

NOTICE  
Decision filed 01/04/19. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (5th) 180148-U

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 5-18-0148

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JAMES AGEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Madison County.
	)	
v.	)	No. 16-L-815
	)	
MADISON COUNTY,	)	Honorable
	)	Dennis R. Ruth,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.  
Justices Welch and Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court properly dismissed, pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2016)), the plaintiff’s complaint against county, alleging a violation of the Illinois Civil Rights Act of 2003 (740 ILCS 23/1 *et seq.* (West 2016)) in its operation of a child visitation exchange center, where county filed an affidavit and supporting documentation showing it did not own, operate, or refer families to the center, and the plaintiff filed no counteraffidavit or other documentation in response.

¶ 2 The plaintiff, James Agee, appeals the February 23, 2018, order of the circuit court of Madison County which dismissed, pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)), his complaint against the defendant,

Madison County, alleging a violation of the Illinois Civil Rights Act of 2003 (Act). 740 ILCS 23/1 *et seq.* (West 2016). For the reasons that follow, we affirm.

¶ 3

### FACTS

¶ 4 In March 2017, the plaintiff filed a first amended complaint (complaint) in the circuit court of Madison County, naming Madison County as the sole defendant. According to the complaint, the plaintiff has a minor child and is required to use a custody exchange center in Wood River called “The Madison County Kid’s Corner” (Kids’ Corner), which Madison County owns and operates. The complaint alleges that, at Kids’ Corner, the “Non-Residential Parent” is required to arrive 15 minutes before the “Residential Parent,” regardless of who actually has possession of the child at the time. Once the exchange takes place, the “Non-Residential Parent” is required to wait 15 minutes to give the other parent time to leave the area, regardless of who actually has possession of the child following the exchange. As a result, the “Non-Residential Parent” always must wait 30 minutes at Kids’ Corner, while the “Residential Parent” is free to come, exchange custody, and immediately leave. The complaint alleges a substantial majority of the “Non-Residential Parents” are the children’s fathers, which, “due to the inherent biology of the human species[,] is of the gender male.” Conversely, a substantial majority of the “Residential Parents” are the children’s mothers, which “due to inherent biology of the human species[,] is of the gender female.” According to the complaint, “as a practical matter, men and women are subject to disparate treatment based on nothing more than their biological sex.” The complaint alleges that this policy amounts to a violation of the Act (740 ILCS 23/1 *et seq.* (West 2016)), and the plaintiff suffered actual

damages as a result of “being forced to sit and wait for 30 minutes each time he exchanges custody of his child, regardless of whether he is picking up or dropping off the child.” The complaint requests an award of actual damages, injunctive relief, attorney fees, costs, and other litigation expenses.

¶ 5 On April 7, 2017, the defendant filed a motion to dismiss pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2016). In support of its motion, the defendant filed the affidavit of Douglas E. Hulme, the county administrator for the defendant. According to the affidavit, the defendant does not administer Kids’ Corner. Rather, Kids’ Corner is managed and administered by the Children First Foundation, which is a separate and independent legal entity. In addition, the defendant does not participate in governing Kids’ Corner, has no members on the Children First Foundation Board of Directors, and does not participate in making rules or setting policies for Kids’ Corner. Finally, according to the affidavit, the defendant does not determine who participates in the Kids’ Corner custody exchange program. Rather, participation in the program is mandated by order of a judge of the Third Judicial Circuit, a governmental body separate and distinct from the defendant. Thus, the defendant plays no role in determining which parent will be designated as the “Non-Residential” or “Residential” parent.

¶ 6 The defendant also attached a “Corporation File Detail Report” for Children First Foundation, showing that it is a not-for-profit corporation with a registered agent in Belleville. Finally, the defendant attached a brochure from Kids’ Corner. The front side of the brochure identifies that the facility is managed by the Children First Foundation, and that parents must be referred by court order of the Third Judicial Circuit.

