

2018 IL App (4th) 170551-U

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Appellate Court of Illinois,
Fourth District.

Charles BONNELL, Plaintiff–Appellant,
v.
The CITY OF GRAFTON, a Municipal
Corporation, Defendant–Appellee.

NO. 4–17–0551

FILED June 12, 2018

Appeal from the Circuit Court of Jersey County, No.
15L5, Honorable Joshua A. Meyer, Judge Presiding.

Attorneys and Law Firms

NOTICE This order was filed under Supreme Court Rule
23 and may not be cited as precedent by any party except
in the limited circumstances allowed under Rule 23(e)(1).

ORDER

JUSTICE TURNER delivered the judgment of the court.

*1 ¶ 1 *Held*: The circuit court properly dismissed
plaintiff's claim under section 2–619 where plaintiff was
bound by a prior judgment under the *lis pendens* statute.

¶ 2 Plaintiff, Charles Bonnell, appeals the Jersey County
circuit court's February 2017 judgment dismissing with
prejudice his first amended complaint against defendant,
the City of Grafton (City), a municipal corporation. The
court found the issues raised in Bonnell's complaint had
been addressed in a prior case (City of Grafton, Illinois
v. Merit Realty, Inc., No. 13–MR–33 (Cir. Ct. Jersey
County)), and Bonnell had actual and constructive notice
of the prior proceedings. On appeal, Bonnell contends
(1) the City did not seek dismissal pursuant to section
2–619(a)(9) of the Code of Civil Procedure (Procedure
Code) (735 ILCS 5/2–619(a)(9) (West 2016)), (2) dismissal
of Bonnell's complaint under section 2–619(a)(4) of the
Procedure Code (735 ILCS 5/2–619(a)(4) (West 2016))
was not proper since the doctrines of *res judicata* and
collateral estoppel do not apply, and (3) this court's prior

Rule 23 order does not resolve the issues of *res judicata*
and collateral estoppel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Prior Case (No. 13–MR–33)

¶ 5 With its motion to dismiss Bonnell's first amended
complaint, the City attached numerous documents from
case No. 13–MR–33. Bonnell also attached documents
from the prior case to his postjudgment motion, including
the report of proceedings for the final hearing. Those
documents show the following facts. On June 20, 2013,
the City filed a civil complaint against Merit Reality,
Inc. In its complaint, the City alleged Merit Reality
owned the property commonly known as 324 Market
Street in Grafton, Illinois (324 Market). The City sought
authorization to demolish the building located on 324
Market because it was abandoned and unsafe. See 65
ILCS 5/11–31–1 (West 2012). In September 2013, Merit
Reality's secretary, Anita Murray, and Bonnell, Merit
Reality's president, neither of whom were an attorney,
filed an answer on behalf of Merit Reality. The answer was
signed by Murray and Bonnell. On September 27, 2013,
the City recorded a *lis pendens* notice for 324 Market,
noting a case for demolition was pending and stating the
information for case No. 13–MR–33. On October 3, 2013,
the circuit court held a case management conference, and
the docket entry for the conference noted the defendant
was a corporation and the cause was continued to allow
the defendant time to retain counsel. In an October
24, 2013, letter to the circuit clerk, Murray requested a
continuance for 45 to 60 days “to secure an attorney.” The
court scheduled a hearing on the request for October 31,
2013. The court denied Murray's motion for a continuance
and scheduled a bench trial for November 19, 2013.

¶ 6 On November 19, 2013, Bonnell filed a demand for
a jury trial, and Murray filed a motion for dismissal
on the ground Merit Realty no longer owned 324
Market. Along with her motion for dismissal, Murray
filed a warranty deed, signed on November 18, 2013, by
“Charles D. Bonnell” as “President” of Merit Realty, in
which he conveyed 324 Market to “Charles D Bonnell,
An individual.” The circuit court's November 19, 2013,
docket entry stated the cause was called for trial, the City
was present by its attorney, and Merit Realty was present
by Bonnell. It further stated the court denied the motion

to dismiss and motion for jury trial. The court deemed the transfer “to be a ‘sham transfer’ for the sole purpose of avoiding the pursuit of this cause of action by the City.” Additionally, the court found that, since Merit Realty was a corporation, it was unable to represent itself and the pleadings filed were moot. Witnesses were sworn, evidence was heard, and exhibits were admitted without objection. The court entered an order of demolition, which was a separate written order. The report of proceedings for the trial indicates that, when Bonnell sought to present an appraisal of the structure on 324 Market, the court stated the following:

