2019 IL App (1st) 180961-U

SIXTH DIVISION
June 28, 2019

Nos. 1-18-0961 & 1-18-0962 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HCOLD, INC.,	)	
	)	Appeal from the
	)	Circuit Court of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	15 L 9900 & 15 L 011390
	)	
ROUNDY'S ILLINOIS LLC d/b/a MARIANO'S,	)	
and ROUNDY'S SUPERMARKETS, INC., a	)	Honorable John P. Callahan,
Wisconsin Corporation,	)	Judge Presiding.
	)	
	)	
Defendants-Appellees.	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's grant of third-party defendants' section 2-619(a)(9) motion to dismiss as to Roundy's Illinois was proper pursuant to its waiver of the workers' compensation lien; trial court's grant of section 2-619(a)(9) motion as to Roundy's Supermarkets was not proper because Roundy's Supermarkets did not produce affirmative matter indicating it was also the employer for purposes of lien waiver; and evidence refuting the third-party complainant's allegation of direct participant exception did not qualify as affirmative matter for purposes of section 2-619(a)(9); affirmed in part, reversed in part, and cause remanded.

¶ 2 Hcold, Inc., previously known as Hollymatic Corporation (Hcold), filed a claim for contribution against Roundy's Illinois LLC (Roundy's Illinois) and Roundy's Supermarkets, Inc. (Roundy's Supermarkets). The plaintiffs in the underlying case were employees of Roundy's Illinois, and were injured while operating a machine manufactured by Hcold. The plaintiffs sued Hcold. Hcold then filed a third-party complaint for contribution arguing that Roundy's Supermarkets and Roundy's Illinois were negligent for: failing to train employees; removing components from the machines and altering their design; failing to provide employees with operator's manuals; and failing to implement proper safety procedures. Roundy's Supermarkets and Roundy's Illinois filed a joint section 2-619 (735 ILCS 5/2-619 (West 2016)) motion to dismiss. The trial court granted the joint motion and Hcold now appeals. For the following reasons, we affirm in part and reverse in part.

¶ 3 BACKGROUND

¶ 4 The plaintiffs in the underlying case filed a complaint against Hcold as the manufacturer of a meat patty-making machine, seeking to recover damages for injuries allegedly sustained while working at Roundy's Illinois stores. On July 11, 2017, Hcold filed an amended third-party complaint for contribution against Roundy's Illinois and Roundy's Supermarkets alleging that: (1) the plaintiffs in the underlying lawsuit were employees of Roundy's Illinois; (2) Roundy's Supermarkets was the parent corporation of Roundy's Illinois; (3) Roundy's Supermarkets purchased, owned, or supplied the machines at issue; and (4) Roundy's Supermarkets maintained equipment and workplace safety at Roundy's Illinois. Hcold further argued that Roundy's Supermarkets was negligent for failing to: implement training policies and procedures; provide the employees with operator's manuals for the machines; and properly conduct safety walk-throughs of the store.

¶ 5 On September 6, 2017, Roundy's Illinois and Roundy's Supermarkets filed a joint section 2-619 motion to dismiss the third-party complaint. In the motion, Roundy's Illinois agreed to "waive its full lien on both [plaintiffs'] recoveries in their respective lawsuits against Hcold." Third-party defendants also argued that the addition of Roundy's Supermarkets to the lawsuit as a parent company did not prevent a dismissal based on a waiver of the workers' compensation lien. This motion was supported by the affidavit of William L. Dowling, "Vice President, Corporate Counsel for Roundy's Supermarkets, Inc." Dowling asserted in his affidavit that Roundy's Illinois is a wholly owned subsidiary of Roundy's Supermarkets, and that the entities "are the same for purposes of asserting the operable Workers' Compensation liens as to both Plaintiffs."

¶ 6 On November 28, 2017, Hcold filed its response to third-party defendants' motion to dismiss. Hcold stated that the motion failed to delineate which of the two separate entities – Roundy's Illinois or Roundy's Supermarkets – actually held the workers' compensation lien. Hcold admitted that if Roundy's Illinois was the plaintiffs' employer, it could waive its workers' compensation lien and extinguish contribution claims against it, but alleged that the motion to dismiss did not support this finding because "the third-party defendants refuse to identify the plaintiffs' actual employer." Therefore, Hcold argued, the motion to dismiss should be denied. Hcold further argued that a parent corporation can be held liable for negligence under the "direct participant liability" theory and is not afforded protection under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2016)).

