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2011 IL App (3d) 090767–U

Order filed August 26, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

CHARITY BITNER,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
Plaintiff-Appellant,	)	Fulton County, Illinois.
	)	
v.	)	Appeal No. 3–09–0767
	)	Circuit No. 08–L–38
WILLIAM GAIL and CONNIE GAIL,	)	
d/b/a/ FULL MOON TRAILER PARK,	)	Honorable
	)	Patricia A. Walton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting the defendants' motion to dismiss because the plaintiff's complaint sufficiently alleged *prima facie* negligence based on the defendant landlord's alleged violation of a municipal ordinance requiring the landlord to maintain exterior stairways of leased units.

¶ 2 The plaintiff, Charity Bitner, filed an amended complaint alleging negligence against the defendants, William and Connie Gail, doing business as the Full Moon Trailer Park (Trailer Park) in Cuba, Illinois. The trial court dismissed the plaintiff's amended complaint with

prejudice. The plaintiff appealed the dismissal, arguing that the plaintiff's allegations of defendants' violation of a public safety ordinance were sufficient to constitute prima facie evidence of negligence. We reverse and remand.

¶ 3 FACTS

¶ 4 On October 10, 2008, the plaintiff filed a negligence complaint against the defendants. On May 1, 2009, the plaintiff amended her complaint, alleging that the defendants owned and maintained the business and buildings at the Trailer Park. The plaintiff alleged that on June 26, 2007, she was "an intended and foreseeable user" of the Trailer Park and, as she exited trailer #10 and descended the stairs, "her foot went through weak and rotten boards and she fell and received severe injuries."

¶ 5 In her amended complaint, the plaintiff alleged that the defendants were negligent because they knew or should have known that the condition of the property involved an unreasonable risk of harm and they had a duty to: (1) keep the property reasonably safe; (2) use ordinary care to design, build, keep and maintain the stairway in a safe condition; (3) use reasonable care to protect the plaintiff, by inspection and other affirmative actions, from foreseeable injury occurring from reasonably foreseeable use of the stairway; (4) inspect and maintain the stairway in a reasonably safe condition; and (5) provide a safe means of ingress and egress for intended users. The plaintiff further alleged that the defendants were negligent for violating Cuba's Minimum Housing Regulations and Living Standards Code (Cuba Code). Cuba City Code § 4–2–1, *et. seq.* (enacted Sept. 9, 1978).

¶ 6 Section 4–2–1-2 of the Cuba Code, entitled "PURPOSE," provided:

> "Because there exists in the City housing structures which are substandard in at least one important feature of structure, equipment, maintenance or occupancy; and because such conditions adversely affect public health and safety, and contribute to the continuation, extension and aggravation of blight, this Code is adopted to provide the establishment and enforcement of minimum housing regulations and living standards and to promote the adequate protection of the public health and welfare.
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> This Code sets forth the responsibilities of owners, operators and occupants of all existing structures." Cuba City Code § 4–2–1-2 (enacted Sept. 9, 1978).

¶ 7 Section 4–2–1-3, entitled "SCOPE," indicated that the Cuba Code was applicable to "occupancy for residential purposes of any building or structure, altered or converted so as to be occupied for residential purposes." Cuba City Code § 4–2–1-3 (enacted Sept. 9, 1978).

¶ 8 Section 4–2–3, entitled "RIGHTS AND RESPONSIBILITIES OF PARTIES," indicated that both the occupants and the owners or operators of "leased units shall be responsible for maintenance thereof as provided in th[e] Code." Cuba City Code § 4–2–3 (enacted Sept. 9, 1978).

¶ 9 Section 4–2–6-4 of the Cuba Code provided:

> "STAIRWAYS, PORCHES AND RAILINGS: All exterior stairs, porches and any appurtenance thereto shall be adequately safe and shall be capable

> of supporting the load that normal use may cause to be placed thereon. All stairways, porches and any appurtenance shall be kept in sound and safe condition." Cuba City Code § 4–2–6-4 (enacted Sept. 9, 1978).

¶ 10 Section 4–2–11-8 of the Cuba Code, regarding stairways and porches provided:

> "Every flight of stairs and porch shall be free of holes, grooves and cracks which are large enough to constitute possible accident hazards." Cuba City Code § 4--2--11-8 (enacted Sept. 9, 1978).

¶ 11 In a combined motion, the defendants moved to dismiss the plaintiff's amended complaint pursuant to sections 2--615 and 2--619 of the Code of Civil Procedure (735 ILCS 5/2--615, 2--619 (West 2008)) (the Code). The trial court granted the defendants' motion to dismiss with prejudice.[1] The plaintiff appealed.

