2015 IL App (2d) 150175-U
No. 2-15-0175
Order filed November 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

TONYA B., as Mother and Next Friend of Y.B., a Minor, Plaintiff-Appellant, v. BCH EMERALD, LLC d/b/a EMERALD COURTS APARTMENTS, WILMETTE REAL ESTATE & MANAGEMENT COMPANY LLC, and CAMEEL HALIM, Individually, Defendants-Appellees (Jose L. Chagala, Defendant).	)	Appeal from the Circuit Court of Du Page County. No. 12-L-1166 Honorable Ronald D. Sutter, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Previously pled counts not included in the amended complaints are forfeited for review by this court. The trial court did not err by denying plaintiff's motion to conduct discovery. The trial court properly granted defendants' motion for section 2-615 dismissal of the general negligence count in plaintiff's third-amended complaint based on the failure to plead sufficient facts to establish that the sexual abuse by defendants' employee in the laundry room was reasonably foreseeable. Affirmed.

¶ 2 This appeal involves the dismissal of the third-amended complaint brought by plaintiff, Tonya B., as the mother and next friend of the minor, Y.B., an 11-year-old girl who was allegedly sexually abused by defendant, Jose L. Chagala, an employee of BCH Emerald, LLC d/b/a Emerald Courts Apartments, and Wilmette Real Estate & Management Company LLC (defendants), the owners and operators of an apartment complex where the abuse allegedly took place. Plaintiff sued defendants and Cameel Halim, individually, for negligence and sought damages as a result of the sexual abuse by Chagala. After the initial complaint and each amended complaint thereafter, the trial court granted defendants' motions to dismiss under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2012)). The third-amended complaint was dismissed with prejudice and plaintiff appealed. She contends the various counts in the four complaints were dismissed in error. Plaintiff also argues that the trial court erred by denying her motion to conduct discovery. We affirm.

¶ 3 I. FACTS

¶ 4 On October 16, 2012, plaintiff filed a four-count complaint to recover damages as a result of the sexual contact between Y.B. and Chagala, over a three-month period between October 2010 and January 1, 2011. Counts I and II were brought against defendants (except for Cameel Halim, who was later dismissed with prejudice), alleging that they negligently hired and supervised Chagala, who was an undocumented alien employed to perform maintenance and landscaping at the apartment complex where plaintiff and Y.B. lived. Counts III and IV alleged that Chagala committed sexual assault and battery after grooming Y.B., who was then 11 years old, with gifts and unsupervised contact.

¶ 5 Defendants filed a section 2-615 motion to dismiss the complaint alleging that counts I and II failed to state causes of action for negligent hiring and negligent supervision. They maintained

that the complaint lacked well-pleaded facts showing that defendants knew or should have known that Chagala had any sexual proclivities, that his status as an undocumented alien put them on notice that he presented harm to others, or that he had any criminal history that, if discovered, would have put them on notice. On April 16, 2013, the trial court dismissed plaintiff's complaint without prejudice.

¶ 6 On May 15, 2013, plaintiff filed a motion to reconsider asserting, among other things, that the trial court misapplied section 2-615 standards. Plaintiff filed a motion for leave to conduct discovery of defendants' personnel records, pursuant to Illinois Supreme Court Rule 201(d) (eff. July 1, 2001), asserting that, without the records, plaintiff was "at a significant disadvantage to set forth meaningful" allegations in the complaint. The trial court denied plaintiff's motions to reconsider and for leave to conduct discovery and gave plaintiff leave to file an amended complaint.

¶ 7 Plaintiff filed a first amended complaint, adding Cameel Halim as a party-defendant and setting forth claims labeled "negligent hiring", "negligent supervision", and "implied warranty of habitability" against defendants in counts I, II, and III, respectively, and for assault and battery against Chagala in counts IV and V. The first amended complaint did not refer to or incorporate by reference the dismissed counts of the original complaint.

¶ 8 On December 4, 2013, plaintiff filed a motion for leave to issue subpoenas to various law enforcement and governmental agencies. Defendants filed a section 2-615 motion to dismiss counts I, II, and III and a response opposing plaintiff's motion to issue subpoenas.

