2015 IL App (2d) 150316-U
No. 2-15-0316
Order filed December 8, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARK HARRELD and JUDITH HARRELD, Plaintiffs, v. LOU BUTLER, Defendant and Cross-Defendant. (Community Contacts, Defendant; DVBC, Inc. Defendant, and Cross-Plaintiff and Third-Party Plaintiff-Appellant; The City of Elgin, ABC Roofing and Siding of Illinois, Inc., and Anytime Roofing and Siding of Illinois, Inc., Third-Party Defendants-Appellants.)	)	Appeal from the Circuit Court of Kane County. No. 11-L-0668 Honorable F. Keith Brown, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed contractor's third-party complaint for contribution for failure to state a claim and on tort immunity grounds.

¶ 2 Defendant, cross-plaintiff, and third-party plaintiff DVBC, Inc. (DVBC), a construction contractor, appeals the dismissal of its third-party complaint against the City of Elgin (the City). We affirm.

¶ 3 DVBC's third-party complaint against the City is an adjunct to a personal injury suit pending in the trial court. Relevant here, defendant, Lou Butler, owns a single-family home with a detached garage in Elgin. The house needed repairs and in November 2009, Butler sought financial assistance from the City, which administers a program for the rehabilitation of owner-occupied single-family residences using funds provided by the U.S. Department of Housing and Urban Development (HUD). Under the program, private homeowners meeting a standard of need make individual agreements with private contractors for the repair or improvement of their homes. See Elgin Municipal Code, ch. 2.30.050 (1976). If the City also approves the agreement, then the work goes forward and the city reimburses the homeowner, with federally provided funds, for all or a portion of the work. *Id*.

¶ 4 In response to Butler's request for financial assistance, a city inspector performed a "housing evaluation" of Butler's home. Thereafter, on November 16, 2009, a representative of the City wrote Butler, informing him that he would need to repair a number of exterior surfaces to receive funds through the City's program including tearing off the old roof and re-roofing the house and the garage, new gutters and downspouts, new paint, new doors and windows, added storm windows, and a new garage door. Included with the letter was a "Residential Rehabilitation Program" inspection form; each box on the form contains a subheading that references a relevant section of the International Property Maintenance Code, which the City has adopted. See Elgin Municipal Code, ch. 16.12.010 (1976).

¶ 5 The City's letter to Butler also indicated that he could contact one of the approved local contractors on a list included with the letter. Butler contacted DVBC, and DVBC began to put together a bid for the work on Butler's house. Since DVBC "does not perform roof and/or gutter repair work," it contacted plaintiff Mark Harreld, owner and operator of ABC Roofing and Siding

of Illinois, Inc. (ABC Roofing), as a potential subcontractor for an estimate on Butler's house and garage. Harreld arrived at Butler's residence on the afternoon of December 1, 2009. No one was home, and there is no allegation that anyone was working with or otherwise supervising Harreld. While inspecting the roof of Butler's garage, Harreld fell through the roof and was seriously injured. Butler returned home, discovered Harreld, and summoned medical assistance.

¶ 6 Notwithstanding the incident with Harreld, DVBC ultimately submitted a $12,500 bid for the work on Butler's house. The City and Butler accepted the bid, and on December 17, 2009, Butler and the City signed an agreement whereby the City would compensate Butler $10,000 upon satisfactory completion of the repairs. The work was completed and, in May 2010, the City sent Butler a check for the subsidy.

¶ 7 In 2011, Harreld and his wife sued Butler on a theory of premises liability, and DVBC for negligently failing to warn him that Butler's roof was unsafe. In response to the complaint, DVBC filed a cross-claim against Butler, a third-party complaint for contribution against ABC Roofing and Anytime Roofing and Siding of Illinois, Inc. (another company that allegedly employed Harreld), and an amended third-party complaint for contribution against the City. DVBC's amended third-party complaint alleged that the City owed a duty to the Harrelds because it "acted as a general contractor" and "voluntarily undertook the entire residence repair process" of Butler's home. DVBC also alleged that the City breached its duty to the Harrelds by negligently evaluating Butler's residence, planning and authorizing the budget for the repairs, and "over[seeing] the repairs."

¶ 8 The City filed a combined motion to dismiss the amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619.1 (West 2012)). First, the City contended under section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) that DVBC's

complaint failed to adequately plead the City owed a "special duty" to Harreld, a necessary predicate to a negligence suit against the City as a municipal corporation. See *Zimmerman for Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 32 (1998). Second, the City contended that DVBC's claims against the City should be dismissed under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2012)) as barred by a statute, the Local Governmental and Governmental Employees Tort Immunity Act (the Act) (745 ILCS 10/1-101 *et seq.* (West 2012)), which immunizes certain conduct by municipal employees and municipalities.

