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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THERESE DOLECEK)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 2010 CH 41654
)	
GREEN VALLEY ESTATES CONDO)	Honorable
UNIT, SEVEN ASSOCIATION BOARD)	David B. Atkins,
OF DIRECTORS, HOME MOBILITY)	Judge Presiding.
SOLUTIONS, INC., HOME ACCESS)	
SERVICES, INC.,)	
)	
Defendants-Appellees.)	

JUSTICE COBBS delivered the judgment of the court.

Presiding Justice McBride and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not err in granting summary judgment in favor of condominium association where Palos Hills Building Commissioner properly exercised his authority in granting permit to install a chairlift. Trial court did not err in dismissing claim against chairlift installer to terminate the litigation.

¶ 2 This case is before us on appeal of the trial court's grant of summary judgment in favor of defendants Green Valley Estates Condo Unit, Seven Association Board of Directors

(collectively "Green Valley"), Home Mobility Solutions, Inc., and Home Access Services, Inc. (collectively "Home Mobility"). Plaintiff Therese Dolecek, a unit owner at Green Valley, filed a complaint in the circuit court of Cook County pursuant to section 5/11-13-15 of the Illinois Municipal Code (65 ILCS 5/11-13-15) alleging a violation of the building code and section 4.03 of the Declaration for Condominium Ownership based on the installation of a chairlift in the condominium's common stairway, which allegedly resulted in an impermissible reduction in stairway width. On appeal, Dolecek argues that the trial court erred because: 1) there was a genuine issue of fact over whether a code violation exists; 2) Commissioner Nelson has no discretionary authority; and 3) the court did not have authority to *sua sponte* dismiss count II against Home Mobility. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4

Palos Hills adopted the 2003 International Building Code (IBC) by incorporating it into The Palos Hills City Municipal Code in 2008. Palos Hills City Municipal Code § 15.04.010 (adopted 12-18-2008). Section 15 of the Municipal Code creates the Building Department and the position of building commissioner. Palos Hills City Municipal Code § 15.04.030 (adopted 12-18-2008). The commissioner is appointed by the mayor and approved by the city council. Palos Hills City Municipal Code § 15.04.040 (adopted 12-18-2008). The IBC authorizes the commissioner to enforce its provisions and states that the commissioner "shall have the authority to render interpretations of this code and to adopt policies and procedures in order to clarify the application of its provisions." 2003 International Building Code § 104.1 (10th Printing). Such interpretations, policies and procedures shall be in compliance with the intent and purpose of this code. Such policies and procedures shall not have the effect of waiving requirements specifically provided for in this code." *Id.*

¶ 5 The IBC requires stairways to be 44 inches wide unless one of four exceptions applies. These exceptions include:

"1. Stairways serving an occupant load of 50 or less shall have a width of not less than 36 inches (914 mm).

2. Spiral stairways as provided for in Section 1009.9.

3. Aisle stairs complying with Section 1024.

4. Where a stairway lift is installed on stairways serving occupancies in Group R-3, or within dwelling units in occupancies in Group R-2, both as applicable in Section 101.2, a clear passage width not less than 20 inches (508 mm) shall be provided. If the seat and platform can be folded when not in use, the distance shall be measured from the folded position." 2003 International Building Code §1009.1 (10th Printing).

The IBC defines Group R-2 as:

"Residential occupancies containing sleeping units or more than two dwelling units where the occupants are primarily permanent in nature[.]"

Group R-3 is defined as:

"Residential occupancies where the occupants are primarily permanent in nature and not classified as R-1, R-2, R-4 or I and where buildings do not contain more than two dwelling units as applicable in Section 101.2[.]" 2003 International Building Code § 310.1 (10th Printing).

¶ 6 Green Valley is a 12-unit condominium association located in Palos Hills, Illinois. It was created by a Declaration for Condominium Ownership, which was recorded in the Cook County Office of the Recorder of Deeds. The building was constructed in 1986 in compliance with the 1968 Building Code. It has two stairwells, a front and a rear exit, as well

as an exit to the garage. The stairwell at issue in this case is 36 inches wide and leads to the exit to the garage.

¶ 7 In 2009, Green Valley's Board of Directors (Board) voted to install a chairlift in one of the two stairwells to make the building more handicap accessible. Dolecek objected to the installation and voiced her concerns to the Board, however, it proceeded with applying for a building permit from Palos Hills Building Commissioner Eugene Nelson and hired Home Mobility to install the chairlift.