¶ 9 On December 9, 2013, the trial court granted, in part, and denied, in part, plaintiff's motion to issue subpoenas. It allowed plaintiff to issue subpoenas to the Village of Woodridge Police Department, the Du Page County State's Attorney Office, and the Du Page County Children's

Center for all records relating to any "occurrence" relating to Y.B. and any defendants between May 1, 2010, and January 1, 2011, including Du Page County case No. 2011 CF 22, with all records to be tendered to the trial court.

¶ 10 On February 19, 2014, the trial court dismissed Halim with prejudice, dismissed counts I (negligent hiring) and II (negligent supervision) without prejudice, and dismissed count III (implied warranty of habitability) with prejudice. The trial court granted plaintiff leave to file a second-amended complaint by March 27, 2014.

¶ 11 On April 1, 2014, plaintiff filed a four-count, second-amended complaint. This complaint had only two counts against defendants: count I for negligence and count II for negligent supervision. The second-amended complaint did not include Halim as a party-defendant and did not refer to or incorporate by reference the dismissed counts of the original and first-amended complaints. Counts III and IV repeated the assault and battery claims against Chagala.

¶ 12 Defendants filed another section 2-615 motion to dismiss counts I and II with prejudice. The trial court dismissed counts I without prejudice and II with prejudice and ordered plaintiff to file a third-amended complaint by August 21, 2014.

¶ 13 On August 26, 2014, plaintiff filed a three-count, third-amended complaint. The third-amended complaint had only one count against defendants, which alleged negligence. Counts II and III alleged sexual assault and battery against Chagala.

¶ 14 Count I of the third-amended complaint, like the prior pleadings, alleged the following. Plaintiff resided with her daughter at the apartment complex at all relevant times. Defendants owned, operated, managed, maintained, or controlled the apartment complex, including the common areas and laundry room. Defendants hired Chagala to perform maintenance and/or

landscaping work in and around the complex prior to October 2, 2010, and he lived in an apartment on the premises.

¶ 15 Chagala communicated with and had unsupervised contacts with minor tenants online via Facebook. Beginning in June 2010, Chagala engaged in sexual grooming of plaintiff's daughter by having repeated unsupervised contact with her and giving her gifts. On one or more occasions between October 2010 and January 1, 2011, Chagala committed the offense of predatory criminal sexual assault, attempt predatory criminal sexual assault, solicitation of a minor, and exploitation of Y.B., by engaging in illegal, non-consensual, forceful, and violent anal and vaginal sexual intercourse upon Y.B., and illegal, non-consensual, forceful, and unwanted licking and touching of the breasts of Y.B., in and around the complex.

¶ 16 Plaintiff also alleged that, at the time in question, defendants operated a "for-profit laundering facility on the premises," in which defendants "allowed the general public access to the for-profit laundering facility," and that defendants "solicited plaintiff to use its for-profit laundering facility prior to October 1, 2010," and that at least one of Chagala's sexual assault occurrences took place within defendants' for-profit laundering facility. Plaintiff alleged that in the preceding three months, three sexual assaults had taken place elsewhere at the apartment complex and had been reported to the Woodridge Police Department.

¶ 17 The complaint referred to three police reports of sexual assault by an unknown Hispanic male but did not set out the particulars of the prior assaults, except to note that in one instance a man reached through the window to fondle a woman's breast and that the assailant had damaged her window screen. Plaintiff further alleged that, after learning of the attack, defendants had agreed to install "some type of mechanism to block the window from being fully opened."

¶ 18 Plaintiff alleged that defendants owed plaintiff and Y.B a duty to exercise reasonable care for their safety while they were invitees on the premises of defendants' laundering facility; that defendants were aware of three preceding sexual assaults in their complex in the three months prior to the assault on Y.B., and undertook measures to prevent further sexual assaults, such as installing a window block mechanism, and that defendants breached their duty of care to plaintiff and Y.B. by one or more of the following:

> (1) failing to install security cameras; (2) failing to restrict access to the laundry room to adults and supervised minors; (3) failing to provide adequate lighting; (4) failing to provide security windows or otherwise make the interior of the laundry facility visible to those outside the laundry facility; (5) failing to warn plaintiff of prior acts of violent crime on the premises; (6) failing to protect its invitees from the criminal acts of its own employees; (7) failing to adequately supervise its employees; (8) failing to supervise and train their employees; and (9) failing to implement a policy relating to the conduct of employees in relation to minors.