¶ 7 On February 22, 2018, the plaintiff filed a response to the motion to dismiss. In the response, the plaintiff argued that his allegation that the defendant operates Kids' Corner and owns the building in which it is located must be taken as true for the purposes of the defendant's motion. The plaintiff attached no counteraffidavits or other documentary evidence to his response. On February 23, 2018, the circuit court held a hearing on the motion to dismiss and issued an order granting the motion. On March 6, 2018, the plaintiff filed a notice of appeal.<sup>1</sup>

¶ 8 ANALYSIS

¶ 9 The principles of law applicable to this appeal are clear and free from doubt, and can be found, set forth in detail, in our supreme court's opinion in *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115-17 (1993):

“Generally, section 2-619 affords a ‘means of obtaining \*\*\* a summary disposition of issues of law or of easily proved issues of fact, with a reservation of jury trial as to disputed questions of fact.’ [Citations.] Subsection (a)(9) \*\*\* permits dismissal where ‘the claim asserted \*\*\* is barred by other affirmative matter avoiding the legal effect of or defeating the claim.’ [Citation.]

The phrase ‘affirmative matter’ encompasses any defense other than a negation of the essential allegations of the plaintiff's cause of action. [Citation.]

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<sup>1</sup>The plaintiff's initial brief contained no citations to the record whatsoever, in violation of Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017). On November 15, 2018, this court issued an order granting the plaintiff 14 days to file a brief that complies with said rule or show cause why his brief should not be stricken and the appeal dismissed. The plaintiff then amended his brief. The plaintiff's counsel is reminded that the rules of procedure concerning appellate briefs are rules, not mere suggestions, and when procedural violations interfere with our review of the issues on appeal, it is within this court's discretion to strike a brief and dismiss an appeal for failure to comply with those rules. See *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 10.

For that reason, it is recognized that a section 2-619(a)(9) motion to dismiss admits the legal sufficiency of the plaintiff's cause of action much in the same way that a section 2-615 motion to dismiss admits a complaint's well-pleaded facts. [Citation.]

If the 'affirmative matter' asserted is not apparent on the face of the complaint, the motion must be supported by affidavit. [Citations.] By presenting adequate affidavits supporting the asserted defense [citation], the defendant satisfies the initial burden of going forward on the motion. The burden then shifts to the plaintiff.

The plaintiff must establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. The plaintiff may do so by 'affidavit[ ] or other proof.' [Citation.] A counteraffidavit is necessary, however, to refute evidentiary facts properly asserted by affidavit supporting the motion else the facts are deemed admitted. If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed.

An appeal from such a dismissal is the same in nature as one following a grant of summary judgment and is likewise a matter given to *de novo* review [citation]. The appellate court must consider 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.”

¶ 10 Applying these principles to the case at bar, assuming that the complained-of policies implemented by Kids' Corner are discriminatory in violation of the Act, the issue of whether the defendant operates Kids' Corner or otherwise implements the complained-of policies is an easily proved issue of fact which would defeat the plaintiff's claim against the defendant, and is one which would defeat the claim against the defendant, though not negating the essential elements of the plaintiff's cause of action for discrimination. See *id.* at 115. Because the fact that the defendant does not operate Kids' Corner or otherwise implement its policies is not apparent on the face of the complaint, the defendant's motion was required to be supported by affidavit. *Id.* at 116. By presenting an adequate affidavit supporting its defense that it did not operate Kids' Corner or otherwise implement its policies, the defendant satisfied the initial burden of going forward on the motion. *Id.* The burden then shifted to the plaintiff. *Id.* Although a counteraffidavit was necessary to refute the evidentiary facts established by the defendant's affidavit supporting its motion, the plaintiff did not produce any counteraffidavit or other evidence. See *id.* Accordingly, the facts were deemed admitted. *Id.* Accordingly, the trial court correctly found that the plaintiff failed to carry the shifted burden on this issue of going forward, and correctly granted the motion to dismiss. *Id.*

¶ 11 CONCLUSION

¶ 12 For the foregoing reasons, the circuit court's February 23, 2018, order, which dismissed the plaintiff's complaint, is affirmed.

¶ 13 Affirmed.