¶ 8 Commissioner Nelson testified in his discovery deposition that Green Valley has a Group R-2 building classification. Therefore, the proper stairway width is dictated by Exception 4 listed in section 1009.1 of the IBC, which allows for a reduction in stairway width in Group R-2 buildings when chairlifts are installed so long as the width clearance is not less than 20 inches. In evaluating the permit request, Commissioner Nelson visited Green Valley but he did not measure the stairway. He explained that Thompson Inspection Services, Inc. (Thompson) conducts elevator inspections for Palos Hills to ensure all elevators and lifts comply with the applicable codes. Thompson reviewed and approved Green Valley's plans for the chairlift. After it was installed, Thompson conducted an inspection and approved the chairlift's compliance with the codes.

¶ 9 Commissioner Nelson further testified that in deciding whether to issue the permit, he consulted with the North Palos Fire Protection District (Fire Department) regarding whether the chairlift allowed for the required clearance. The Fire Department measured the stairway and verbally assured him that the width with the chairlift is greater than 20 inches. In a letter Commissioner Nelson sent to Dolecek during the permit application process, Commissioner Nelson stated that the Fire Department informed him that, although it does not like chairlifts

in stairways, "because of A.D.A. requirements allowing them and the presence of a second stairwell for emergency access, the lifts are allowed."

¶ 10 Additionally, Commissioner Nelson testified that prior to issuing the permit, Home Mobility emailed Douglas Gamble, a State of Illinois Accessibility Specialist, inquiring about whether the use of the chairlift was acceptable in residential facilities. Gable responded that chairlifts are generally acceptable and are in compliance with the Illinois Accessibility Code.

¶ 11 Commissioner Nelson issued the permit on January 12, 2010. Subsequently, the chairlift was installed. The undisputed width clearance of the stairway without the lift is 36 inches. The approximate width of the stairway with the chairlift is between 21.3 and 23 inches when the chairlift is in the upright position. It is undisputed that the stairway clearance with the chairlift is greater than 20 inches.

¶ 12 Dolecek filed a two-count complaint in the circuit court of Cook County pursuant to section 5/11-13-15 of the Illinois Municipal Code, which authorizes individuals to commence actions to enforce ordinance provisions. 65 ILCS 5/11-13-15 (West 2012). In the first count against the Green Valley Estates Condominium Board, Dolecek alleged that the chairlift was installed in a manner that dangerously restricts, obstructs, and interferes with her use of the stairway. She further alleged that the Condominium Board's authorization of the chairlift was a violation of section 4.03 of its declaration and section 1009.1 of the International Fire Code¹ as well as other life safety laws and regulations. She requested that the court restrain, correct, or abate the violation and award attorneys' fees and costs of the litigation.

¹ The Complaint alleges a violation of section 1009.1 of the International Fire Safety Code, however, that provision is actually located in the 2003 International Building Code (10th Printing).

¶ 13 The second count against Home Mobility incorporated the allegations of the first count and further alleged that the chairlift was negligently installed because Home Mobility knew or should have known "that the chair lift they installed violated [l]ife [s]afety [c]odes and could not be safely operated because it interfered with the legally required passage to and from [Dolecek's] condominium to her garage.

¶ 14 Dolecek hired Michael McGreal of Firedyne Engineering, P.C. as an expert. McGreal opined in his discovery deposition that Green Valley has a Group R-2 classification under the IBC. Green Valley cannot be classified as a Group R-3 building because R-3 generally refers to single family homes. McGreal explained that in R-2 buildings, Exception 4 allows stairway width to be reduced when chairlifts are installed within a "dwelling unit." It is undisputed that the chairlift in this case is located in a common area, thus the exception is inapplicable. He further opined that because the Green Valley chairlift reduces the stairway width to approximately 23 inches, it is a clear violation of the IBC. In McGreal's discovery deposition, he discussed a letter from the Office of the State Fire Marshall, which concluded that Exception 4 only applies to Group R-2 buildings when the chairlift is within a dwelling unit.

¶ 15 Green Valley hired Gregory P. Wisniewski, a licensed architect with a National Council of Architectural Registration Board certificate, as an expert. In his discovery deposition, Wisniewski opined that when a building which existed prior to the adoption of the current code applies for a permit, the commissioner must "meld the new code and the old code" in deciding whether to issue the permit. Wisniewski explained that because the building was built according to different standards, the commissioner may use his discretion to vary the IBC as long as the permit complies with the IBC's intent. Wisniewski stated that section 104

of the IBC empowers the commissioner with the discretion to interpret the IBC in these situations.

