheme perpetrated by certain defendants to fraudulently sell the property of a condominium conversion project without the knowledge or approval of plaintiff's alleged manager. Plaintiff LLC filed a lawsuit seeking a declaratory judgment vacating the sale and to quiet title.

¶ 3 The trial court dismissed with prejudice Plaintiff LLC's amended complaint, finding that (1) defendant Olimpia Mihai, as a member of the Plaintiff LLC, had the authority to enter into a short sale to sell the property to satisfy Plaintiff LLC's creditors; (2) there was no evidence that an allegedly fraudulent LLC, which had a name similar to Plaintiff LLC and was created when Plaintiff LLC was administratively dissolved, was involved in the sale of the property; and (3) Plaintiff LLC's actions, including the sale of the property, were ratified when Plaintiff LLC was reinstated.

¶ 4 On appeal, Plaintiff LLC argues that the trial court's judgment should be reversed because (1) the property sale should be invalidated since Plaintiff LLC was dissolved on January 14, 2011, (2) defendants Olimpia and Ben Mihai failed to distribute the entire \$88,000 in sale proceeds as required by Plaintiff LLC's operating agreement, and (3) the trial court failed to consider alleged evidence of misconduct and fraud perpetrated by Olimpia.

¶ 5 For the reasons that follow, we affirm the judgment of the circuit court.¹

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 6

I. BACKGROUND

¶ 7 This appeal arose from the 2018 short sale of a failed condominium conversion project at 6154 North Oakley Avenue, Chicago, Illinois (the property).

¶ 8 In 2006, attorney Phillip I. Rosenthal represented Olimpia in connection with the acquisition of the property. At her direction, Rosenthal filed articles of organization with the Illinois Secretary of State for Plaintiff LLC. The articles of organization listed Olimpia as Plaintiff LLC's manager. Rosenthal obtained a federal employment identification number for Plaintiff LLC, which ended in "4906," and prepared a written operating agreement for Plaintiff LLC. Plaintiff LLC was organized for the purpose of holding title to the property. Olimpia and Ben intended to develop the property and convert it into condominiums. Stefan Szafian and/or his company, Premier Associates Development, served as the general contractor. Ben and Szafian were also attempting to develop other properties in 2006.

¶ 9 Olimpia signed Plaintiff LLC's operating agreement on September 14, 2006. The signed operating agreement listed her as the original manager of Plaintiff LLC and as the only member with a capital contribution. Also on that date, Plaintiff LLC closed on the purchase of the property, and Olimpia, as Plaintiff LLC's manager, signed the financing documents of that closing.

¶ 10 In 2007, Plaintiff LLC refinanced with a new lender, codefendant Belmont Bank and Trust (BBT). Again, Olimpia signed the loan documents as the manager of Plaintiff LLC. BBT identified the initial note and mortgage for \$2,295,500 as Loan No. 8700000346 (Loan No. 0346). Olimpia and Ben provided BBT with individual guaranties for Loan No. 0346.

¶ 11 On June 11, 2008, a second articles of organization were filed on behalf of Plaintiff LLC. These second articles named only Szafian as a member and manager. However, Plaintiff LLC's

operating agreement was never amended and continuously listed only Olympia as Plaintiff LLC's member and manager.

¶ 12 In November 2008, Plaintiff LLC granted a second mortgage against the property to BBT to cross-collateralize a revolving line of credit to Olympia, Ben and Szafian. Once again, Olympia signed the mortgage as the manager of Plaintiff LLC.

¶ 13 On May 28, 2009, a third articles of organization were filed on behalf of Plaintiff LLC. These third articles named only Szafian as a member and manager.

¶ 14 The property was not converted to condominiums. In approximately 2010 or 2011, BBT took control of the property pursuant to an assignment of rents, with all rents being applied to cover expenses before being applied to the BBT loans.

¶ 15 In January 2011, the Illinois Secretary of State administratively dissolved Plaintiff LLC for failing to file its 2010 annual report.

¶ 16 On December 10, 2012, Plaintiff LLC executed a loan from BBT for \$630,167.81 and identified as Loan No. 8700000347 (Loan No. 0347). Loan No. 0347 was not a new distribution or obligation; rather, it split the original loan, Loan No. 0346, into two separate loans. The disbursement shifted \$630,167.81 from the principal balance on Loan No. 0346 to the principal balance of Loan No. 0347. The balance on Loan No. 0346 was then reduced from \$2,365,167.81 to \$1,735,000.

¶ 17 On December 31, 2012, Plaintiff LLC modified its mortgage with BBT to extend the maturity date for Loan No. 0346 and to combine the debt for Loan No. 0347 with BBT's mortgage.

¶ 18 On December 10, 2017, the BBT loans matured. The total payoff due to BBT for both loans was \$2,710,860.10. BBT declined to extend the loans and Olympia was unable to refinance the

property. BBT informed Olympia and Ben that it was willing to accept a short sale of the property subject to its approval of the purchase price.

