2015 IL App (1st) 150436-U

THIRD DIVISION
November 18, 2015

No. 1-15-0436

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES P. MCGINLEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
vs.	)	
	)	
SYSCO CORPORATION,	)	
	)	No. 13 L 13524
Defendant-Appellee,	)	
	)	
(HOB CHICAGO, INC.,	)	The Honorable
	)	John P. Callahan, Jr.
Defendant).	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting defendant's motion to dismiss under section 2-619(a)(9) of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2012)), where plaintiff's complaint failed to establish any duty owed by another vendor who used the same freight elevator at the time that he was injured by its descending doors. Thus, the trial court properly dismissed plaintiff's Third Amended Complaint with prejudice. Affirmed.

¶ 2 This appeal arises from the trial court's order granting a section 2-619(a)(9) motion to dismiss filed by defendant SYSCO Corporation (SYSCO) against plaintiff James P. McGinley (735 ILCS 5/2-619(a)(9) (West 2012)). On appeal, plaintiff contends that the trial court erred in

dismissing the negligence claim because the complaint asserts factual allegations supporting duty, including that SYSCO is a common carrier. Plaintiff also contends SYSCO's employee created an unpredictable danger which caused plaintiff's injury. In addition, plaintiff contends the trial court erred in granting the dismissal of its *res ipsa loquitur* claim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On March 22, 2013, plaintiff was working as a delivery driver at the House of Blues (HOB) in downtown Chicago. In the course and scope of his employment, he was using the establishment's freight elevator to facilitate his delivery of heavy loads of boxes of liquor with a moving dolly. In plaintiff's initial complaint, he sued both HOB Chicago, Inc. and SYSCO, another vendor that was using the same freight elevator that day. The parties engaged in motion practice, with HOB and SYSCO moving to dismiss the complaints and the trial court granting leave to amend the complaint until the Third Amended Complaint was filed. When confronted with SYSCO's motion to dismiss this complaint, the trial court granted the motion and further found that the order was final pursuant to Supreme Court Rule 304(a), and thus, plaintiff could appeal the order. Plaintiff's cause of action against HOB continued.

¶ 5 As stated above, plaintiff filed his Third Amended Complaint in which plaintiff sought to allege that SYSCO owed plaintiff a duty of care and that it negligently failed to protect him from harm. Factually, plaintiff pled that he was delivering boxes of liquor to HOB while using the establishment's freight elevator when its downward descending doors unexpectedly struck him, causing injury. Apparently, SYSCO was also delivering goods to HOB that day, but plaintiff did not plead that any employee of SYSCO was operating the elevator in any way at the time of his injury. In fact, he pled that no one was operating the elevator at that time. Instead, he pled (upon information and belief) that a SYSCO employee had earlier left a key in the elevator which caused the unpredictable danger of the door coming down after a period of time. Plaintiff alleged that he knew that the doors on this particular elevator could only close if the key was

used by a person at that time. Finally, he pled that the doors were open for a lengthy period of time and then surprisingly closed on him while he was wheeling the boxes of liquor out of the elevator.

¶ 6 In addition to the negligence count, the complaint also alleged common carrier negligence on the part of SYSCO, and that under the theory of *res ipsa loquitur*, SYSCO somehow possessed and controlled HOB's elevator and that only its negligence could be attributable for plaintiff's injuries. In response, SYSCO argued that it owed no duty to plaintiff as it did not own the premises or control the elevator. Alternatively, SYSCO also argued that the condition of the elevator closing was open and obvious, which negated any potential duty on its part to warn plaintiff. The trial court dismissed all three counts of the complaint and plaintiff filed a timely notice of appeal.

¶ 7 II. ANALYSIS

¶ 8 A motion to dismiss under section 2-619 of the Code admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). In reviewing a motion to dismiss under section 2-619, the court accepts as true all well-pleaded facts in plaintiff's complaint and any reasonable inferences drawn therefrom. *Purmal v. Robert N. Wadington & Associates*, 354 Ill. App. 3d 715, 720 (2004). The court "must determine whether the existence of a material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is proper as a matter of law." *Carlen v. First State Bank of Beecher City*, 367 Ill. App. 3d 1051, 1056 (2006). Our review of a section 2-619 motion is *de novo*. *Peregrine Financial Group, Inc. v. Futronix Trading, Ltd.*, 401 Ill. App. 3d 659, 660 (2010).

¶ 9 On appeal, plaintiff contends that the trial court erred in dismissing the negligence claim because the complaint asserts factual allegations supporting duty. As detailed above, plaintiff

proffered three separate legal theories of potential liability on the part of SYSCO. In all three theories, plaintiff was required to prove that defendant owed plaintiff a duty of care. As the following analysis will show, SYSCO owed no duty to plaintiff and his complaint was properly dismissed.

¶ 10 In order to recover damages in a common law negligence case, plaintiff must set forth a duty, a breach of that duty and injury proximately caused by the breach. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 63. In a classic duty analysis, one looks to see if the parties stood in such a relationship to one another that the law would impose a duty on defendant. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). Here, plaintiff apparently seeks to argue that the factual circumstances somehow created an affirmative duty on SYSCO's part to protect him. Unfortunately for plaintiff, he has quite simply not pled that SYSCO or its employee was aware at any time of plaintiff's activity in the elevator in any context that would impose any duty of care. There are no allegations of any connection between the activities of SYSCO's delivery man and plaintiff.