¶ 16 Thereafter, Dolecek filed a motion for summary judgment against Green Valley and Home Mobility arguing that she is entitled to judgment as a matter of law because the commissioner was not authorized to issue a permit that would allow a violation of the building code and the chairlift impermissibly reduced the stairway width. Green Valley responded by filing a cross-motion for summary judgment, contending that it is entitled to judgment as a matter of law because the IBC empowers the commissioner to render interpretations of the IBC and Commissioner Nelson's determination that the chairlift complied with the IBC was proper. Home Mobility did not file a written response but did argue verbally at a hearing on the matter that if summary judgment is granted on count I, count II should be dismissed.

¶ 17 The trial court granted summary judgment in favor of Green Valley and denied Dolecek's motion. In doing so, it explained that "the court cannot substitute its own judgment for that of a governmental body performing a discretionary act." The court found that Commissioner Nelson did not abuse his discretion in granting the permit and therefore the permit is valid and in compliance with all applicable codes. The court further found that section 5.09 of the Declaration limiting the Board's liability to gross negligence or fraud was not implicated and that section 4.03 was inapplicable because it relates to unit owners who encroach on common spaces, but not to the Board's decision to alter a common area. Thus, the Board did not violate the declaration. Additionally, the court dismissed the count against Home Mobility. Dolecek filed a motion to reconsider, which was denied. Dolecek appeals.

¶ 18

ANALYSIS

¶ 19 We review a trial court's grant of summary judgment *de novo*. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). Summary judgment will only be granted if the "pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005 (c) (West 2012); *Thompson*, 241 Ill. 2d at 438. The pleadings, depositions, admissions, and affidavits must be strictly construed against the moving party. *Feliciano v. Geneva Terrace Estates Homeowners Association*, 2014 IL App (1st) 130269, ¶ 30. The purpose of summary judgment is not to try a question of fact, but to determine if a genuine question of fact exists. *Thompson*, 241 Ill. 2d at 438. "When parties file cross-motions for summary judgment, the court is invited to decide the issue on summary judgment as a matter of law; however, summary judgment is nevertheless inappropriate if factual questions regarding a material issue exist." *Feliciano v. Geneva Terrace Estates Homeowners Association*, 2014 IL App (1st) 130269, ¶ 30 (quoting *William Blair & Co., LLC v. F.I. Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005)).

¶ 20 Section 4.03(a) of the Declaration

¶ 21 Initially, we address Dolecek's contention that the Board violated section 4.03(a) of its declaration by approving the chairlift. The trial court noted that Dolecek omitted relevant portions of section 4.03(a) in her complaint, but then looked to the language in the declaration and found that the Board did not violate this section. Dolecek argues on appeal that the trial court erred because it did not give her the opportunity to address the issue. Here, Dolecek filed a motion for summary judgment and Green Valley filed a cross-motion for summary judgment. In Green Valley's motion, it responded to Dolecek's claim that the Board violated section 4.03 and argued that it is inapplicable to this case because it applies only to

situations where a specific unit owner encroaches upon the common elements. Both parties had an opportunity to respond to the arguments raised in the motions prior to the court's final order, and Dolecek's claim on appeal that she did not have the opportunity to respond is without merit.

¶ 22 Moreover, the Illinois Condominium Property Act authorizes the Board "to provide for the operation, care, upkeep, maintenance, replacement and improvement of the common elements." 765 ILCS 605/18.4(a) (West 2012). The Board maintains that it had the chairlift installed to improve the common stairway. Section 4.03(a) of Green Valley's declaration provides, "that in no event shall a valid easement for any encroachment or use of the Common Elements be created in favor of any Unit Owner if such encroachment or use is detrimental to or interferes with the reasonable use and enjoyment of the Property by any other Unit Owner." The plain language of the declaration makes clear that this section prohibits easements for a specific unit owner if it is detrimental to any other unit owner. That situation is not present here where the chairlift was installed completely within a common area for the benefit of all unit owners. Therefore, Dolecek's claim that the Board violated section 4.03(a) of the declaration must fail.