¶ 19 On December 28, 2017, Olympia signed a real estate sales contract on behalf of the “Owner of Record,” agreeing to sell the property to Samuel Block or his assignee. Also on December 28, 2017, 6154 Oakley LLC (defendant LLC), which is a different and distinct entity from Plaintiff LLC, was organized as an Illinois limited liability company. Defendant LLC does not include a “comma” in its name and has its own Illinois Secretary of State filing number.

¶ 20 On or about March 1, 2018, the property was sold to defendant Drysdale Estates, LLC, which received a \$1,645,000 loan from defendant Finance of America Commercial, LLC to purchase the property. Specifically, on March 1, 2018, Olympia signed a deed and power of attorney granting her attorney authority to execute documents for the closing. She signed the power of attorney on behalf of Plaintiff LLC, using Plaintiff LLC’s name and original “4906” federal employment identification number from 2006. She signed the deed on behalf of Plaintiff LLC. The sale of the property closed on or about March 2, 2018.

¶ 21 Finance of America Commercial, LLC recorded a new mortgage against the property. Defendant Stewart Title Guaranty Company insured this new mortgage. The proceeds from the sale were used to pay off the BBT loans. Consequently, on April 6, 2018, BBT recorded a release deed and released its interest in the property acquired in connection with Loan Nos. 0346 and 0347.

¶ 22 In June 2018, Szafian filed an application with the Illinois Secretary of State and reinstated Plaintiff LLC as a limited liability company. Szafian was its registered agent and manager. After its reinstatement, Plaintiff LLC filed this lawsuit seeking equitable relief.

¶ 23 In July 2018, Plaintiff LLC filed a two-count amended complaint that alleged Szafian was Plaintiff LLC's sole manager. The complaint sought a declaration voiding and unwinding all financial transactions related to the March 2018 sale of the property to Drysdale Estates, LLC based on an alleged fraudulent conveyance (count I), and asked the court to quiet title to the property and restore title to Plaintiff LLC (count II). Plaintiff LLC alleged that Ben and Olimpia fraudulently created defendant LLC, which did not have title to the property.

¶ 24 In February 2019, Olimpia, Ben and defendant LLC moved the trial court to dismiss the amended complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2018)). The motion to dismiss included supporting affidavits from Olimpia and attorney Rosenthal. Plaintiff LLC's response to the motion to dismiss included the counter-affidavit of Szafian.

¶ 25 On June 18, 2019, the trial court granted defendants' motion to dismiss Olimpia, Ben and defendant LLC with prejudice. The court ruled that (1) Olimpia, as an original and current member of Plaintiff LLC, was authorized to convey the property by short sale and her actions were ratified and confirmed upon the reinstatement of Plaintiff LLC with the Illinois Secretary of State; (2) the ratification precluded any attempt to void the otherwise proper conveyance and rendered moot any further consideration of allegations regarding the distribution of the sale proceeds or the sale price; and (3) there was no evidence that the allegedly fraudulently created defendant LLC was involved in the sale of the property.

¶ 26 On June 25, 2019, defendants Drysdale Estates, LLC; Finance of America Commercial, LLC; Stewart Title Guaranty Company, and BBT filed a separate 2-619 motion to dismiss, moving

to terminate the litigation and dismiss the amended complaint with prejudice based on the trial court's June 18, 2019 order. Plaintiff LLC never responded to this motion.

¶ 27 On September 3, 2019, the court granted the remaining defendants' 2-619 motion to dismiss. The same day, Plaintiff LLC filed a motion to reconsider the June 18, 2019 order, and the court later denied that motion.

¶ 28 Plaintiff LLC appealed.

¶ 29 **II. ANALYSIS**

¶ 30 **A. Section 2-619(a)(9) Dismissal with Prejudice**

¶ 31 First, Plaintiff LLC argues that this court should reverse the trial court's 2-619 dismissal of the amended complaint because the 2018 property sale should be invalidated based on Plaintiff LLC's dissolved status since January 14, 2011.

¶ 32 We review *de novo* the trial court's dismissal of Plaintiff LLC's claims under section 2-619(a)(9) of the Code. See *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377-78 (2003); see also *Thomas v. Weatherguard Construction Company, Inc.*, 2015 IL App (1st) 142785, ¶ 63 (under *de novo* review, the reviewing court performs the same analysis that a trial judge would perform). Because a dismissal under section 2-619(a)(9) resembles the grant of a motion for summary judgment, an appeal from a section 2-619(a)(9) dismissal is the same in nature as an appeal following a grant of summary judgment, and is likewise afforded *de novo* review. *Van Meter*, 207 Ill. 2d at 377-78. The reviewing court must consider 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. [Citation.]’ ” *Id.*

¶ 33 Section 35-30(c) of the Limited Liability Company Act (Act) states in pertinent part:

“Upon the administrative dissolution of a limited liability company, a dissolved limited liability company shall continue for only the purpose of winding up its business. A dissolved limited liability company may take all action *** necessary or appropriate to wind up its business and affairs and terminate.”

