IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

ELIAS SANCHEZ, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**20 CH 2206**
	)	
BICKERDIKE REDEVELOPMENT CORP., et al.,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Defendants Bickerdike Redevelopment Corporation and Rockwell Community Development, Inc. have filed a Motion to Dismiss pursuant to 735 ILCS 5/2-619.1.

Defendant City of Chicago has also filed a Motion to Dismiss pursuant to 735 ILCS 5/2-619.1.

I. Background

On November 20, 2019, the City Council of the City of Chicago ("the City") approved a zoning change, Ordinance No. O2019-9419 ("PD Ordinance"), for property located at 2602-38 North Emmett Street, Chicago, Illinois ("the Subject Property"). (Compl. ¶24). The Subject Property is currently a parking lot adjacent to the CTA's Logan Square blue line station. (Id. at ¶¶4, 37). The PD Ordinance created a new planned development ("PD") allowing for construction of a seven-story, 100-unit residential rental building on the Subject Property. (Id. at ¶¶24, 46, Ex. B).

On January 15, 2020, the City Council passed an ordinance declaring its intent to potentially issue up to $22,500,000 in tax-exempt bonds ("Bond Intent Ordinance"). (Id. at ¶25 and Ex. A). If bonds are issued in the future, the Bond Intent Ordinance allows the City to lend all, or a portion, of the proceeds of the bonds to the developer of the PD to finance redevelopment of the Property with a residential rental building with 100% of its units being designated as affordable. (Id. at Ex. A). The Bond Intent Ordinance states that there is a shortage of affordable housing in the City of Chicago and that this shortage harms the health and welfare of the City's residents. (Id.).

On February 21, 2020, Plaintiffs filed a Complaint against Defendants Bickerdike Redevelopment Corporation ("Bickerdike"), Rockwell Community Development, Inc. ("Rockwell") and the City of Chicago. Plaintiffs are individuals and businesses owning real property in the area surrounding the Subject Property. Bickerdike is a non-profit corporation that

owns the Subject Property and is about to commence construction of 100 units of affordable housing on the Subject Property.

Plaintiffs allege, on information and belief, that Rockwell might serve as the general partner of the entity developing the Subject Property, but do not allege any facts supporting this conclusion. (Compl., ¶14). Nor do Plaintiffs allege any other facts supporting naming Rockwell as a defendant in this action.

Plaintiffs contend that the development of the Subject Property will harm them because it is out of character with the surrounding area and "inappropriate" for the area. (Compl., ¶58). Plaintiffs further contend that the development will eliminate public parking which will harm the businesses in the area and "jeopardize" "hundreds of jobs." (Id.). Plaintiffs further assert that allowing the development will reduce the value of their properties and other properties in the area. (Id.). Plaintiffs further allege that the development does not promote the health, safety or general welfare of the public, but caters to the private party Defendants. (Id.).

Count I of the Complaint seeks a declaration that the rezoning provided for by the PD Ordinance is null and void as a violation of Plaintiffs' substantive due process rights. Count I further seeks to enjoin the City from enforcing the PD Ordinance.

Count II seeks a declaration that the Bond Intent Ordinance violates Plaintiffs' substantive due process rights as guaranteed by Art. I, §2 and Art. VIII, §1 of the Illinois Constitution. Count II further seeks a declaration that the Bond Intent Ordinance is null and void and injunctive relief barring further implementation of the Bond Intent Ordinance.

II. Motions to Dismiss

The City is moving to dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. Bickerdike and Rockwell are also moving to the dismiss the Complaint pursuant to 735 ILCS 5/2-619.1. As Defendants raise many of the same arguments, the motions will be addressed together.

"A section 2-615 motion to dismiss challenges the legal sufficiency of the complaint. Yoon Ja Kim v. Jh Song, 2016 IL App (1st) 150614-B, ¶41. "Such a motion does not raise affirmative factual defenses but alleges only defects on the face of the complaint." Id. "All well-pleaded facts and all reasonable inferences from those facts are taken as true. Where unsupported by allegations of fact, legal and factual conclusions may be disregarded." Kagan v. Waldheim Cemetery Co., 2016 IL App (1st) 131274, ¶29. "In determining whether the allegations of the complaint are sufficient to state a cause of action, the court views the allegations of the complaint in the light most favorable to the plaintiff. Unless it is clearly apparent that the plaintiff could prove no set of facts that would entitle him to relief, a complaint should not be dismissed." Id.

