2018 IL App (1st) 171017-U
No. 1-17-1017
Order filed March 27, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

AARON SEALS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 6860
	)	
JEWEL-OSCO,	)	Honorable
	)	John P. Callahan, Jr.,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it granted defendant's section 2-615 motion to dismiss plaintiff's personal injury complaint with prejudice on the basis that plaintiff failed to sufficiently plead that defendant had a duty to protect and warn about a third party's criminal conduct. The trial court did not abuse its discretion when it denied plaintiff's motion to reconsider.

¶ 2 Plaintiff Aaron Seals appeals from the trial court's orders dismissing his amended personal injury complaint with prejudice under section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)) and denying his motion to reconsider. Seals contends that his amended complaint pled sufficient facts to support the duty element and the trial court

erred in granting defendant Jewel-Osco's section 2-615 motion to dismiss before discovery had closed. Seals also contends the court erred when it denied his motion to reconsider because the motion presented "newly discovered information" demonstrating that Jewel-Osco was on notice of prior criminal activity at its store such that it had a duty to Seals.

¶ 3 We affirm. The amended complaint lacks facts that sufficiently support the reasonable foreseeability of the theft and Seals' resulting injuries from pursuing the offender so as to impose a duty on Jewel-Osco to protect and warn him. Also, Seals brought his discovery motion after the trial court granted the motion to dismiss, and thus, the trial court never had the opportunity to exercise its discretion to rule on discovery before granting dismissal. Finally, Seals' motion to reconsider did not establish the existence of newly discovered evidence.

¶ 4 Background

¶ 5 In his amended complaint, Seals alleges that he and his wife were shopping at a Jewel-Osco's store when "another patron" stole his wife's purse. Seals pursued the offender through the store, yelled for assistance, and "struggled" with the offender at the store's entrance. Seals alleged that he did not receive assistance from store employees or security guards and, as a result, he suffered injuries. Seals asserted that Jewel-Osco had a duty to use reasonable care in the "ownership, operation, maintenance, control and security service provided on the premises."

¶ 6 Seals further alleged that Jewel-Osco knew or should have known that the offender "was dangerous and had on multiple occasions committed criminal acts on the premises and that her presence posed a danger to anyone present on the premises." Seals claimed Jewel-Osco failed to provide proper security by failing, for instance, to remove and monitor "dangerous persons" from the premises. As a result of Jewel-Osco's negligent acts or omissions, Seals experienced pain and suffering and incurred medical expenses.

¶ 7 Jewel-Osco moved under section 2-615 to dismiss the amended complaint, arguing, among other grounds, that, even assuming Seals had a business invitee relationship with Jewel-Osco, he "must still allege facts sufficient" for the trial court "to infer that the criminal attack was reasonably foreseeable." According to Jewel-Osco, Seals' allegations showed that he "was injured only after he voluntarily chose to pursue" the offender who stole his wife's purse and did not support that Jewel-Osco had a duty "to protect Plaintiff from injuries he sustained when he voluntarily chose to pursue" the offender. Seals responded that he alleged specific facts to establish a special relationship between the parties and to support that the attack was foreseeable and Jewel-Osco was aware of prior criminal activity at the store.

¶ 8 The trial court issued a written order granting Jewel-Osco's section 2-615 motion to dismiss with prejudice, finding that Jewel-Osco owed no duty of care. It determined that Seals' allegations of "known criminal activity" at Jewel-Osco's store were "speculative and conclusory" and "devoid of any specific facts," and Seals "failed to plead a single fact that would show Defendant was on notice of the need to police its premises." The trial court also found that, "[w]ithout factual support that would show known criminal conduct, the purse snatching incident ***is nothing but the unforeseeable criminal conduct of a third party, for which there is no duty to warn or protect." The trial court noted that Seals could have filed an Illinois Supreme Court Rule 191(b) affidavit seeking discovery "of past purse snatchings and other known criminal activity" at the store but waived this discovery by responding to the motion to dismiss and standing on his pleadings.

¶ 9 Thereafter, Seals filed a motion to compel, requesting Jewel-Osco produce its response to Seals' discovery and make a corporate representative available for a discovery deposition about incidents of criminal conduct. The trial court struck Seals' motion due to lack of jurisdiction.