¶ 9 In response, DVBC argued that its complaint sufficiently alleged a special duty was owed and, further, that the Act only immunized the City for "inspection[s]." Here, however, DVBC argued that, because the City's stated in its letter to Butler that it had performed a housing "evaluation" of the property, the City has conceded as a matter of law that it did not perform an immunized "inspection." To support its point that an evaluation is distinct from an inspection, DVBC supplied a definition for each term in the trial court; the definitions were nearly identical.

¶ 10 After a hearing, the trial court granted the City's motion to dismiss on both section 2-615 and section 2-619 grounds. The court found that DVBC had not adequately pled that the City owed a special duty to Harreld, and even if the City had pled as much, it was protected by the Act from tort liability. The court also dismissed DVBC's inspection-versus-evaluation argument as "nothing but semantics."

¶ 11 DVBC appealed, but it did so without a proper immediate-appealability finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), and we dismissed the appeal. *Harreld v. Butler*, 2014 IL App (2d) 131065. DVBC returned to the trial court, obtained a proper Rule 304(a) finding, and the matter is now before us on the merits of the trial court's dismissal. We affirm.

¶ 12 As noted, the trial court dismissed DVBC's amended complaint on section 2-615 and

section 2-619 grounds. A motion to dismiss under section 2-615 of the Code challenges the legal sufficiency of a complaint based on defects apparent on its face, while a motion to dismiss pursuant to section 2-619 admits the legal sufficiency of the complaint, but asserts an affirmative matter beyond the face of the complaint which defeats the claim. *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 15. A complaint may be dismissed on either ground and we review such dismissals *de novo*. *Id*.

¶ 13 We first address the trial court's dismissal of DVBC's amended third-party complaint against the City for common law negligence under section 2-615 of the Code. "Under section 2-615, the critical question is whether the allegations in the complaint, construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted." *Jane Doe-3*, 2012 IL 112479, ¶ 16.

¶ 14 In a common law negligence action, the plaintiff must establish that defendant owed plaintiff a duty, for unless a duty is owed there can be no recovery in tort. *Borcia v. Hatyina*, 2015 IL App (2d) 140559, ¶ 24. In addition, because DVBC's amended third-party complaint alleged negligence on the part of the City, a municipal corporation, DVBC's complaint faced the additional burden of establishing, *inter alia*, that Harreld was under the "direct and immediate control of municipal employees or agents" when he was injured. *Ries v. City of Chicago*, 242 Ill. 2d 205, 225 (2011); see also *Zimmerman for Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 45 (1998). Like the trial court, we determine that the DVBC failed to carry that burden.

¶ 15 Our supreme court has held that "a person is under the direct and immediate control of a municipality if a municipal employee who is acting with official authority which private citizens would reasonably believe they cannot refuse (such as a police officer's authority) makes a request of the private citizen and the citizen complies with the request" and is injured. *Burdinie v. Village*

of Glendale Heights, 139 Ill. 2d 501, 509 (1990), *overruled in part on other grounds by McCuen v. Peoria Park District*, 163 Ill. 2d 125 (1994). Accordingly, direct and immediate control has been found where a motorist was struck by oncoming traffic while following a police officer's instructions during a traffic stop (*Leone v. City of Chicago*, 156 Ill. 2d 33, 40 (1993)), but not where an adult swimmer was injured following a municipal swimming instructor's command to "jump" into the shallow end of a concrete pool (*Burdinie*, 139 Ill. 2d at 526-27). In the latter case, the court found there was no direct and immediate control because the "[p]laintiff voluntarily joined the swimming class. He was not forced to jump into the pool, nor was he ordered or instructed to jump by a person whom he could have reasonably believed he must obey." *Id*.

¶ 16 The degree of control alleged in DVBC's complaint is even more attenuated than that in *Burdinie*. The complaint does not allege that Harreld was ordered onto Butler's roof by a City employee who possessed police-officer-like authority. There is no allegation that a City official supervised Harreld while he prepared an estimate for Butler's house; there is no allegation that any City employee had any communication with Harreld at all. In its briefs, DVBC points out that the City inspected Butler's house and sent Butler a letter notifying him of the requirements of the residential rehabilitation program should he wish to participate, but we find DVBC's reliance on both points unpersuasive. That the City inspected the house and communicated with *Butler* does not warrant the inference that the City had "direct and immediate control" over *Harreld* when the roof collapsed. See *Ware v. City of Chicago*, 375 Ill. App. 3d 574, 584 (2007) (victims of porch collapse were not under direct and immediate control of building inspectors at the time of collapse). From all that appears in the complaint and exhibits, Harreld voluntarily accepted DVBC's request for an estimate, voluntarily went to Butler's home, and voluntarily ascended the roof over Butler's garage.