*2 “But I deem that transfer to be a transfer in an effort to avoid this cause. You didn't ask ... you didn't ask to substitute parties. You asked to dismiss the cause of action. Had you asked to substitute parties it may well have been permitted. But you did not. You asked to have it dismissed because the property had been sold. Therefore, we're back to where we started again. You can't submit that.”

¶ 7 The written demolition order entered the same day as trial noted the following:

“Proof being now here made to the Court that all the defendants have been served. Further, notice was mailed to the person or person in whose name the real estate was last assessed pursuant to 65 ILCS 5/11–31–1 was accomplished. The defendant, Joseph Meyer and Associates as Jersey County Trustee appears by virtue of Entry of Appearance, Waiver and Consent filed by Attorney Stephen Schrimpf. The remaining defendant having failed to appear for non-jury trial called on this date, said defendant is now in default and, on motion of [the City]'s attorney, said default is ordered to be taken and same is hereby entered of record.”

The court further found the structure located on 324 Market was dangerous, unsafe, and beyond reasonable repair. It also noted proper notices were given, demanding repair or demolition of the structure, and no repair or demolition had been made. The court granted the City the authority and power to demolish the structure located on 324 Market.

¶ 8 On December 12, 2013, an attorney entered his appearance for Merit Realty and filed a motion to vacate the default judgment against Merit Realty pursuant to section 2–1301(e) of the Procedure Code (735 ILCS 5/2–1301(e) (West 2012)) and a motion to stay the demolition. In February 2014, the circuit court held a hearing on Merit Realty's motion to vacate. Merit Realty was represented by counsel at the hearing. Following the hearing, the court entered a docket entry, stating, in pertinent part, the following:

“Statements and arguments made. The court finds that substantial justice was achieved and that the defendants were given an extraordinary period of time, given the nature of this type of litigation, to secure counsel and failed to do so. An evidentiary hearing was held with significant and persuasive evidence both by way of testimony and photographic evidence which clearly demonstrated the allegations contained in [the City]'s complaint. Accordingly, Motion to Vacate denied.”

¶ 9 Merit Realty appealed, contending the circuit court erred by denying its motion to vacate the demolition judgment. On February 27, 2015, this court dismissed the appeal as moot, finding the demolition and the lien were of no practical consequence to Merit Realty if, at the time the court awarded those remedies, Merit Realty no longer had any ownership interest in 324 Market. *City of Grafton, Illinois v. Merit Realty, Inc.*, 2015 IL App (4th) 140194–U, ¶ 6.

¶ 10 B. This Case

¶ 11 In April 2015, Bonnell filed his complaint against the City, asserting (1) destruction and unlawful injury to property, (2) negligence, (3) conversion, and (4) quiet title related to the demolition of the building located on 324 Market. The City filed a motion to dismiss Bonnell's complaint in July 2015, noting the circuit court had entered an order for demolition of the buildings in case No. 13–MR–33. In January 2016, the circuit court dismissed Bonnell's complaint without prejudice under section 2–615 of the Procedure Code (735 ILCS 5/2–615 (West 2014)). Thereafter, Bonnell filed a first amended complaint, adding an additional claim for damages under section 11–31–1 of the Illinois Municipal Code (65 ILCS 5/11–31–1 (West 2014)). The City filed a motion to dismiss the first amended complaint under section 2619

of the Procedure Code (735 ILCS 5/2–619 (West 2016)), attaching documents from case No. 13–MR–33 and this court's Rule 23 order dismissing Merit Realty's appeal in that case (*City of Grafton*, 2015 IL App (4th) 140194–U). In his response to the motion to dismiss, Bonnell withdrew his quiet title claim and the claim under section 11–31–1 of the Illinois Municipal Code. Thus, the only remaining claims were (1) destruction and unlawful injury to property, (2) negligence, and (3) conversion. In those claims, Bonnell asserted he was the owner of 324 Market, he did not authorize the City to demolish the buildings on 324 Market, he was not made a party to the prior action, and the City did not give him notice of the prior proceedings in compliance with section 11–31–1 of the Illinois Municipal Code.