¶ 23 Alleged IBC Violation

¶ 24 Dolecek additionally contends that the trial court erred in granting summary judgment because there is a factual dispute over whether a code violation exists. She argues that the Office of the State Fire Marshall and her expert witness McGreal both opined that the chairlifts were not compliant with the fire and building codes and could foreseeably create a dangerous condition during a fire or other emergency situation. Specifically, she points to McGreal's opinion that Exception 4 in section 1009.1 of the IBC does not apply because the

lift was installed in a common area, not in an individual unit. In contrast, Green Valley's expert Wisnewski opined that, in this case, because the building was built before the IBC was adopted, the commissioner had the discretion to find that Exception 4 applied and that a 20-inch clearance was sufficient. Dolecek argues that this difference of opinion demonstrates that there are factual disputes that need to be resolved. Green Valley responds that when cross-motions for summary judgment are filed, it is acknowledged that there are no disputed questions of fact.

¶ 25 Regardless of whether cross-motions for summary judgment were filed, if a question of fact exists, summary judgment is not appropriate. *Feliciano v. Geneva Terrace Estates Homeowners Association*, 2014 IL App (1st) 130269, ¶ 30. Here, however, the experts' opinions differed on the application of the IBC. There is no dispute as to the underlying facts that the stairway is 36 inches wide and the chairlift reduced the clearance width of the stairway to approximately 21.5 to 23 inches. Therefore, there are no issues of fact that preclude summary judgment. The relevant inquiry is whether Commissioner Nelson had discretionary authority to find that the reduction in width did not violate the IBC, which is a question of law. See *In re Application for Judgment & Sale of Delinquent Properties for the Tax year 1989*, 167 Ill. 2d 161, 176 (1995).

¶ 26 Commissioner Nelson's Discretionary Authority to Interpret IBC

¶ 27 Dolecek contends that the reduction in width violates the IBC and that Commissioner Nelson did not have authority to issue a permit to Green Valley. Specifically, she maintains that Commissioner Nelson does not have discretionary authority because the power to grant a building permit is vested in the City of Palos Hills. Thus, any attempt to confer the commissioner with this discretionary power is void as an unlawful delegation of power.

Green Valley responds that the Palos Hills Municipal Code properly confers authority on the commissioner to render interpretations of the IBC's provisions.

¶ 28 The Illinois Municipal Code empowers municipalities to adopt a building code, such as the IBC. 65 ILCS 5/1-2-3.1 (West 2012). Palos Hills adopted the IBC in its entirety. Palos Hills City Municipal Code § 15.04.010 (adopted 12-18-2008). The IBC calls for a building official to enforce its provisions. 2003 International Building Code § 104.1 (10th Printing). Section 104 delineates the commissioner's powers and responsibilities and mandates that the commissioner "shall render interpretations" of the IBC. *Id.* Furthermore, the Palos Hills City Municipal Code specifically establishes the position of building commissioner and sets forth the commissioner's qualifications and the procedures for appointment. Palos Hills City Municipal Code §§ 15.04.030 – 15.04.040 (adopted 12-18-2008).

¶ 29 Dolecek points out that despite authorizing legislation, a delegation of authority is void if an official is granted power that is reserved for the City. She contends that "the power of the corporate body is to be exercised by the city in the mode prescribed," however, she fails to elucidate how Palos Hills has gone beyond the prescribed mode. As noted above, the relevant codes provide for a building commissioner with the power to enforce and interpret the IBC.

¶ 30 Dolecek further maintains that "there is nothing in the ordinance which indicates that full discretion was not given to the building inspector" and therefore the delegation of authority to the commissioner is void because it is too broad. In support she cites *Moy v. City of Chicago*, 309 Ill. 242 (1923). *Moy* makes clear, however, that although a legislative body cannot completely delegate its power so that a person's rights are subjected to the arbitrary discretion of an officer, delegation is unobjectionable where the officer is merely determining when the provisions of an ordinance are disobeyed. *Id.* at 580. Further, delegation of

authority is appropriate where the terms under which an official's discretion is to be exercised are set forth in the ordinance. *Id.* In fact, Dolecek recognizes that administrative officers may properly have discretionary powers under the law where the terms of the authority are sufficiently defined (*In re Application for Judgment & Sale of Delinquent Properties for the Tax year 1989*, 167 Ill. 2d at 176), and where the official is guided by intelligible standards (*Hoogasian v. Regional Transportation Authority*, 58 Ill. 2d 117, 130 (1974)).