Seals then filed a motion to reconsider the motion to dismiss, arguing that he could demonstrate that, before the incident, "criminal activity was occurring on the premises of the Jewel Osco." Seals attached as an exhibit a Chicago Police Department "report," which was a five-page document containing the header "CLEAR Data Warehouse Service Calls Search." The report shows service calls that came in for the store's address. Under the headers "Initial Dispatch," "Final Dispatch," and "Final Disposition," there is a short description of the occurrence for each date, such as assault, theft, "holding offender," and "EMS." Seals argued the "report" showed that, between May and October of 2015, seven acts of criminal conduct occurred at the store. Seals also argued that Jewel-Osco "failed to raise any argument related to past incidents of criminal conduct on the premises" and "the parties have already agreed that the Plaintiff has plead [*sic*] a sufficient duty." The trial court denied the motion to reconsider.

¶ 10 Analysis

¶ 11 As preliminary matters, we note that the record on appeal does not contain the transcripts of the proceedings before the trial court. Also, Jewel-Osco indicated in its motions filed with the trial court that the correct name for defendant is "New Albertson's, Inc.," and it was incorrectly sued as "Jewel-Osco."

¶ 12 Seals asserts that the trial court abused its discretion by ruling on the motion to dismiss before discovery closed, as discovery would have demonstrated incidents of criminal activity that occurred at the store before the incident here. Seals further asserts his amended complaint pled sufficient facts to establish the element of duty. He requests we reverse the trial court's ruling granting Jewel-Osco's section 2-615 motion to dismiss with prejudice, and remand for further proceedings.

¶ 13 Seals also contends the trial court erred by denying his motion to reconsider. Seals claims that the CPD "reports" or "log" attached to his motion to reconsider show prior acts of criminal conduct, including "thefts, batteries, and assaults as well as one offender who was being held, presumably by security or store employees as a result of criminal activity." Seals argues these reports show that Jewel-Osco "knew or should have known of criminal activity in and around its stores" and the "purse snatching was foreseeable criminal conduct." He claims this "newly discovered information" showed Jewel-Osco awareness of prior criminal activity at the store and thus it had a duty to protect customers against criminal acts on its premises.

¶ 14 Section 2-615 Motion to Dismiss

¶ 15 A motion to dismiss under section 2-615 "challenges the legal sufficiency of the complaint by alleging defects on the face of the complaint." *C.H. v. Pla-Fit Franchise, LLC,* 2017 IL App (3d) 160378, ¶ 12. On review, "we accept as true all well-pleaded facts in the complaint and all reasonable inferences therefrom" (*C.H.,* 2017 IL App (3d) 160378, ¶ 12) and "construe the allegations in the complaint in the light most favorable to the plaintiff" (*Marshall v. Burger King Corp*., 222 Ill. 2d 422, 429 (2006)). We should not dismiss a claim unless "no set of facts can be proved which would entitle the plaintiffs to recover." *Iseberg v. Gross*, 227 Ill. 2d 78, 86 (2007). But, "Illinois is a fact-pleading jurisdiction," and, therefore, plaintiffs "must allege facts, not mere conclusions, to establish their claim as a viable cause of action." *Iseberg*, 227 Ill. 2d at 86.

¶ 16 We review a trial court's ruling on a section 2-615 motion *de novo* and may affirm the court's ruling "on any basis appearing in the record." *Lewis v. Heartland Food Corp*., 2014 IL App 1st 123303, ¶ 7.

¶ 17 To state a cause of action for negligence, a plaintiff must allege facts to show that (i) the defendant owed a duty of care, (ii) the defendant breached that duty, and (iii) an injury was proximately caused by that breach. *Lewis*, 2014 IL App 1st 123303, ¶ 8. Whether a defendant owed a duty is a question of law. *Iseberg*, 227 Ill. 2d at 86.

¶ 18 Generally, a business owner does not have a "duty to protect persons on his property from the criminal activity of third parties." *Sameer v. Butt*, 343 Ill. App. 3d 78, 86 (2003). There are, however, four special relationships, such as that between a business inviter and invitee, which will impose on a business owner a "legal duty to warn or protect a person from harm." *Sameer*, 343 Ill. App. 3d at 86. Even if a special relationship exists between the parties, "no duty to protect against criminal acts will be imposed unless the incident should reasonably have been foreseen by the landowner." *Sameer*, 343 Ill. App. 3d at 86 (2003).