¶ 19 Plaintiff alleged that, as a direct and proximate result of one or more or all of the acts or omissions of defendants, Y.B. sustained bodily and emotional injuries, medical expenses, pain and suffering, and loss of a normal life. The complaint did not refer to the dismissed counts in the three previous complaints.

¶ 20 Defendants filed a section 2-615 motion to dismiss count I of the third-amended complaint, which the court granted. On January 22, 2015, the trial court granted the motion to dismiss with prejudice. At the hearing on the motion to dismiss, plaintiff asked the court if it would reconsider granting the motion to dismiss with prejudice and allow her to file a fourth-amended complaint. The court noted that plaintiff had proposed a number of different theories, *i.e.*, a theory of

negligent hiring, negligent supervision, and negligence. But, in the court's opinion, based on what it had seen and the facts that had been pled in all of the various pleadings, it did not believe that plaintiff would be able to state a cause of action. The court dismissed count I against defendants with prejudice and, because the claims of assault and battery against Chagala remained pending, the court found no just reason to stay enforcement or delay appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 21 Plaintiff timely appeals.

¶ 22 II. ANALYSIS

¶ 23 A. Abandonment of Claims

¶ 24 Plaintiff contends that the trial court erred in dismissing the original, first-amended, second-amended, and third-amended complaints. Defendants argue that, because nothing in the third-amended complaint referred to or adopted the dismissed counts of the claims set forth in the prior pleadings, which were dismissed and had not been re-pleaded, plaintiff forfeited review of the dismissal of these counts of the original, first-amended, and second-amended complaints on appeal. Whether a plaintiff has preserved for review a dismissed count is a question of law that we review *de novo*. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 17.

¶ 25 We find that plaintiff has forfeited review of the sufficiency of those claims not included in her third-amended pleading. The record reveals that plaintiff's initial complaint alleged negligent hiring and negligent supervision. The first-amended complaint alleged the same claims along with a count of breach of implied warranty of habitability. The second-amended complaint alleged general negligence and negligent supervision. The third-amended complaint only alleged a claim of general negligence. The law affirmatively establishes that counts not

included in an amended complaint, or at a minimum referred to in the amended complaint, are forfeited.

¶ 26 The supreme court's decision in *Foxcroft Townhome Owners Association v. Hoffman Rosner Corporation*, 96 Ill. 2d 150 (1980), is instructive. In that case, the relevant issue was whether the plaintiffs forfeited their right to object to the trial court's rulings on the original complaint by filing an amended complaint that failed to restate or incorporate by reference two counts that were pled in the original complaint. *Id*. at 153. The supreme court recognized the well-established principle "that a party who files an amended pleading waives any objection to the trial court's ruling on the former complaints." *Id*. The court held that an amended complaint that fails to refer to or adopt a prior pleading generally causes the earlier pleading to cease being part of the record for most purposes, "being in effect abandoned and withdrawn." *Id*. at 154; *Bonhomme*, 2012 IL 112393, ¶ 17.

¶ 27 Plaintiff argues that the holding in *Foxcroft* should not apply because it is an unduly harsh senseless formality. Plaintiff cites the dissent in *Foxcroft* in support of her argument. However, as it is well-established in Illinois, a dissenting opinion is not binding on this court and therefore, plaintiff's reliance upon the dissent is not useful. We are bound to follow the majority holding in *Foxcroft*. See *Winnebago County Citizens for Controlled Growth v. County of Winnebago*, 383 Ill. App. 3d 735, 748-49 (2008).

¶ 28 Citing *Zurich Insurance Company v. Baxter International Inc.*, 275 Ill. App. 3d 30 (1995), plaintiff maintains that *Foxcroft* does not apply to procedural issues regarding previously filed complaints. Plaintiff appears to equate the trial court's denial of plaintiff's discovery motion, which she filed after the dismissal of the original complaint but before filing any amended complaints, as a procedural error barring the application of the *Foxcroft* rule.

¶ 29 In *Zurich*, the plaintiff filed a declaratory judgment action seeking a determination of its rights and obligations under various insurance contracts it entered with the defendants. The defendants argued that, under *Foxcroft*, the plaintiff waived the necessary parties, representation, and class actions issues by failing to reallege them in subsequent amended complaints. We observed that *Foxcroft* involved a plaintiff who failed to reallege substantive factual matters supportive of particular theories of recovery; whereas the issues in *Zurich* involved procedural matters defining the scope, not the substance, of the litigation. *Zurich*, 275 Ill. App. 3d at 36. Here, the trial court's denial of a discovery motion did not define the scope of the litigation to the extent that plaintiff's failure to reallege certain theories is excused. Similar to *Foxcroft*, plaintiff filed a third-amended complaint that failed to reallege substantive factual matters supporting particular theories of recovery.