¶ 11 Under the well pled facts of plaintiff's complaint, the elevator in question was owned by HOB, which also owned the premises upon which the occurrence took place. SYSCO was in the building in the same legal capacity as plaintiff, as a business invitee. As such, the owner of the building and the elevator owed certain duties to plaintiff while he was on the premises. See *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 16 (as the operator of a business, a business owner owes plaintiff, his invitee, a duty to exercise reasonable care to maintain his premises in a reasonably safe condition for use by plaintiff). On the other hand, plaintiff and his employer had no legal relationship with SYSCO, even by virtue of the fact that they had been working in the same building on the same date. *Cf.*

Simpkins v. CSX Transportation, Inc., 2012 IL 110662, ¶ 20 (a duty may arise when there is a special relationship that is independent of the specific situation such as a "common carrier and passenger, innkeeper and guest, custodian and ward, and possessor of land who holds it open to the public and member of the public who enters in response to the possessor's invitation" as well as "a parent-child relationship and a master-servant or employer-employee relationship"). SYSCO meets none of the aforementioned special relationships and was not a common carrier as plaintiff suggests. While HOB allowed both delivery men use of its freight elevator for deliveries, there are absolutely no factual allegations pled to establish HOB permitted SYSCO use of its freight elevator for a public undertaking. See *Doe v. Rockdale School District, No. 84*, 287 Ill. App. 3d 791, 793 (1997) (longstanding authority in Illinois has held that a common carrier is "one who undertakes for the public to transport from place to place such persons or goods of such as choose to employ him for hire").

¶ 12 Further, despite being granted leave to file three amended complaints, plaintiff was singularly unable to properly plead any legal duty on the part of SYSCO or its delivery person to protect plaintiff. SYSCO properly asserts, there is no legally cognizable duty on the part of its delivery man to "remain in the elevator or to operate the elevator for the benefit" of plaintiff. Plaintiff did not allege that he was working in concert with SYSCO's employee, that this person was somehow responsible for the operation of the elevator when plaintiff was doing his job, that SYSCO's employee was aware that plaintiff would be using the elevator or even that their delivery activities overlapped. Accordingly, plaintiff can establish no duty under a common negligence theory.

¶ 13 Plaintiff also contends that SYSCO's employee created an "unpredictable danger" because the employee "misused" the elevator key or "upon information and belief, left the key in

the elevator." While there is no legal duty to anticipate the negligence of others, an individual does owe a duty of care to guard against injuries which flow as the "reasonably and foreseeable consequence" of that individual's actions. *Simpkins*, 2012 IL 110662 at ¶ 19. If a court finds that the defendant, by his act or omission, contributed to a risk of harm to the plaintiff, it weighs the following four factors to determine whether a duty ran from the defendant to the plaintiff: "(1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant." *Stearns v. Ridge Ambulance Service*, Inc., 2015 IL App (2d) 140908, ¶ 10.

¶ 14 In the *case sub judice*, plaintiff pleads no factual allegations that establish SYSCO's employee, by his act or omission, contributed to a risk of harm. Indeed, as SYSCO properly highlights, plaintiff's complaint avers that "no one" was operating the freight elevator at the time plaintiff was injured. Laying inference upon inference, plaintiff argues that SYSCO's delivery man "mis-used" the elevator key in a way that allowed his injury to occur. This facile conclusion does not in any way lead to an inference that SYSCO owed a duty of care to plaintiff. The elevator only operates if there is a key in place, so whether a key was left by a previous user or inserted by the current user, it cannot amount to a "misuse." Thus, plaintiff pled no factual allegations that created a duty which flowed from a foreseeable consequence created by a SYSCO employee's actions. Therefore, we need not consider whether there was an open and obvious condition. See *Park v. Northeast Illinois Regional Commuter R.R. Corp*., 2011 IL App (1st) 101283, ¶ 13 ("the existence of a duty in the face of a known or obvious condition is subject to the same analysis of a duty as is necessary in every claim of negligence ").

¶ 15 Plaintiff finally contends SYSCO owed defendant a duty under the *res ipsa loquitur* doctrine. The purpose of the *res ipsa loquitur* doctrine is to allow proof of negligence by

circumstantial evidence when the direct evidence concerning cause of injury is primarily within the knowledge and control of the defendant. *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 338 Ill. App. 3d 812, 816 (2003). The doctrine, however, cannot apply unless a duty of care is owed by the defendant to the plaintiff. *Heastie v. Roberts*, 226 Ill. 2d 515, 532 (2007) ("the requisite control is not a rigid standard, but a flexible one in which the key question is whether the probable cause of the plaintiff's injury was one which the defendant was under a duty to the plaintiff to anticipate or guard against"). As we have already established, SYSCO owed plaintiff no duty, and thus, his claim for *res ipsa loquitur* fails. Consequently, the trial court properly dismissed plaintiff's Third Amended Complaint.

¶ 16 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 17 Affirmed.