*3 ¶ 12 On February 17, 2017, the circuit court entered a written order granting the City's motion to dismiss Bonnell's first amended complaint. The order indicated the case was called for a hearing on the City's motion to dismiss on January 30, 2017. The docket sheet does not mention the hearing, and the record on appeal does not contain a report of proceedings for that hearing. At the City's request, the court took judicial notice of case No. 13–MR–33. The court found Bonnell had actual notice of the proceedings in case No. 13–MR–33 because he participated in several hearings, including the bench trial, and had constructive notice from the *lis pendens* notice recorded in September 2013. The actual and constructive notice provided to Bonnell in case No. 13–MR–33 were affirmative matters barring relief in the present case. Thus, the court granted the City's motion to dismiss with prejudice Bonnell's complaint under section 2–619 of the Procedure Code.

¶ 13 On March 16, 2017, Bonnell filed a timely motion for rehearing. In the rehearing motion, Bonnell argued he was not allowed to participate in the bench trial in case No. 13–MR33 because he was not an attorney and thus could not represent Merit Realty. He noted he was not made a party to the proceedings in case No. 13–MR–33. Moreover, Bonnell argued the doctrines of *res judicata* and collateral estoppel did not apply.

¶ 14 On June 14, 2017, the circuit court held a hearing on Bonnell's motion for rehearing. After hearing the parties' arguments, the court took the matter under advisement. In a June 22, 2017, written order, the circuit court denied Bonnell's motion for rehearing.

¶ 15 On July 19, 2017, respondent filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017). Accordingly, this court has jurisdiction under Illinois Supreme Rule 301 (eff. Feb. 1, 1994).

¶ 16 II. ANALYSIS

¶ 17 In this case, Bonnell challenges the circuit court's dismissal with prejudice of his complaint under section 2–619 of the Procedure Code (735 ILCS 5/2–619 (West 2016)). With a section 2–619 motion to dismiss, the movant admits the sufficiency of the complaint but asserts an affirmative matter that defeats the claim. *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 40, 32 N.E.3d 583. Section 2–619(a) of the Procedure Code (735 ILCS 5/2–619(a) (West 2016)) lists nine grounds on which dismissal may be based. The City's motion to dismiss did not state on what ground it was seeking dismissal. As the circuit court noted, the City's motion to dismiss could have been more explicit. However, the court found the City was raising the *lis pendens* notice filed in the prior case as well as actual and constructive notice as affirmative matters that defeat Bonnell's claims. Section 2–619(a)(9) of the Procedure Code (735 ILCS 5/2–619(a)(9) (West 2016)) provides for dismissal when the claim “is barred by other affirmative matter avoiding the legal effect of or defeating the claim.” An “[a]ffirmative matter” includes something in the nature of a defense that negates the alleged cause of action completely or refutes a crucial conclusion of material fact unsupported by allegations of specific fact contained in or inferred from the complaint.” *Holubek v. City of Chicago*, 146 Ill. App. 3d 815, 817, 497 N.E.2d 348, 350 (1986). Bonnell disagrees the motion to dismiss was based on section 2–619(a)(9). He contends the proper basis for the City's motion to dismiss was section 2619(a)(4) of the Procedure Code (735 ILCS 5/2–619(a)(4) (West 2016)), which provides for dismissal when “the cause of action is barred by a prior judgment.” Bonnell further suggests the circuit court could not have relied on the prior case as a basis for dismissing his complaint unless the doctrines of *res judicata* or collateral estoppel apply. While the City attached numerous documents from a prior case, the essence of its argument was Bonnell's claims are defeated because he had actual and constructive notice based on the *lis pendens* notice of the prior proceedings. The City never

raised the doctrines of *res judicata* or collateral estoppel. Thus, we disagree with Bonnell's argument the dismissal motion had to be brought pursuant to section 2619(a)(4) and the doctrine of *res judicata* and collateral estoppel were the only possible reasons for dismissal based on the prior case.