¶ 12 ANALYSIS

¶ 13 On appeal, the plaintiff argues that the trial court erred in dismissing her complaint pursuant to section 2–619 of the Code because the court failed to acknowledge that a violation of a public safety ordinance constituted *prima facie* evidence of negligence. The defendants state that it is undisputed that they were landlords of the property at issue on the date of the incident and that the property was leased to tenants, who were in possession and control of that property. The defendants argue that they did not owe a duty of care to the plaintiff in relation to the

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[1] The trial court's dismissal order does not indicate whether the court dismissed the complaint under section 2–615 or section 2–619 of the Code. The defendants moved to dismiss the complaint under both sections, and they argue that the trial court dismissed the complaint under both sections.

condition of the property because they were not in possession and control of the property. We disagree.

¶ 14 A section 2–619 motion to dismiss admits the legal sufficiency of a plaintiff's complaint but raises defects, defenses, or other affirmative matters that act to defeat the complaint as a matter of law. *Johnson v. Bishop*, 388 Ill. App. 3d 235, 237 (2009); 735 ILCS 5/2–619 (West 2008). The questions a reviewing court must consider where a section 2--619 dismissal is challenged on appeal are whether a genuine issue of material fact exists and whether the defendant is entitled to judgment as a matter of law. *Saichek v. Lupa*, 204 Ill. 2d 127, 134 (2003). We review a dismissal under section 2–619 de novo. *Id.*

¶ 15 In order for a plaintiff to prevail in a negligence case, the plaintiff must demonstrate that the defendant owed a duty to the plaintiff and that the defendant's breach of that duty was the proximate cause of the plaintiff's injuries. *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990). A landlord has a duty to use ordinary care to maintain the portion of the premises over which he retains control; however, he is generally not liable for injuries to a third party resulting from a defective condition on the premises leased to a tenant and under the tenant's control. *Lombardo v. Reliance Elevator Co. et al.*, 315 Ill. App. 3d 111, 118 (2000); *Moreno v. Balmoral Racing Club, Inc.*, 217 Ill. App. 3d 365, 367 (1991); *Gilbreath v. Greenwalt*, 88 Ill. App. 3d 308, 309-10 (1980).

¶ 16 An exception to that general rule is that the violation of a statute or ordinance designed for the protection of human life or property is *prima facie* evidence of negligence. *Kalata v. Anheuser-Busch Companies, Inc.*, 144 Ill. 2d 425, 434 (1991); *Lombardo*, 315 Ill. App. 3d at 118; *Moreno*, 217 Ill. App. 3d at 367. A party injured by such a violation of an ordinance has a

cause of action, provided the party can show that: (1) he or she was within the class of persons that the ordinance was designed to protect; (2) the injury was the type of harm that the ordinance was intended to prevent; and (3) the defendant's violation of ordinance was the proximate cause of the plaintiff's injury. *Kalata*, 144 Ill. 2d at 434; *Price ex rel. Massey v. Hickory Point Bank & Trust*, 362 Ill. App. 3d 1211, 1216 (2006). A plaintiff is not required to show defendants' awareness of the violation of the ordinance since the violation itself is *prima facie* evidence of negligence. *Price*, 362 Ill. App. 3d at 1216. Moreover, statutes and ordinances designed to protect human life establish the standard of conduct required of a reasonable person and thus "fix the measure of legal duty." *Noyola v. Board of Education of the City of Chicago*, 179 Ill. 2d 121, 130 (1997); *Price*, 362 Ill. App. 3d at 1216. Accordingly, once a violation of a public safety ordinance is shown, there is no question of duty and the focus turns to whether the plaintiff is a member of the class of persons protected by the statute who suffered the kind of injury that the ordinance was intended to prevent. *Price*, 362 Ill. App. 3d at 1216-17.

¶ 17 The Cuba ordinance at issue here is a public safety measure. After noting that substandard structural features and substandard maintenance of housing in Cuba "adversely affect public health and safety," the ordinance provides that "this Code is adopted to provide the establishments and enforcement of minimum housing regulations and living standards and promote the adequate protection of the public health and welfare." Cuba City Code § 4–2–1-2 (enacted Sept. 9, 1978). The language of the ordinance imposes a duty upon both the landlord and the occupant to be "responsible for maintenance" of any building or structure that is to be occupied for residential purposes, including "leased units." *Id.* § 4–2–3; see also *id.* § 4–2–1-3. Specifically, the ordinance provides that the landlord and the occupants have a duty to keep all

exterior stairs adequately safe and capable of supporting a normal load. Cuba City Code § 4–2–6-4 (enacted Sept. 9, 1978). The ordinance also provides that the landlord's duty to maintain the stairways and keep them safe may not be delegated to the tenant by contract. See *id.* § 4–2–3-13 ("A contract effective between*** owner and occupant, with regard to compliance hereunder shall not relieve any party of his direct responsibility under this Code.") The plaintiff is a member of the public who was exiting trailer #10 in the defendants' trailer park, which establishes her as being within the class of persons designed to be protected by the ordinance. Moreover, the plaintiff claimed that she was injured when her foot went through weak and rotten boards in the stairway leading out of the trailer. This is exactly the type of injury that the ordinance was designed to prevent. Thus, the plaintiff's complaint alleges *prima facie* negligence on the part of the defendants, and the trial court erred in granting the defendants' motion to dismiss.

