2013 IL App (1st) 122701-U

SECOND DIVISION
July 9, 2013

No. 1-12-2701

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GERALDINE GRZELAK and JOHN J. GRZELAK,	)	
Plaintiffs-Appellants,	)	Appeal from the Circuit Court of Cook County
v.	)	
CLASSIC MIDWEST, INC., d/b/a CLASSIC PARTY RENTALS, an Illinois corporation; W2001 VHE REALTY LLC, a Delaware limited liability company; ALAN S. KAVA; HBHB1 REALTY, LLC, a Delaware limited liability company; HORIZON BAY REALTY, LLC; SLEVIN CAPITAL INVESTMENTS, INC., an Illinois corporation; ARCHON GROUP, LP; and MID-AMERICA ASSET MANAGEMENT, INC.	)	No. 09 L 10410 Honorable Eileen Mary Brewer, Judge Presiding.
Defendants-Appellees.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

O R D E R

***Held*:** Archon's section 2-619(a)(9) motion to dismiss was properly granted where Archon was not the possessor or occupier of the premises, and did not have

complete control over the premises at the time of the alleged injury, and therefore owed no duty to plaintiff.

¶ 1 This appeal arises from a complaint for negligence that was filed by plaintiff Geraldine Grzelak (plaintiff) against Archon Group, L.P. (Archon), as well as several other defendants. Archon filed a motion to dismiss, arguing that it did not owe plaintiff a duty because it was not the owner or the occupier of the land that plaintiff was injured on. The trial court granted Archon's motion to dismiss, and plaintiff now appeals.

¶ 2 I. BACKGROUND

¶ 3 On September 3, 2009, plaintiff filed a complaint for negligence against the Village of Hoffman Estates, Classic Midwest, Inc., and BDA Terra Firma, LLC., alleging that they had constructed tents in the mall parking lot where plaintiff was injured, and that they owed a duty of reasonable care to plaintiff to keep the walkway she was injured on in a reasonably safe condition. Plaintiff claimed that defendants knew or should have known that the tent stakes driven into the asphalt surface and projecting "above grade", which were used to secure the tents, posed an unreasonably dangerous condition for invitees. Plaintiff's husband, John Grzelak, also claimed a loss of consortium against the same defendants.

¶ 4 Exactly one year later, on September 3, 2010, plaintiff requested leave to file an amended complaint adding additional defendants Archon, Mid-America Asset Management, Inc., (Mid-America), and W2001 VHE Realty, LLC (VHE Realty). Archon filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)). Archon stated that it was not the owner of the premises described in plaintiff's

complaint, and did not occupy the premises on the date in question, and thus it owed no duty to perform any supervisory, maintenance, inspection, or repair services on the premises. Instead, Archon claimed that VHE Realty was the owner of the premises, and that Mid-America was the manager of the premises. Archon stated that, as asset manager, it merely held the property as an asset in an investment portfolio.

¶ 5 Archon attached the affidavit of Heather Abel to its motion to dismiss. Abel stated that she was a manager at Archon, which is an investment portfolio management company. Abel further stated that Archon provided contractual back-office portfolio-level financial investment management services for owners of investment portfolios, but that Archon itself does not own or manage the daily activities of real estate properties. Her primary responsibility at Archon included oversight of the premises in question. Abel stated that on the date in question, Archon did not own the property, and it was not the property management company responsible for the day-to-day management of the property. At all relevant times, VHE Realty was the owner of the premises, and Mid-America was the property management company responsible for the day-to-day management of the premises.

¶ 6 Plaintiff filed a response to Archon's motion to dismiss, contending that Archon did not need to be the "owner" of the subject property in order to owe a duty to plaintiff, but rather can be liable where it "approves" an activity on the property under its ultimate control. Plaintiff alleged that Cory Born, an employee of Mid-America, testified in her deposition that she was one of the property managers for the property at the time of the alleged injury. Born testified that she, in conjunction with Archon, approved the event in question, and that she dealt with Peggy Kral at

Archon. Born testified that she was managing the property for VHE Realty, and Kral was a representative of VHE Realty "via Archon." Born testified in her deposition that VHE Realty was the ownership entity, and Archon was the manager, and that Kral had some role in the management of the "shopping center."

¶ 7 Plaintiff argued that Archon undertook control of the premises on behalf of VHE Realty, and together with Mid-America approved the event where plaintiff was injured, and that Archon had ultimate control over what activities were permitted on the land. Plaintiff further argued that her architectural expert, John Van Ostrand, testified in his deposition that if Archon approved the event, it was "to some extent managing the property," and that it had "ultimate control" because Born had to ask Kral for final approval.