¶ 30 In sum, plaintiff filed a third-amended complaint that included a single count of general negligence and failed not only to include negligent hiring, negligent supervision, and breach of implied warranty of habitability, but also failed to even refer to or incorporate those counts in the pleading. Consequently, plaintiff has forfeited review by this court of the sufficiency of those abandoned claims.

¶ 31 B. Supreme Court Rule 201(d) Motion

¶ 32 Plaintiff contends that the trial court erred by denying her motion to conduct discovery pursuant to Rule 201(d). After plaintiff's initial complaint had been dismissed, but before plaintiff filed the first-amended complaint, she filed a motion to reconsider and a motion to conduct discovery.

¶ 33 A discovery order is generally "reviewed for a manifest abuse of discretion." *Norskog v. Pfiel*, 197 Ill. 2d 60, 70 (2001). But where the question to be decided is one of law, our

review is *de novo*. *Id*. at 71. The question we must decide is whether a trial court can order discovery when there is no complaint on file. This is a question of law, which we review *de novo*. *Allen v. Peoria Park Dist*., 2012 IL App (3d) 110197, ¶ 9.

¶ 34 Rule 201(d) provides that, prior to the point that "all defendants have appeared or are required to appear," no discovery shall be initiated without leave of the court granted upon good cause shown. Ill. S. Ct. R. 201(d) (eff. July 1, 2002). According to plaintiff, it was proper to initiate discovery after defendants had appeared. However, there are two problems with plaintiff's argument.

¶ 35 First, since there was no complaint pending when the motion was filed, the trial court could not determine whether the discovery request was " 'relevant to any issue in the case.' " *Allen*, 2012 IL App (3d) 110197, ¶ 10 (quoting *Owen v. Mann*, 105 Ill. 2d 525, 530 (1985)). Second, plaintiff's argument concerning this motion is centered on the trial court's dismissal of the negligent hiring and negligent supervision counts set forth in the initial complaint, both of which have been abandoned by plaintiff. Accordingly, the trial court did not err in denying plaintiff's motion to compel discovery.

¶ 36 C. Negligence

¶ 37 The only issue properly before us on appeal is the trial court's section 2-615 dismissal of the general negligence count in the third-amended complaint. The trial court determined that plaintiff failed to plead sufficient facts to establish that the abuse was reasonably foreseeable. We agree with the trial court.

¶ 38 A section 2-615(a) motion presents the question of whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a

cause of action upon which relief may be granted. *Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 16. "[A] cause of action should not be dismissed pursuant to section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006); *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 8 (To survive a section 2-615 motion a " 'plaintiff must allege facts sufficient to bring a claim within a legally recognized cause of action.' " (quoting *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009))). In ruling on a section 2-615 motion, the court only considers (1) those facts apparent from the face of the pleadings, (2) matters subject to judicial notice, and (3) judicial admissions in the record. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005); *Thurman*, 2011 IL App (4th) 101024, ¶ 8. A section 2-615(a) motion dismissal is reviewed *de novo*. *Doe-3*, 2012 IL 112479, ¶ 15.

¶ 39 In order to recover in an action for negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury to the plaintiff proximately caused by the breach. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). The existence of a duty is a question of law and, in determining whether a duty exists, the trial court considers whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party. *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 215 (1988).

¶ 40 A landowner generally has no affirmative duty to protect persons on his property from the criminal activity of third parties (*Iseberg v. Gross*, 227 Ill. 2d 78, 87 (2007)), except if (1) there exists a special relationship between the injured party and the property owner, and (2) the criminal attack was reasonably foreseeable (*Sameer*, 343 Ill. App. 3d at 86).

¶ 41 Illinois law recognizes four special relationships that will impose upon a property/business owner a legal duty to warn or protect a person from harm, *i.e.*, (1) carrier-passenger; (2) innkeeper-guest; (3) business invitor/invitee; and (4) one who voluntarily takes custody of another in such a manner that it deprives the person of his normal opportunities for protection. *Lutz v. Goodlife Entertainment, Inc.*, 208 Ill. App. 3d 565, 569 (1990).