A §2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-pled facts and their reasonable inferences, but raises defects or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers

Sys., LLC, 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id. Section 2-619(a)(9) authorizes dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9).

A. *Pre-Suit Notice Requirements of 65 ILCS 5/11-13-8 (§2-619)*

Count I of the Complaint seeks a finding that the PD Ordinance is unconstitutional. Defendants contend that Plaintiffs were required to provide pre-suit notice pursuant to 65 ILCS 5/11-138 which states:

> In municipalities of 500,000 or more population, when any zoning ordinance, rule or regulation is sought to be declared invalid by means of a declaratory judgment proceeding, not more than 30 days before filing suit for a declaratory judgment the person filing such suit shall serve written notice in the form and manner and to all property owners as is required of applicants for variation in Section 11-13-7 [65 ILCS 5/11-13-7], and shall furnish to the clerk of the court in which the declaratory judgment suit is filed, and at the time of filing such suit, the list of property owners, the written certificate and such other information as is required in Section 11-13-7 to be furnished to the board of appeals by an applicant for variation. * * *

65 ILCS 5/11-13-8. Section 11-13-7 requires the service of:

> written notice, either in person or by registered mail, return receipt requested, on the owners, as recorded in the office of the recorder of deeds or the registrar of titles of the county in which the property is located and as appears from the authentic tax records of such county, of all property within 250 feet in each direction of the location for which the variation or special use is requested; provided, the number of feet occupied by all public roads, streets, alleys and other public ways shall be excluded in computing the 250 feet requirement. * * *

65 ILCS 5/11-13-7.

The purpose of pre-suit notice is to alert the surrounding neighbors to the zoning classification challenge and allow them to support or oppose the challenge. Scott v. City of Chicago, 2015 IL App (1st) 140570, ¶ 20.

1. Whether Count I Seeks Declaratory Judgment

Plaintiffs contend that they were not required to provide pre-suit notice under §11-13-8 because Count I does not seek declaratory judgment. This court emphatically disagrees.

Count I seeks a finding that the PD Ordinance is unconstitutional and, therefore, null and void. This clearly seeks a declaratory judgment. That Plaintiffs do not use the word "declare" in Count I or label Count I as a cause of action for declaratory judgment is irrelevant. It is the factual allegations of a complaint – not the label, or lack thereof, assigned to it by the plaintiff –

that define the cause of action asserted. Childs v. Pinnacle Health Care, L.L.C, 399 Ill. App. 3d 167, 181 (2d Dist. 2010).

The court additionally notes that if Count I does not state a cause of action for declaratory judgment, which it does, then it states no cause of action at all. Injunctive relief is a remedy for an underlying cause of action, not an independent cause of action. People ex rel. Madigan v. J.T. Einoder, Inc., 2013 IL App (1st) 113498, ¶66. Therefore, Count I cannot constitute a cause of action for injunctive relief as suggested by Plaintiffs.[1]

Furthermore, while Count I alleges that it is being brought "in accord with 65 ILCS 5/11-13-25," (Compl. ¶2), that section does not provide for any independent, private cause of action. Conaghan v. City of Howard, 2016 IL App (2d) 151034; Figel v. Chicago Plan Comm'n, 408 Ill. App. 3d 223 (1st Dist. 2011). Section 11-13-25 merely allows for *de novo* judicial review of zoning decisions. Therefore, Count I does not state any cause of action pursuant to §11-13-25.

Plaintiffs cannot escape the requirements of §11-13-8 by attempting to characterize Count I as something other than what it is – a cause of action for declaratory judgment. Section 11-13-8 expressly requires pre-suit notice for declaratory proceedings seeking to declare a zoning ordinance invalid. Count I seeks to declare the PD Ordinance invalid. Therefore, Plaintiffs were required to give pre-suit notice in accordance with the requirements of §11-13-8 and §11-13-7. It is undisputed that Plaintiffs did not provide such notice.