*4 ¶ 18 Accordingly, we address whether the circuit court erred by finding the City established an affirmative matter barring Bonnell's claims. With a section 2–619 motion, “[t]he defendant bears the initial burden of proof of the affirmative matter and, if satisfied, the burden shifts to the plaintiff to show that ‘the defense is unfounded or requires the resolution of an essential element of material fact before it is proven.’” *Mondschein v. Power Construction Co.*, 404 Ill. App. 3d 601, 606, 936 N.E.2d 1101, 1106 (2010) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116, 619 N.E.2d 732, 735 (1993)). In ruling on a section 2–619 motion to dismiss, courts must interpret all pleadings and supporting documents in the light most favorable to the nonmovant. *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶ 18, 53 N.E.3d 1. We review *de novo* the grant of a section 2–619 motion to dismiss. *Richter*, 2016 IL 119518, ¶ 18. “Additionally, we note this court may affirm the circuit court's granting of a motion to dismiss on any basis or ground established by the record, regardless of the circuit court's reasoning.” *Carroll v. Community Health Care Clinic, Inc.*, 2017 IL App (4th) 150847, ¶ 18, 81 N.E.3d 122.

¶ 19 Moreover, we point out the circuit court took judicial notice of case No. 13–MR–33. “A court may take judicial notice of facts when addressing a section 2–619 motion.” *Village of Riverwoods v. BG Ltd. Parntership*, 276 Ill. App. 3d 720, 724, 658 N.E.2d 1261, 1265 (1995). “Judicial notice is proper where the document in question is part of the public record and where such notice will aid in the efficient disposition of a case.” *Village of Riverwoods*, 276 Ill. App. 3d at 724, 658 N.E.2d at 1265.

¶ 20 Section 2–1901 of the Procedure Code (735 ILCS 5/2–1901 (West 2016)) addresses *lis pendens* and provides, in pertinent part, the following:

“Except as otherwise provided in Section 15–1503 [of the Illinois Mortgage Foreclosure Law], every condemnation proceeding, proceeding to sell real estate of decedent to pay debts, or other

action seeking equitable relief, affecting or involving real property shall, from the time of the filing in the office of the recorder in the county where the real estate is located, of a notice signed by any party to the action or his attorney of record or attorney in fact, on his or her behalf, setting forth the title of the action, the parties to it, the court where it was brought and a description of the real estate, be constructive notice to every person subsequently acquiring an interest in or a lien on the property affected thereby, and every such person and every person acquiring an interest or lien as above stated, not in possession of the property and whose interest or lien is not shown of record at the time of filing such notice, shall, for the purposes of this Section, be deemed a subsequent purchaser and shall be bound by the proceedings to the same extent and in the same manner as if he or she were a party thereto. If in any such action plaintiff or petitioner neglects or fails for the period of 6 months after the filing of the complaint or petition to cause notice to be given the defendant or defendants, either by service of summons or publication as required by law, then such notice shall cease to be such constructive notice until service of summons or publication as required by law is had.”

Here, the City recorded its *lis pendens* notice for case No. 13–MR–33 on September 27, 2013, which (1) identified the property as 324 Market, (2) contained the property's legal description, (3) listed the parties to the litigation, (4) noted the title of the action, (5) stated where the action was brought, and (6) was signed by the City's attorney. Merit Realty had filed its answer on September 16, 2013, indicating it had received service of summons. Bonnell acted as president of Merit Realty until he received title to 324 Market as an individual in November 2013. Accordingly, Bonnell, as an individual, was not in

possession of 324 Market at the time the City recorded the *lis pendens* notice. Moreover, Bonnell obtained title to 324 Market on November 19, 2013, which is after the City recorded its *lis pendens* notice. Thus, we find the City's *lis pendens* notice complied with section 2–1901, and under that section, Bonnell is deemed a subsequent purchaser and bound by the judgment in case No. 13–MR–33.