¶ 42 Foreseeability under ordinary negligence standards means that which is objectively reasonable to expect, not merely what might conceivably occur. *Hills v. Bridgeview Little League Ass'n***,** 195 Ill. 2d 210, 238 (2000). In addition, "[s]erious crimes are generally unforeseeable because they are different in nature from what employees in a lawful occupation are expected to do." *Wright v. City of Danville,* 174 Ill. 2d 391, 405 (1996).

¶ 43 Here, the only relationship pled was that of a business invitee in the "for profit" laundry facility operated by defendants in the apartment complex. Specifically, plaintiff alleged that defendants owed plaintiff and her daughter a duty to exercise reasonable care for their safety while in the laundry room where one of the acts of abuse occurred. Plaintiff alleged various ways in which defendants breached this duty to exercise reasonable care by failing to install security cameras, adequate lighting, and window block mechanisms, and by limiting public access to the laundry room. Nothing in the complaint alleges how the conditions of the property facilitated the criminal activities of Chagala and how defendants could reasonably foresee this abuse taking place in the laundry room. Plaintiff alleged that defendants were aware of three incidents of sexual assault taking place on the premises just before the abuse began. Again, the only potentially viable cause of action alleged in the third-amended complaint was specific to an incident taking place in the "for profit" laundry facility. Yet, plaintiff did not allege facts tending to show that defendants should have been aware of the

potential for abuse to take place in that location. In particular, there are no facts about the condition of the laundry room that would make it reasonably foreseeable that a sexual assault by Chagala would occur there.

¶ 44 Plaintiff's reliance on *Marshall* is distinguishable. In that case, a motorist in the defendants' parking lot backed into a lamppost. When she drove forward, the accelerator stuck and the car crashed through the restaurant, killing a patron inside. *Marshall*, 222 Ill. 2d at 425. The decedent's father alleged that the defendants were negligent in designing, constructing, and maintaining the restaurant. *Id*. at 424. The defendants argued that the plaintiff had failed to state a cause of action because defendants had no duty to protect the decedent from such an accident. *Id*. at 427. The trial court granted the motion, the appellate court reversed and remanded, and the supreme court affirmed the appellate court. *Id.* at 424.

¶ 45 The supreme court held that the defendants owed the plaintiff the duty of care that a business invitor owes to invitees to protect them against the unreasonable risk of physical harm because it was "reasonably foreseeable, given the pervasiveness of automobiles, roadways, and parking lots, that business invitees will, from time to time, be placed at risk by automobile-related accidents." *Id*. at 442-43. The court stated that, regardless of whether there had been prior similar incidents, the defendants had reason to know that the negligence of third persons was likely to endanger its customers based on the place and character of the defendants' business. *Id*. at 445-46.

¶ 46 The *Marshall* court faced a different set of facts and law than the present case. *Marshall* did not involve a crime committed by a third party on property owned, managed, maintained, or controlled by a defendant. The *Marshall* court faced a question based on the duty of care that a business invitor owes to invitees and whether it was reasonably foreseeable to

the business owner that a motorist could lose control and crash a vehicle into a building, because of the place and character of the business owner's building, given "the pervasiveness of automobiles, roadways, and parking lots." *Id.* at 442. The *Marshall* court did not analyze what facts must be pled to impose on others a duty of ordinary care to protect against third-party criminal attacks.

¶ 47 On appeal, plaintiff argues that the trial court abused its discretion in denying her further leave to amend. At the hearing on defendants' section 2-615 motion to dismiss the third-amended complaint, plaintiff asked the court for leave to file a fourth-amended complaint, but she did not file a motion for leave to file a proposed fourth-amended complaint or submit a proposed amended complaint. The trial court denied her oral request and dismissed count I of the third-amended complaint with prejudice. In her notice of appeal, plaintiff failed to request that this court grant her leave to amend her complaint. Thus, we are not in a position to say that justice would be done by granting leave to amend and we cannot say that the trial court abused its discretion in denying her leave to amend. See *Continental Building Corporation v. Union Oil Company*, 152 Ill. App. 3d 513, 515 (1987).

¶ 48 III. CONCLUSION

¶ 49 For the preceding reasons, we affirm the judgment of the circuit court of Du Page County.

¶ 50 Affirmed.