¶ 7 On January 30, 2018, third-party defendants filed a reply, stating that Roundy's Illinois is a subsidiary of the parent company, Roundy's Supermarkets, and that because the workers' compensation benefits were paid to the plaintiffs in the underlying case by Roundy's Illinois,

"with funds allocated by the parent company," both Roundy's Illinois and Roundy's Supermarkets should be allowed to waive the workers' compensation lien and be dismissed from the case. Third-party defendants further argued that even if Roundy's Supermarkets could not waive the lien, it was not liable under a theory of direct participant liability because its participant liability only rose to the level of activities incidental to ownership.

¶ 8 On March 30, 2018, Hcold filed a sur-reply to third-party defendants' reply, contending that Roundy's Supermarkets and Roundy's Illinois were not "one and the same" for purposes of employer immunity. Hcold further argued that Roundy's Supermarkets directly participated in the purchase of the machines at issue and all aspects of workplace safety. Hcold argued that Roundy's Supermarkets was responsible for purchasing the hamburger patty machines, and instructed vendors to discuss all prices and job quotes only with Roundy's Supermarkets. Hcold argued that paper feeds were removed from all machines after Roundy's Supermarkets purchased the machines, but it was undetermined whether Roundy's Supermarkets or Roundy's Illinois removed them. Hcold contended that an employee of Roundy's Supermarkets investigated the accidents of both plaintiffs in the underlying case. Hcold argued that employees of Roundy's Illinois were trained on the machine in question via videotape, but it was undetermined who provided the videotaped training.

¶ 9 On April 10, 2018, third-party defendants filed a response to Hcold's sur-reply, arguing again that both Roundy's Illinois and Roundy's Supermarkets were entitled to "waive and walk." They also reiterated that if Roundy's Supermarket was not able to "waive and walk," it did not fall under the "direct participant liability" exception to the general rule that parent corporations are not liable for the acts of their subsidiaries because its participation in Roundy's Illinois was incidental.

¶ 10 On April 19, 2018, the trial court entered an order simply stating, "This matter coming before the Court on Third-Party Defendants' Rule 2-619 Motion to Dismiss the Third-Party Complaint, and the Court having been fully apprised of the issues therein, it is hereby ordered *** that Third-Party Defendants' Rule 2-619 Motion to Dismiss the Third-Party Complaint is granted." If a hearing was held on this matter, the transcript has not been provided to this court. Hcold now appeals.

¶ 11 ARGUMENT

¶ 12 On appeal, Hcold contends that the trial court erred in granting third-party defendants' section 2-619 motion to dismiss because (1) Roundy's Illinois and Roundy's Supermarkets cannot both be the employer for purposes of a workers' compensation lien waiver, and (2) if Roundy's Supermarkets is not the employer for purposes of lien waiver, Hcold properly pled a cause of action for negligence against Roundy's Supermarkets under the direct participant theory of liability.

¶ 13 As an initial matter, we note that although third-party defendants' motion to dismiss did not delineate which specific subsection of section 2-619 that it was brought under, they claim in their appellee brief that it was brought pursuant to section 2-619(a)(9). A motion for involuntary dismissal under section 2-619(a)(9) admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action. 735 ILCS 5/2-619(a)(9) (West 2016). When ruling on a section 2-619(a)(9) motion, the court construes the pleadings in the light most favorable to the nonmoving party, and should only grant the motion "if the plaintiff can prove no sets of facts that would support a cause of action." *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8.

¶ 14 In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits. *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). The question on appeal is " 'whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law.' " *Id*. at 185-86 (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)). Our standard of review of a motion to dismiss under section 2-619 of the Code is *de novo*. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000).