¶ 31 Here, the IBC provides substantial guidance as to when the commissioner should grant a building permit. See 2003 International Building Code (10th Printing). In fact, the Commissioner is only called to "render interpretations" of the IBC when the language is ambiguous on its face or if the language is ambiguous as it applies to a specific situation, such as where a building was built before the IBC was adopted. Even in those instances, however, the commissioner is required to follow the IBC's intent and is never authorized to waive any of its explicit requirements. 2003 International Building Code §104.1 (10th Printing). These standards combined with the substantial requirements for issuing a permit listed in the IBC sufficiently guide the commissioner in issuing permits. Accordingly, the City of Palos Hills properly vested the commissioner with the authority to interpret the IBC and issue permits accordingly.

¶ 32 Green Valley points out that the commissioner's interpretive duties are discretionary, not ministerial. It contends that when the commissioner is exercising his discretionary power, the court cannot substitute its interpretation of the IBC for that of the commissioner. Dolecek concedes that interpreting the IBC is a discretionary act. (In her brief, she states: "there is nothing in the ordinance which indicates that full discretion was not given to the building inspector."). When reviewing an official's discretionary act, the court may only review the

decision for whether it contravenes a statute or constitution. *Bigelow Group, Inc. v. Rickert*, 377 Ill. App. 3d 165, 175 (2007). "Absent some evidence of illegality, a court will be satisfied that an executive decision was not arbitrary or capricious, and will not inquire further into the propriety of the reasoning behind the decision." *Id.*; See also *Mattson v. Chicago*, 89 Ill. Ap. 3d 378 (1980) ("[W]here performance of an official duty or act involves the exercise of discretion, the administrative action is not subject to review or control by mandamus.") (citing *Kramer v. City of Chicago*, 58 Ill. App. 3d 592, 599 (1978)). Accordingly, we will not substitute our judgment regarding whether installation of the chairlift violated the IBC.

¶ 33 Declaration Provision Limiting Board's Liability

¶ 34 Green Valley contends that the court also granted summary judgment in its favor because section 5.09 in the declaration exempts the Board from liability except in cases of gross negligence or fraud. Review of the trial court's order reveals that the court found that Section 5.09 was not implicated in this case. It is unclear, however, whether that means that the Board was entitled to summary judgment for that reason or whether Section 5.09 does not have an effect in this case because Dolecek's requested relief is an injunction. Because we affirm the judgment on other grounds, we do not address whether section 5.09 of the declaration defeats Dolecek's lawsuit.

¶ 35 Dismissal of Count II

¶ 36 Next, Dolecek contends that the court erred in *sua sponte* dismissing count II of the complaint against Home Mobility.² She argues that Home Mobility did not file a dispositive motion and the court does not have the authority to dismiss a claim without such a motion.

² We note that Home Mobility did not file a response brief in this appeal.

Dolecek asserts that because of the court's *sua sponte* dismissal, she did not have an opportunity to respond. Review of the court's order reveals that the court dismissed Count II against Home Mobility in denying Dolecek's motion for summary judgment. We agree with Dolecek that section 5/2-1005 of the Illinois Code of Civil Procedure does not grant the court authority to *sua sponte* dismiss a claim. 735 ILCS 5/2-1005 (West 2012); *Peterson v. Randhava*, 313 Ill. App. 3d 1, 11 (2000). Although in another case this dismissal may constitute reversible error, under these facts, we find that reversal is not required. Here, rather than acting *sua sponte*, the court was actually responding to Dolecek's motion for summary judgment and Home Mobility's verbal argument that count II could not stand if count I was dismissed. Therefore, Dolecek presented her argument in her motion and had the opportunity to respond to Home Mobility's verbal argument at the hearing.

¶ 37 Further, although Count II asserts a negligence claim, the elements of negligence are not set forth in her complaint. Rather, the complaint alleges that Home Mobility was negligent for installing the chairlift because it should have known that the chairlift obstructs the stairway and violates the codes. In granting summary judgment in favor of Green Valley, the trial court found that the chairlift did not violate the codes or impermissibly obstruct the stairway, and for the reasons herein stated, we agree. Therefore, the trial court was correct that there is no legal basis for count II. Section 2-615 (d) of the Illinois Code of Civil Procedure authorizes the court to enter appropriate orders to terminate the litigation in whole or in part when it makes rulings on motions. 735 ILCS 2-615(d) (West 2012). Therefore, the court should have dismissed count II pursuant to this authority. Nevertheless, dismissal was appropriate.

¶ 38

CONCLUSION

¶ 39 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 40 Affirmed.