2. Plaintiffs' Request to Cure Notice Failure

Plaintiffs assert that this court should allow them to cure their failure to provide the required pre-suit notice. Plaintiffs cite to Hanna v. City of Chicago, 331 Ill. App. 3d 295, 310 (1st Dist. 2002), overruled in part on other grounds, Napleton v. Vill. of Hinsdale, 229 Ill. 2d 296 (2008), in support of this request. However, the First District has held that Hanna does not allow this court to excuse Plaintiffs' failure to comply with §11-13-8.

In Scott v. City of Chicago, 2015 IL App (1st) 140570, ¶32, the plaintiffs attempted to comply with the pre-suit notice requirements of §11-13-8 and §11-13-7, but made multiple errors. The First District found that these multiple errors could not be excused or attributed to the defendants and, therefore, their complaint must be dismissed with prejudice. Id.

The plaintiffs argued that their "imperfect but sincere" efforts to provide the required pre-suit notice should not result in the dismissal of their action, citing to Hanna. Id. at ¶33. The plaintiffs asserted that Hanna stands for the proposition that the notice requirement of §11-13-8 should be construed "leniently" and plaintiffs should be allowed "make-up notice." Id. In rejecting this argument, the First District explained:

> Hanna is distinguishable on the facts and the opinion does not suggest in any way that the notice requirement should be relaxed. That case involved the rezoning of an entire 40–

[1] Plaintiffs' citation to Kupsik v. City of Chicago, 25 Ill. 2d 595 (1992), is unavailing as that case involved an equitable action to remove a cloud on the title to the plaintiffs' property created by the zoning ordinance at issue. Plaintiffs here state no cause of action other than one for declaratory judgment.

> block neighborhood. The plaintiff challenged the rezoning of his own property, unlike the current plaintiffs who challenged the rezoning of a nearby property. The plaintiff's presuit notice was apparently perfect as to all property owners within 250 feet of his own property. However, in a case of first impression, we determined that he would be required to also give notice to all property owners within 250 feet of the rezoned neighborhood, despite his contention that this was a burden that could not have been intended by the legislature. In contrast, here, we have plaintiffs who failed to attempt to notify numerous property owners who were plainly entitled to notice because they were within 250 feet of the affected property. Hanna does not excuse their noncompliance with the statute at issue. The opinion does not state or imply that plaintiffs may be lax in giving presuit notice and that Illinois courts will be "lenient" in enforcing the notice standard. The plaintiffs' failure to strictly comply with the plainly worded notice requirement is fatal to their lawsuit . . . concerning the Lake Park development.

Id. at ¶ 36 (internal citations omitted).

Here, Plaintiffs were required to provide pre-suit notice under §11-13-8. Unlike Hanna, this case does not involve any question of first impression which would excuse the failure to provide the required notice.

Plaintiffs do not dispute that they did not provide the required notice. Scott is clear that Hanna does not hold that Illinois courts will be lenient in enforcing this requirement. Rather, even where some effort is made to provide the required notice, failure to strictly comply will be fatal to the plaintiff's claim. Scott, 2015 IL App (1st) 140570, ¶36. Therefore, Plaintiffs' failure to provide notice is fatal to Count I of the Complaint.

Count I is dismissed with prejudice pursuant to §2-619.

B. *Due Process Claims Against Bickerdike and Rockwell (§2-615)*

Bickerdike and Rockwell contend that Plaintiffs' entire Complaint is premised upon alleged violations of the Illinois Constitution and that as private entities, they cannot be sued for violation of Plaintiffs' constitutional rights.

Count I seeks a declaration that the PD Ordinance is a violation of Plaintiffs' substantive due process rights. Count II seeks a declaration that the Bond Intent Ordinance is a violation of Plaintiffs' substantive due process rights as guaranteed under Article I, §2 and Article VIII, §1 of the Illinois Constitution.

"To assert a violation of the Illinois due process clause, a plaintiff must allege that a state action deprived him of a protected right, privilege or immunity." Hill v. PS Illinois Trust, 368 Ill. App. 3d 310, 313 (1st Dist. 2006). "The Illinois due process clause stands 'as a prohibition against governmental action, not action by private individuals.'" Id., quoting, Methodist Med. Ctr. of Ill. v. Taylor, 140 Ill. App. 3d 713, 717 (3rd Dist. 1986).