¶ 15 Our first question is whether third-party defendants have articulated an affirmative matter that would defeat Hcold's third-party complaint. Our supreme court has described an affirmative matter as "some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action,' " (*Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120-21 (2008) (quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d at 115)), and " 'something in the nature of a defense which negates the cause of action completely" (*Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003) (quoting *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 486 (1994))). For example, the existence of a tort immunity or a plaintiff's lack of standing is a proper affirmative matter pursuant to section 2-619(a)(9) as each completely defeats the plaintiff's ability to successfully prosecute a claim against the defendant. See *Smith*, 231 Ill. 2d at 121; *Jackson v. Randle*, 2011 IL App (4th) 100790, ¶ 12.

¶ 16 An affirmative matter does not include evidence upon which defendant expects to contest an ultimate fact stated in the complaint. *Smith*, 231 Ill. 2d at 121. Affirmative matter is not the defendant's version of the facts as such a basis merely tends to negate the essential allegations of the plaintiff's cause of action. *Id*. at 120-22. Accordingly, section 2-619(a)(9) does not authorize the defendant to submit affidavits or evidentiary matter for the purpose of contesting the

plaintiff's factual allegations and presenting its version of the facts. *Id*. at 121-22. Where a defendant seeks to address the complaint's factual allegations, a summary judgment motion pursuant to section 2-1005 of the Code is the proper vehicle. *Howle v. Aqua Illinois, Inc*., 2012 IL App (4th) 120207, ¶ 37.

¶ 17 Under the Act, employers compensate their employees for job-related injuries or illnesses, regardless of fault. 820 ILCS 305/1 *et seq*. (West 2016). In return for not having to prove fault, employees receive only workers' compensation benefits from their employers and cannot sue their employers to receive more damages. 820 ILCS 305/5(a) (West 2016). Sometimes, however, parties other than an employer might cause an employee to be injured at work. An employee in this situation can sue these third parties for damages. 820 ILCS 305/5(b) (West 2016) ("Where the injury or death for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act."). These third parties can in turn seek contribution from the employer, thereby pulling the employer into the suit. *Id*.

¶ 18 If the employee ends up recovering money from a third party for a work-related injury, that would imply that the employer was not solely responsible for the accident. So Illinois law gives the employer a lien on any recovery that an employee obtains from a third party for a work-related injury. 820 ILCS 305/5(b) (West 2016). However, an employer can escape contribution liability altogether by waiving its lien on an employee's recovery from third parties. See *LaFever v. Kemlite Co*., 185 Ill. 2d 380, 404 (1998). An employer who takes this option can

no longer share in damages that the employee recovers from a third party. However, the employer can be certain that its only payment obligation will arise under workers' compensation.

¶ 19 Here, Roundy's Illinois and Roundy's Supermarkets both alleged waiver of the workers' compensation lien in order to avoid liability for contribution. However, Hcold argues on appeal that Roundy's Illinois and Roundy's Supermarkets never specified which entity was the "employer" of the underlying plaintiffs for purposes of waiver. Hcold alleges that both entities cannot be considered the employer, and that the affidavit by Dowling stating that the funds to pay for workers' compensation were allocated from Roundy's Supermarkets did not establish that they were both the "employer" for purposes of waiver. Third-party defendants do not cite any case law for their argument that both entities can be considered the employer for purposes of lien waiver.

¶ 20 We find our supreme court's analysis in *Forsythe v. Clark USA, Inc*., 224 Ill. 2d 274 (2007), to be helpful in this case. In *Forsythe*, two men were killed while working at a refinery owned and operated by Clark Refining. The estate of each decedent received payment from Clark Refining pursuant to the Act. Subsequently, the special administrators of the decedents' estates filed suit against Clark Refining and Clark Refining's parent company, Clark USA. Clark USA argued that the exclusivity provision in the Act (820 ILCS 305/5(a) (West 2016)) rendered it immune from liability. *Forsythe*, 224 Ill. 2d at 296. Our supreme court held that it was Clark Refining "who actually employed the decedents. As such it is Clark Refining, not Clark USA, that should enjoy the exclusive remedy provision of the [Act]. We decline to allow Clark USA to pierce its own corporate veil." *Id*. at 298.