¶ 8 Archon replied that while an independent contractor or servant to whom the owner or possessor turns over the entire charge of the land is subject to the same liability for harm caused to others, plaintiff presented no evidence to show that VHE Realty or Mid-America had turned over "the entire charge" of the land to Archon. Instead, Archon's purpose was to financially manage the asset of the premises on behalf of VHE Realty. Further, Archon noted that plaintiff's architectural expert, Van Ostrand, testified that he was not an expert with respect to asset management, and that he could not opine as to whether Archon was an owner of the premises.

¶ 9 Archon attached the deposition testimony of Cory Born (of Mid-America) and Heather Abel. Abel testified that the owner of the property in question was VHE Realty, which had a property management agreement with Mid-America. Abel testified that there was no direct contractual agreement between Mid-American and Archon. Born affirmed that there was a

property management agreement between Mid-America and VHE Realty, and that Mid-America "maintains" the parking lot on which the tent was constructed. Abel testified that she took over as asset manager when Peggy Kral left, and that she had been out to the property to meet with the property manager, Mid-America. The times she went to the premises she quickly drove around to make sure Mid-America was doing its job and keeping the premises maintained.

¶ 10 On August 30, 2012, the trial court entered an order allowing Archon's motion to dismiss plaintiff's amended complaint against Archon with prejudice. Plaintiff now appeals.

¶ 11 II. ANALYSIS

¶ 12 On appeal, plaintiff contends that Heather Abel's testimony" failed to prove that [Archon] was entitled to dismissal as a matter of law," and instead raised questions of fact where Abel's affidavit was in conflict with Cory Born's deposition testimony.

¶ 13 The purpose of a section 2-619 (735 ILCS 5/2-619(a) (West 2010)) motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). Specifically, section 2-619(a)(9) permits involuntary 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) (West 2010). An " 'affirmative matter,' in a section 2-619(a)(9) motion, is something in the nature of a defense which negates the cause of action completely," or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994); *Consumer Electric Company v. Cobelcomex, Inc.*, 149 Ill. App. 3d 699, 703 (1986). The moving party thus

admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter to defeat the plaintiff's claim. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). When a court rules on a section 2-619 motion to dismiss, it "must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). Our review of a section 2-619 dismissal is *de novo*. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368 (2003).

¶ 14 The affirmative matter presented by Archon in the case at bar is its claim that it was not the owner or occupier of the property at the time the accident occurred, nor did it have "entire charge" of the premises, and therefore owed no duty of care to plaintiff. Plaintiff contends on appeal that this affirmative matter, which was supported by the affidavit of Heather Abel, is in conflict with Cory Born's and John Van Ostrand's deposition testimony, and therefore factual issues exist regarding Archon's role as property manager and its duty of care. Plaintiff maintains that a dismissal on the pleadings was premature.

¶ 15 Plaintiff claims Archon owed a duty of care to her under the Illinois Premises Liability Act. Plaintiff however cites to 745 ILCS 65/1 *et seq*. (West 2010), which, as Archon pointed out in its reply to its motion to dismiss at trial, and as it again notes on appeal, is the Recreational Use of Land and Water Areas Act, which has no bearing on this case.

¶ 16 The Illinois Premises Liability Act (740 ILCS 130/1 *et seq*. (West 2010)), on the other hand, is an "Act to regulate the duty on which an occupier of a premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them ***." The existence of a duty is essential to a claim of negligence, and whether a duty

exists is a question of law. *LaFever v. Kemlite Co.*, 185 Ill. 2d 380, 388 (1998). In determining whether a duty exists, a court should consider: (1) the reasonable foreseeability of injury, (2) the reasonable likelihood of injury, (3) the magnitude of the burden that guarding against injury places on the defendant, and (4) the consequences of placing that burden on the defendant. *LaFever*, 185 Ill. 2d at 389.

¶ 17 When a plaintiff alleges, as in this case, that an injury was caused by a condition on the defendant's property, and the plaintiff was an invitee on that property, the foreseeability prong set forth above is decided pursuant to section 343 of the Restatement (Second) of Torts §343 (1965)). *LaFever*, 185 Ill. 2d at 389. That section provides as follows:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger."