805 ILCS 180/35-30(c) (West 2018).

¶ 34 The Act also provides that “[a]fter dissolution, a member who had not wrongfully dissociated may participate in winding up a limited liability company’s business.” 805 ILCS 180/35-4(a) (West 2018).

¶ 35 Plaintiff LLC’s operating agreement was never amended to remove Olympia as a member and manager. Consequently, she had the power to wind up Plaintiff LLC’s business under the Act. Even though Plaintiff LLC was dissolved in 2011 and the property sale occurred in March 2018, the Act does not impose a time limit and provides instead that an individual winding up a company’s business may preserve the company’s property for a reasonable time. See 805 ILCS 180/35-4(c) (West 2018). Here, the loans secured by the BBT mortgages matured in December 2017, and it was reasonable for Olympia to wait until those loans matured before selling the property in March 2018. Furthermore, Plaintiff LLC ratified Olympia’s action when Plaintiff LLC was reinstated as an Illinois limited liability company. See 805 ILCS 180/35-40(d) (West 2018) (“Upon the filing of the application for reinstatement, the limited liability company existence shall be deemed to have continued without interruption from the date of the issuance of the notice of dissolution *** and all acts and proceedings of its members, managers, officers, employees, and

agents, acting or purporting to act in that capacity, and which would have been legal and valid but for the dissolution, shall stand ratified and confirmed.”)

¶ 36 We conclude that the trial court did not err by dismissing with prejudice Plaintiff LLC’s amended complaint under section 2-619 of the Code. The record established that during Plaintiff LLC’s dissolution period Olympia merely sold the property it owned in the process of winding up its affairs to satisfy its debts. Olympia had the authority to sell Plaintiff LLC’s property pursuant to its operating agreement, and Plaintiff LLC ratified her sale of the property upon Plaintiff LLC’s reinstatement.

¶ 37 B. Forfeiture

¶ 38 Second, Plaintiff LLC argues that the trial court erred by allowing Olympia to keep the entire \$80,000 in sale proceeds because she failed to distribute that money as required by Plaintiff LLC’s operating agreement.

¶ 39 A party who fails to make an argument in its response to a motion to dismiss before a trial court forfeits that argument on appeal. *Vantage Hospitality Group, Inc. v. Q Ill Development, LLC*, 2016 IL App (4th) 160271, ¶ 49. This rule also applies to arguments raised for the first time in a motion to reconsider. *Id.* ¶ 46; *Sewickley, LLC v. Chicago Title Land Trust Co.*, 2012 IL App (1st) 112977, ¶ 37.

¶ 40 Our review of the record establishes that Plaintiff LLC has forfeited review of this claim by failing to timely raise it in the trial court. Plaintiff LLC’s amended complaint sought to invalidate Finance of America Commercial, LLC’s mortgage and sought a declaration that the warranty deed was void and the property sale was invalid. The amended complaint neither requested relief in the form of a division of the property sale proceeds between Olympia and Szafian

nor mentioned fraud by Olympia related to the property sale proceeds. The amended complaint's mention of misconduct or fraud was limited to the creation of the defendant LLC entity. Therefore, we do not address this claim on appeal.

¶ 41 C. Motion to Reconsider

¶ 42 Finally, Plaintiff LLC argues that the trial court's denial of the motion to reconsider was an abuse of discretion because the court failed to address alleged circumstantial evidence of misconduct and fraud by Olympia based on the sale price. Specifically, Plaintiff LLC contends that the \$1,978,000 selling price was too low and appraisals from February and October 2018 valued the property as high as \$2,635,000.

¶ 43 A motion to reconsider based on new facts or legal theories not previously raised is reviewed for abuse of discretion. *Horlacher v. Cohen*, 2017 IL App (1st) 162712, ¶ 80. "An abuse of discretion occurs when the trial court's decision is arbitrary, fanciful, unreasonable" (*id.*), or where no reasonable person would agree with the position adopted by the trial court (*Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997)).

¶ 44 We find no abuse of discretion here because, as discussed above, Plaintiff LLC ratified Olympia's act of selling the property for \$1,978,000 when Plaintiff LLC was reinstated. See 805 ILCS 180/35-40(d) (West 2018).

¶ 45 III. CONCLUSION

¶ 46 The trial court did not err when it granted defendants' 2-619 motions to dismiss Plaintiff LLC's amended complaint with prejudice, and did not abuse its discretion when it denied Plaintiff LLC's motion to reconsider.

¶ 47 For the foregoing reasons, we affirm the judgment of the circuit court.

No. 1-19-2072

¶ 48 Affirmed.