¶ 21 While *Forsythe* dealt with section 5(a) of the Act instead of 5(b), we find the same reasoning to apply to the case at bar. There is no dispute that Roundy's Illinois actually

employed the plaintiffs in this case. Both parties admit to that in their pleadings. Accordingly, Roundy's Illinois was properly dismissed from the case via its section 2-619 motion because it waived its workers' compensation lien, thereby shielding it from liability to Hcold. However, Roundy's Supermarkets cannot pierce its own corporate veil, and we find that the Act does not automatically immunize Roundy's Supermarkets from liability. There is simply nothing in the section 2-619 pleadings or attachments to those pleadings that establish that Roundy's Supermarkets is free from liability because of its status as employer, aside from Dowling's conclusory statement in his affidavit that the entities were "the same for purposes of asserting the operable Workers' Compensation liens as to both Plaintiffs." This does not amount to an affirmative matter that would defeat the third-party complaint. Accordingly, Roundy's Supermarket should not have been dismissed on the basis of lien waiver under section 2-619(a)(9).

¶ 22 The question then becomes whether Roundy's Supermarket was properly dismissed under section 2-619(a)(9) for a reason other than lien waiver. Hcold argues that if Roundy's Supermarkets was immune from liability because of lien waiver, it was nevertheless liable for contribution under the "direct participant" exception to the general rule that parent corporations are not responsible for the wrongdoings of their subsidiaries. This narrow exception to the general rule is rooted in a 1929 law review article written by then-professor William O. Douglas, in which he stated that liability is imposed on a parent corporation in those limited situations where the parent is directly a participant in the wrong complained of. *Forsythe*, 224 Ill. 2d at 282-83 (citing Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L.J. 193, 208 (1929)). Douglas wrote that such liability attaches where the parent uses its ownership control to interfere in the internal management of the subsidiary, thereby overriding

the independent discretion of the managers of the subsidiary. *Id*. Our supreme court in *Forsythe* explained:

> "The key elements to the application of direct participant liability *** are a parent's specific direction or authorization of the manner in which an activity is undertaken and foreseeability. If a parent company specifically directs an activity, where injury is foreseeable, that parent could be held liable. Similarly, if a parent company mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken, it can be liable for foreseeable injuries." *Id*. at 290.

¶ 23 The court noted that although "[p]arent companies are free to craft overall business and budgetary strategies" for their subsidiaries, they "must not interfere directly in the manner their subsidiaries undertake certain activities such that the subsidiaries are not longer free to utilize their own expertise." *Id*. at 291. Activities that do not give rise to liability include: "monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures." *Id*. at 303.

¶ 24 Hcold maintains that "[j]ust as in *Forsythe,* [Hcold] properly pleaded in its third-party complaint that Roundy's Supermarkets directly participated in conduct at the two Roundy's Illinois stores in question that caused or contributed to the plaintiffs' injuries." Specifically, Hcold alleges that Roundy's Supermarkets "directly engaged in activity involving safety and oversight and was negligent for failing to train the plaintiffs, failing to provide the plaintiffs with operator's manuals for the machines, failing to maintain the machines, removing components from the machines, failing to properly conduct safety walk-throughs, failing to ensure that

untrained Roundy's Illinois employees were not operating the machines and failing to transmit its safety program to Roundy's Illinois."

¶ 25 Third-party defendants argued in their motion to dismiss that Roundy's Supermarkets did not directly participate in the complained-of wrong doing. They attached several deposition transcripts in support of their motion, all of which alleged facts that indicated employees from Roundy's Supermarket did not have as much involvement in activities at Roundy's Illinois as alleged by Hcold. We find that Roundy's Supermarkets did not properly assert an affirmative matter that completely barred Hcold's cause of action against it. Rather, it presented evidence to contest Hcold's factual allegations regarding direct participation. See *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 42. Such a fact-based motion is properly treated under summary judgment, not involuntary dismissal. *Id*. Accordingly, we find that Roundy's Inc. should not have been dismissed on a section 2-619(a)(9) motion, and we remand for further proceedings.

¶ 26 Affirmed in part and reversed in part.
Cause remanded.