¶ 18 It is a prerequisite to liability under section 343 that defendant be a possessor of the land. *Madden v. Paschen*, 395 Ill. App. 3d 362, 375 (2009). "The term 'possessor' with respect to possession of land is defined by the Restatement as 'a person who is in occupation of the land with intent to control it.' " *Madden*, 395 Ill. App. 3d at 375 (quoting Restatement (Second) of

Tors §328E) (citing *Esser v. McIntyre*, 169 Ill. 2d 292, 302 (1996) (defendant not subject to premises liability where he did not "occupy land with intent to control it")). The two requirements for possession are occupation and intent to control the land, "as opposed to the activities or individuals thereon." *O'Connell v. Turner Construction Company*, 409 Ill. App. 3d 819, 824 (2011).

¶ 19 Archon maintained in its motion to dismiss that it was not the possessor of the land on which plaintiff was injured, but rather the asset manager, and therefore it owed no duty to invitees. Archon claimed that VHE Realty was the owner of the property and Mid-America was the property manager. In support of this contention, Archon submitted the affidavit of Heather Abel, a manager at Archon. Abel stated in her affidavit that on the date in question, Archon did not own the subject property, and was not the property manager. As Archon notes in its appellate brief, "[w]hen a defendant submits an affidavit in support of a motion to dismiss which controverts a well-pleaded fact in the complaint and the plaintiff fails to file a counteraffidavit, the facts set forth in the affidavit are accept as true despite any contrary assertions in the plaintiff's complaint." *Nielsen-Massey Vanillas, Inc. v. City of Waukegan*, 276 Ill. App. 3d 146, 155 (1995) (citing *Chicago Title & Trust Co. v. Weiss*, 238 Ill. App. 3d 921, 925 (1992)). Here, Archon's affidavit was unrebutted by any affidavit from plaintiff. Accordingly, we find that there was no issue of fact about whether Archon was the possessor of the premises at the time of the alleged injury. See *Nielsen-Massey*, 238 Ill. App. 3d at 155.

¶ 20 Plaintiff nevertheless contends that even if Archon was not the possessor of the land, that it had ultimate control over the premises at the time of the injury. The Restatement does

recognize that a person may conduct activities on a land or be in charge of the land without being the possessor. It provides that: "One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, for physical harm caused thereby to others upon the outside of the land as though he were the possessor of the land." Restatement (Second) of Torts §383. It also provides:

> "An independent contractor or servant to whom the owner or possessor turns over the entire charge of the land is subject to the same liability for harm caused to others upon or outside of the land, by his failure to exercise reasonable care to maintain the land in safe repair as though he were the possessor of the land." *Id*. at § 387.

¶ 21 "This implies that one who controls the land on behalf of another is not the possessor and that limited control of the land does not equate possession." *O'Connell*, 409 Ill. App. 3d at 825. Here, plaintiff has not provided any evidence indicating that Archon had ultimate control or intended to have ultimate control over the land at issue. The only evidence plaintiff points to is the deposition testimony of Cory Born and her architectural expert, John Van Ostrand. Cory Born, of Mid-America, testified that she would not have joined in the approval of the event but for Archon's prior approval. Plaintiff contends this is evidence that Archon had ultimate control over what activities were permitted on the land in question. However, Born also testified that Mid-America had a property management agreement with VHE Realty, and that Mid-America maintained the property. Abel testified that there was no direct contract between Mid-America and Archon. Moreover, Born's reasons for joining in the approval of an event does not establish

the amount of control Archon had over the property in question.

¶ 22 Plaintiff also points to the following colloquy, which took place at Van Ostrand's deposition, as evidence of Archon's control over the subject property:

> "Q: *** does the 2003 International Property Maintenance Code apply to Archon?
>
> A: Well, it seems like if they are - it seems to me if they approved the event, they are to some extent managing the property.
>
> ***
>
> Q: What's Archon's extent of control?
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> ***
>
> A: Ultimate control, they decided whether it should happen or not. Cory Born asked the lady whose name I forget at Archon whether they could have the event and she said yes. So that's ultimate control seems to me."

¶ 23 This exchange does not rebut Heather Abel's affidavit, and Cory Born's deposition testimony, stating that VHE Realty owned the property and Mid-America was the property manager. The opinion Van Ostrand gave was not made through his retained expertise as an architect, but rather constituted lay opinion testimony. Accordingly, we find that the evidence presented by Archon constituted affirmative matter that defeated plaintiff's claim of negligence against Archon, and Archon's 2-619 motion to dismiss was properly granted.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 26 Affirmed.