¶ 17 Parenthetically, we note that DVBC's also relies on what it calls the "corporate function exception" to argue that the City was engaged in a proprietary endeavor (for which it is liable) and not a "traditional" governmental function (for which it would only possibly be liable). See, *e.g.*, *Thames v. Board of Education of City of Chicago*, 269 Ill. App. 3d 210 (1994). We find DVBC's reliance on this point unpersuasive, however, as our supreme court abandoned the governmental/proprietary function distinction in *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 190-192 (1997).

¶ 18 Accordingly, we agree with the trial court that DVBC's complaint failed to satisfy the direct and immediate control requirement and failed to state a claim. The complaint was, therefore, properly dismissed under section 2-615 of the Code.

¶ 19 In the interest of a complete resolution of this case, we will also address the dismissal of DVBC's complaint on tort immunity grounds under section 2-619(a)(9) of the Code. Immunity pursuant to the Act is an affirmative matter that warrants the dismissal of a complaint under section 2-619. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54.

¶ 20 Below, the trial court found that the City was immune under section 2-105 of the Act, which states:

> "A local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its own, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety." 745 ILCS 10/2-105 (West 2012).

Section 2-105 immunity extends to a municipality's failure to warn of a dangerous condition once it is discovered or to ensure that the hazard is abated. See, *e.g.*, *Hess v. Flores*, 408 Ill. App. 3d 631, 648 (2011); *Ware*, 375 Ill. App. 3d at 584; *Rascher v. City of Champaign*, 262 Ill. App. 3d 592, 596

(1994). Interpretation of the Act is a question of law, which we review *de novo*. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 493 (2001).

¶ 21 Emphasizing the last clause of section 2-105, DVBC argues that section 2-105 only immunizes "inspection[s]", which it defines (without authority) as "passive *** determinations of code compliance [for] fitness or hazards" to the exclusion of the City's evaluation of Butler's home to determine its eligibility for the residential rehabilitation program. The argument essentially asks us to read a limitation into the Act, which we will not do. See *Village of Bloomingdale*, 196 Ill. 2d at 493 (courts will not read limitations into the Act that the legislature did not express).

¶ 22 Furthermore, like the trial court, we also reject DVBC's attempt to limit section 2-105's use of the word "inspection" by comparing it to the word evaluation. Our supreme court has rejected similarly weak arguments. See, *e.g.*, *Ries*, 242 Ill. 2d at 219 ("We agree with the City that [the plaintiff's argument] is mere semantics designed to avoid a clearly applicable immunity.").

¶ 23 Here, the plain language of section 2-105 clearly immunized the City. Pursuant to section 2-105, the City is immune when it conducts an inspection to determine "whether the property complies with *** *any enactment*" (emphasis added) (745 ILCS 10/2-105), and the City's residential rehabilitation program is an enactment; as noted earlier, it is part of the City's municipal code (*supra* ¶ 3 (citing Elgin Municipal Code, ch. 2.30.050 (1976)). In addition, whether one calls the examination of Butler's property an "inspection" or an "evaluation," the City's "*Inspection* Form" (emphasis added) clearly referenced the International Property Code, which was also adopted by the City, again by enactment. *Supra* ¶ 4 (citing Elgin Municipal Code, ch. 16.12.010 (1976)). Thus, the City's inspection of Butler's property and any liability arising therefrom falls squarely within section 2-105's grant of immunity.

¶ 24 Last, DVBC also argues that section 2-105 is inapplicable because the City's alleged negligence arose not from an inspection, but from the City's "oversight" of the "construction and/or repair" on Butler's house. At oral argument, DVBC also maintained that the City's liability arose from its agreement with Butler for the repair of his home, asserting that the City had acted as a general contractor. DVBC ignores that, per its complaint, at the time of Harreld's injury there was no agreement between the City and Butler and no construction was taking place. The agreement came two weeks *after* Harreld was injured and the construction was undertaken and completed in the months that followed. That the City and Butler ultimately signed an agreement, and that DVBC ultimately performed the work, does not affect our analysis of immunity at the time Harreld was injured. When Harreld was injured while preparing his estimate, he was at most a potential subcontractor for a potential general contractor, DVBC. Even if we accept DVBC's tenuous analogy that the City was somehow a *de facto* general contractor, Harreld's injuries were still caused (allegedly) by the City's negligent inspection, and thus immunized under section 2-105 of the Act. The trial court, therefore, correctly found that the City was immune from liability under section 2-105 of the Act and correctly dismissed DVBC's third-party complaint under section 2-619 of the Code as well.

¶ 25 For these reasons we affirm the judgment of the circuit court of Kane County.

¶ 26 Affirmed.