¶ 19 To determine "whether a duty exists, reasonable foreseeability of harm is the primary concern." *Popp v. Cash Station, Inc.*, 244 Ill. App. 3d 87, 93 (1992). "In addition to the injury being reasonably foreseeable, it must have resulted from the same risk as was present in the prior incidents of criminal activity." *Ignarski*, 271 Ill. App. 3d at 527. "Generally, foreseeability is established through prior criminal attacks on the premises." *Id.* at 526. See Comment f to Section 344 of the Restatement (Second) of Torts (1965) (describes business owner's duty to police premises as it relates to prior knowledge of criminal activity).

¶ 20 We conclude that the trial court did not err in dismissing the amended complaint. While Seals pled sufficient facts that Jewel-Osco had a special relationship (business inviter and invitee), he failed to plead sufficient facts to support the conclusion that the theft and Seal's resulting injuries from pursing the offender were reasonably foreseeable so as to impose a duty on Jewel-Osco to protect and warn Seals.

¶ 21 The amended complaint alleged that Jewel-Osco "knew or should have known that Mr. Seals[']s assailant was dangerous and had on multiple occasions committed criminal acts on the premises and that her presence posed a danger to anyone present on the premises." We agree with the trial court—this allegation is speculative and conclusory, and is unsupported by any facts. Accordingly, the amended complaint fails to sufficiently plead that Jewel-Osco owed a duty to protect Seals. See *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 735 (2009) (in reviewing section 2-615 motion to dismiss, "conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted").

¶ 22 CPD Report and Motion to Reconsider

¶ 23 Seals refers to the "CPD reports" attached to his motion to reconsider as supporting his contention that Jewel-Osco should have known about seven prior incidents of criminal activity that took place at or around the store before the incident. Seals asserts that the trial court "abused its discretion by making its ruling before discovery was closed" as the discovery would have shown the prior criminal activity at Jewel-Osco's store. None of these alleged prior acts of criminal activity appear in the amended complaint or in Seals' response to the motion to dismiss.

¶ 24 First, "[t]he notion that plaintiffs are permitted to plead an action against a defendant before they are possessed of sufficient information to satisfy each element of the claim runs counter to Supreme Court Rule 137, which requires that all pleadings be well grounded in fact to the best of the pleader's knowledge, information and belief after reasonable inquiry." *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1051 (1998) (rejecting plaintiff's argument that defendants' section 2-615 motion to dismiss was "premature before discovery").

¶ 25 Further, nothing in the record shows that during the proceedings on Jewel-Osco's motion to dismiss, Seals requested a continuance to allow him to obtain or complete discovery so that he

could add specific factual allegations about prior criminal activity at the store. Instead, Seals filed a response to Jewel-Osco's motion to dismiss, knowing that he had relevant unanswered discovery pending.

¶ 26 Seals had mailed his initial interrogatories after Jewel-Osco filed its motion to dismiss the amended complaint, asking Jewel-Osco about criminal activity at the store within the last five years. The copy of the interrogatories is undated; however, the affidavit of Dominique Mabrey attached to Jewel-Osco's motion to compel attests that plaintiff mailed his initial discovery to Jewel-Osco before he filed his response to Jewel-Osco's motion to dismiss, that is, before having received Jewel-Osco's responses to his interrogatories. He waited until after the court dismissed his amended complaint before moving to compel Jewel-Osco to respond to the interrogatories. Thus, the trial court never had the opportunity to exercise its discretion to rule on any discovery motion before it granted the motion to dismiss. See *Evitts v. DaimlerChrysler Motors Corp.,* 359 Ill. App. 3d 504, 513-14 (2005) (trial court should "not refuse a discovery request and grant a motion to dismiss" if it "reasonably appears discovery might assist the nonmoving party," and we will not disturb trial court's ruling on discovery motion unless it is a "manifest abuse of discretion"). Thus, we are unpersuaded by Seals' argument that the court "abused its discretion" when it ruled on Jewel-Osco's section 2-615 motion to dismiss "before discovery was closed."