*5 ¶ 21 Bonnell concedes he had actual and constructive notice of the proceedings in case No. 13–MR–33. However, he argues the *lis pendens* doctrine does not apply because the circuit court in case No. 13–MR–33 did not have personal jurisdiction of him. Bonnell cites *First Midwest v. Pogge*, 293 Ill. App. 3d 359, 363, 687 N.E.2d 1195, 1198 (1997), which cites a secondary source (3 R. Michael, Illinois Practice § 21.1 (1989) (Civil Procedure Before Trial)) and states the following: “For the doctrine to be applicable, three requirements must be satisfied: (1) the property must be of such a character as to be subject to the rule, (2) the court must have jurisdiction both ‘of the person and of the res,’ and (3) the property involved must be sufficiently described in the pleadings.” However, the City complied with the statute, and thus the common-law doctrine is not at issue in this case. While the *lis pendens* statute does not create an obligation to file a *lis pendens* notice, it provides the filing of “such notice will serve to bind purchasers of property *pendente lite* to such litigation as if they had been a party thereto.” *Admiral Builders Corp. v. Robert Hall Village*, 101 Ill. App. 3d 132, 137, 427 N.E.2d 1032, 1036 (1981).

¶ 22 Moreover, we note that, under the common-law doctrine, the personal jurisdiction to which the second element is referring is personal jurisdiction of the property owner or owners at the time the action was filed, and not the subsequent purchaser of the property. To require personal jurisdiction over the subsequent purchaser would be inconsistent with the purpose of the doctrine of *lis pendens* and destroy the doctrine.

“One purpose of *lis pendens* is the avoidance of endless litigation of property rights precipitated by transfers of interest. This end is achieved by conclusively binding one who obtains an interest in the property during the pendency of a suit affecting it to the result of that litigation as if he had been a party from the outset. In this respect the filing of *lis pendens* notice is designed to protect a plaintiff from third persons who might acquire, during the pendency of litigation, interest in the subject matter of the litigation such as would preclude

the court from granting the plaintiff the requested relief. [Citations.] Another less widely recognized purpose of the doctrine is to protect purchasers by giving them notice that the land which they are buying might be affected by a judgment later entered in a pending action, by which they would be bound. [Citation].” *Admiral Builders Corp.*, 101 Ill. App. 3d at 136–37, 427 N.E.2d at 1036.

Thus, the doctrine is designed to avoid requiring a plaintiff to add subsequent purchasers as parties to the pending litigation. Further, the City and the circuit court were not required to make Bonnell a party to case No. 13–MR–33 when he became the owner of 324 Market. If Bonnell wanted to be a party in the prior case, he needed to make a motion to intervene or, as noted by the circuit court in case No. 13–MR–33, a motion to substitute parties. Accordingly, the court's lack of personal jurisdiction over Bonnell in case No. 13–MR–33 does not render the *lis pendens* statute or doctrine inapplicable, and Bonnell is bound by the judgment in case No. 13–MR–33.

¶ 23 Last, Bonnell claims the circuit court's dismissal order did not explain how the prior proceeding was an “affirmative matter” that avoided the legal effect of his claims. We disagree. The court found the issues raised in Bonnell's amended complaint were addressed in case No. 13–MR–33 and Bonnell received prior notice of that proceeding through actual notice and “constructive notice (*lis pendens*).” Moreover, in its order denying Bonnell's motion for rehearing, the court explained “[t]he actual and constructive notice shown in these affirmative matters bar the relief requested in the present case because Bonnell is bound to the decision in 13–MR–33.” On appeal, Bonnell does not argue that, if the *lis pendens* doctrine does apply and he is bound by the prior judgment, his cause of action still survives. Accordingly, Bonnell has forfeited any such argument. See Ill. S.Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Thus, we affirm the circuit court's dismissal and do not address the specifics of the claims raised in Bonnell's amended complaint.

¶ 24 III. CONCLUSION

*6 ¶ 25 For the reasons stated, we affirm the Jersey County circuit court's judgment.

¶ 26 Affirmed.

All Citations

Justices DeArmond and Cavanagh concurred in the judgment.

Not Reported in N.E.3d, 2018 IL App (4th) 170551-U,
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