¶ 18 The defendants cite *Coshenet v. Holub*, 80 Ill. App. 3d 430 (1980), for the proposition that a plaintiff may not state a cause of action under an ordinance against someone not in control of the premises. The plaintiff in *Coshenet* fell on an interior stairway in a building that the owner rented in its entirety to a tenant. The ordinance at issue in *Coshenet* imposed a duty on the owners to keep stairways in sound condition and good repair. One of the counts of the plaintiff's complaint was a negligence claim based on the ordinance violation. The Second District of the Appellate Court affirmed the trial court's dismissal of that claim, holding that a plaintiff may not state a cause of action under the ordinance against someone not in control of the premises. *Coshene*t, 80 Ill. App. 3d 430.

¶ 19 We decline to apply the rule announced in *Coshenet* in this case. The First District of the Appellate Court has held that when an owner of property violates an ordinance which imposes a nondelegable duty on a landlord to keep the leased premises safe, the owner cannot avoid the duty owed to an injured plaintiff on the ground that the premises was leased and the owner was not in possession and control of the property. *Lombardi*, 315 Ill. App. 3d at 119; see also *Jones v. Polish Falcons of City of Chicago*, 244 Ill. App. 3d 348 (1993). We agree with the First District and we conclude that the Cuba Code imposed a duty upon the defendants to maintain the exterior stairway in the leased premises that cannot be avoided merely because tenants were in control of the premises.[2] The dismissal of the plaintiff's amended complaint under section 2–619 of the Code was therefore improper.

¶ 20 In addition, if the trial court had dismissed the plaintiff's complaint under section 2–615 for failure to state a claim, such dismissal would also be also improper. The allegations in the plaintiff's complaint are sufficient to state a cause of action for negligence based on the defendants' violation of the Cuba Code. The plaintiff alleged that she was injured when she fell through weak and rotten boards in a stairway that the Cuba Code required the defendants to maintain. As noted above, these allegations state a *prima facie* claim of negligence against the defendants. The plaintiff also alleged that the defendants' violation of the Cuba Code was the proximate cause of her injuries. Taking all of these allegations as true and drawing all reasonable

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[2] Moreover, *Coshenet* is factually distinguishable because the stairs at issue in this case are exterior stairs. Thus, even if the rule of *Coshenet* were applicable, there would still be a question of fact as to the extent of control either the defendants or the tenants had over the exterior stairs.

inferences in favor of the plaintiff – as we must, in reviewing a dismissal under section 2–615 (*Universal Scrap Metals, Inc. v. J. Sandman and Sons, Inc.*, 337 Ill. App. 3d 501, 504 (2003)) – we conclude that the plaintiff's complaint adequately stated a cause of action for negligence. Accordingly, a dismissal under section 2–615 would be inappropriate.[3]

¶ 21 Nevertheless, we note that a violation of an ordinance or statute does not constitute negligence *per se*, and the defendants may prevail by showing that they acted reasonably under the circumstances. *Kalata*, 144 Ill. 2d at 435. The defendants could also prevail by showing that their violation of the ordinance was not the proximate cause of the plaintiff's injury.

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, we reverse the judgment of the circuit court of Fulton County and remand for further proceedings.

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[3] The defendants argue that the plaintiff the plaintiff has waived any challenge to the trial court's dismissal of her complaint under section 2–615 because she failed to oppose the defendants' arguments under section 2–615 in her response to the defendant's motion to dismiss or in her appellate briefs. The defendants are mistaken. In response to the defendant's section 2–615 motion to dismiss, the plaintiff argued that she "ha[d] pleaded all that is necessary for her complaint to survive a Section 2–615 dismissal motion," including "a duty imposed by the Cuba Code, violations of the Cuba Code by [d]efendants, and proximate cause of injury from the violations." In the alternative, the plaintiff requested leave to amend her complaint if the trial court found he pleading to be insufficient. On appeal, the plaintiff argued for reversal of the trial court's dismissal order and argued that she had "pleaded facts that, when proven, establish *prima facie* evidence of negligence."

¶ 24 Reversed and remanded.