¶ 27 Seals also asserts that the trial court improperly, *sua sponte*, raised the argument that Seals' amended complaint did not put Jewel-Osco "on notice to provide security to its customers on the premises." The trial court's order granting Jewel-Osco's motion to dismiss found Seals "failed to plead a single fact that would show Defendant was on notice of the need to police its premises." Citing to *Lustig v. Horn*, 315 Ill. App. 3d 319, 328-29 (2000), Seals contends Jewel-Osco "waived" this argument, as it was raised for the first time before the trial court in its reply

brief, not in "its initial brief." Seals argues the trial court should not have "allowed" Jewel-Osco "to argue in its reply brief a totally new theory."

¶ 28 *Lustig* is irrelevant, as it addressed the rule that, on appeal, "points raised and argued for the first time in a reply brief are waived." *Lustig*, 315 Ill. App. 3d at 328-29. Seals' is not arguing Jewel-Osco improperly raised the issue on appeal. Further, Jewel-Osco, as appellee, did not file a reply brief, let alone raise a new issue. Lastly, Jewel-Osco did raise the issue in its motion to dismiss when it argued that Seals failed to establish duty because his "allegations do not support the imposition of a duty on" Jewel-Osco. The trial court's conclusion that Seals failed to allege facts to show that Jewel-Osco was "on notice" of the criminal activity and thus the need to police its premises addressed Jewel-Osco's duty argument as a result of the business invitee relationship. See Restatement (Second) of Torts § 344 (1965).

¶ 29 Seals' argument that the trial court erred when it denied his motion to reconsider fails too. "The purpose of a motion to reconsider is to bring to the court's attention a change in the law, an error in the court's previous application of existing law, or newly discovered evidence that was not available at the time of the hearing." *People v. $280,020 U.S. Currency*, 372 Ill. App. 3d 785, 791 (2007). " 'Newly discovered' evidence is evidence that was not available prior to the hearing and trial courts should not allow litigants to stand mute, lose a motion, and then frantically gather evidentiary material to show that the court erred in its ruling." *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1078 (2007). We review the trial court's ruling on a motion to reconsider that "was based on new matters" under an abuse of discretion standard. *Muhammad v. Muhammad-Rahmah*, 363 Ill. App. 3d 407, 415 (2006).

¶ 30 Seals' motion to reconsider was based on allegedly "newly discovered evidence," specifically on prior incidents of criminal activity at the store demonstrated by CPD "reports."

Seals claimed the reports showed seven prior acts of criminal conduct at the store, thus supporting the allegations in his amended complaint that Jewel-Osco know of criminal activity there. But, Seals' motion to reconsider did not demonstrate why the alleged CPD "reports" were unavailable when he drafted his amended complaint or responded to the motion to dismiss. His assertion that he was unable to include the information in his amended complaint because he was "now aware of these additional attacks" and "there had been no information discovered" regarding the crimes on Jewel-Osco's premises does not suffice to establish that the material was newly discovered evidence. We conclude that the trial court did not abuse its discretion when it denied Seals' motion to reconsider.

¶ 31 We recognize that Seals claimed in his motion to reconsider that he propounded his "initial discovery," but that Jewel-Osco had not responded when the trial court ruled on the motion to dismiss. Seals has not demonstrated that he could only obtain these reports through taking discovery on Jewel-Osco. Indeed, it is apparent that since the reports were generated by the CPD, they could have been readily obtained from that source via a timely subpoena. Further, as discussed, Seals fails to provide a reasonable explanation for why he had not requested a continuance before the court's ruling on the motion to dismiss or filed a discovery motion compelling Jewel-Osco respond.

¶ 32 Accordingly, because Seals has failed to establish that the CPD "reports" or "information" constitute newly discovered evidence, the trial court did not abuse its discretion when it denied Seals' motion to reconsider. *Emrikson v. Morfin,* 2012 IL App (1st) 111687, ¶ 30 ("In the absence of a reasonable explanation regarding why the evidence was not available at the time of the original hearing, the circuit court is under no obligation to consider it.").

¶ 33 Affirmed.