

No. 1-13-3275

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MATTHEW KWILAS, an Individual, and)	Appeal from the
PRODIGY GLASSWORKS, a Corporation,)	Circuit Court of
)	Cook County.
Plaintiffs-Appellants,)	
v.)	No. 12 L 64004
)	
BUILTMAX CONSTRUCTION, LLC, a Limited)	
Liability Company,)	Honorable
)	Cheryl D. Ingram,
Defendant-Appellee.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 **Held:** We affirmed the dismissal of plaintiffs-appellants' various *respondeat superior* claims against a general contractor where plaintiffs failed to allege or show the general contractor retained control over the work of the subcontractor which, allegedly, caused plaintiffs' damages, and affirmed the dismissal of the negligent infliction of emotional distress claim where plaintiffs failed to challenge the dismissal on appeal.

¶ 2 Plaintiffs, Matthew Kwilas and Prodigy Glassworks, appeal from the dismissal, with prejudice, of the trespass (count II), trespass to chattel (count VI), negligence (count X), and negligent infliction of emotional distress (count XV) claims against defendant, Builtmax Construction, LLC (Builtmax), set forth in their second-amended complaint. Plaintiffs had

sought to recover for damages which resulted from the collapse of portions of the facade of a building in which they were tenants during renovations of that building. Plaintiffs maintained that Builtmax, the general contractor for the renovations, was liable on *respondeat superior* grounds for the conduct of the masonry subcontractor which allegedly caused the collapse. We affirm the dismissal of counts II, VI, X, and XV of plaintiffs' second-amended complaint, with prejudice.

¶ 3 Matthew Kwilas owns the business, Prodigy Glassworks (Prodigy), which was a leaseholder of a commercial unit in a building located at 201-211 Harrison Street, in Oak Park, Illinois (the building). In April 2011, during Prodigy's tenancy, CD Klere, the owner of the building, and Yuan Quan Corporation (Yuan Quan), another leaseholder at the building, undertook a renovation project. The project included the build-out of a restaurant in the space leased by Yuan Quan and renovations to the facade of the building. Builtmax was hired as a general contractor for the renovations. Builtmax subcontracted the exterior masonry work to LK Precision (LK). In performing its masonry work, LK removed various parts of the building's facade.

¶ 4 On August 10, 2011, portions of the building's facade collapsed. Mr. Kwilas observed the collapse from inside Prodigy's unit. After the collapse, the Village deemed the building uninhabitable. As a result, Prodigy was denied access to its unit, glass kiln, and glasswork inventory and, therefore, was unable to conduct its business.

¶ 5 On May 29, 2012, plaintiffs commenced this action by filing a 21-count complaint against LK, Builtmax, CD Klere, Yuan Quan, Daniel Harrington, the appointed bankruptcy receiver for the building, and the Village of Oak Park which approved a permit for the project. In that this appeal involves only Builtmax, and the other defendants are not participating in the

appeal, we will recite only those allegations and proceedings which pertain to the claims brought against Builtmax.

¶ 6 Plaintiffs' initial complaint included trespass, trespass to chattels, negligence, and negligent infliction of emotional distress claims against Builtmax. Plaintiffs sought to impose liability on Builtmax for the actions of LK on a *respondeat superior* basis as to the trespass, trespass to chattel, and negligence counts. Plaintiffs, generally, claimed that LK, in performing its masonry work on the building, had caused a partial collapse of the building's facade. In their trespass and trespass to chattel claims, plaintiffs alleged that in doing its masonry work, LK removed parts of the facade as to Prodigy's unit, invaded plaintiffs' space, and interfered with plaintiffs' rights to possession. As to the negligence claim, plaintiffs contended that LK had failed to properly support the building's facade during the removal process which led to the collapse.

¶ 7 The negligent infliction of emotional distress claim against Builtmax, brought on behalf of Mr. Kwilas only, alleged that Mr. Kwilas was in the "target zone" of the facade's collapse, and suffered a "shock to his nervous system" and other emotional injuries. This count did not include a reference to *respondeat superior* as did the other counts against Builtmax.

¶ 8 On August 27, 2012, Builtmax moved to dismiss those counts of the complaint brought against it pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)). Builtmax argued, in part, that plaintiffs had failed to sufficiently set forth facts to support claims for *respondeat superior* liability against Builtmax for the conduct of LK and, also, failed to plead a viable claim for negligent infliction of emotional distress. On September 12, 2012, the circuit court entered and continued Builtmax's motion to dismiss pending plaintiffs' filing of an amended complaint.

¶ 9 Plaintiffs filed a first-amended complaint on October 3, 2012, asserting the same causes of action against Builtmax and, again, the trespass, trespass to chattel, and negligence claims were based on *respondeat superior*. On November 13, 2012, Builtmax brought a combined section 2-615 and 2-619 motion to dismiss those counts of the first-amended complaint brought against it pursuant to section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2012)). As to its section 2-615 motion, Builtmax argued that: plaintiffs failed to cure the pleading deficiencies of the initial complaint with respect to their *respondeat superior* claims; the negligent infliction of emotional distress count was insufficiently pled; and plaintiffs' tort claims against Builtmax were barred by the *Moorman* doctrine in that plaintiffs sought to recover solely economic damages. Further, Builtmax sought dismissal under section 2-619 on the ground that it neither controlled nor supervised LK's work on the project and could not be held vicariously liable for the conduct of LK. In support of this argument, Builtmax attached the affidavit of its project consultant, Mike Markopoulos. Mr. Markopoulos averred that Builtmax hired LK pursuant to an agreement which was attached to the affidavit. The agreement set forth the scope of the work to be performed by LK and the terms for payment. This agreement did not state that Builtmax retained any control or supervision over LK's work on the project. The agreement provided that LK was to "furnish the materials and perform the labor necessary for the completion of [the outlined work]." Mr. Markopoulos asserted that "[n]one of Builtmax's employees, agents or servants performed any of the masonry work" on the project. Mr. Markopoulos also stated: "Builtmax was not responsible for the supervision or control of any LK employees, agents or servants whatsoever that performed any of the masonry work on the outside of 201-211 Harrison Street that is the subject of [plaintiffs'] [c]omplaint."

¶ 10 On January 29, 2013, the circuit court granted Builtmax's motion to dismiss, but allowed plaintiffs another opportunity to file an amended complaint.

¶ 11 On February 26, 2013, plaintiffs filed their second-amended complaint, the pleading at issue here. Plaintiffs' second-amended complaint included the same causes of action against Builtmax—trespass, trespass to chattel, and negligence based on *respondeat superior* grounds, and negligent infliction of emotional distress. Plaintiffs, in attempting to support their claims that Builtmax was liable for the acts of LK on a *respondeat superior* basis, alleged Builtmax: "employed" LK as a masonry subcontractor; Builtmax "controlled and directed" LK's work; LK "was an agent for Builtmax"; as the general contractor, Builtmax "had the ability to affect the terms and conditions of LK's work"; and LK was, at all relevant times, working within the scope of its employment. Plaintiffs further contended that, on or about July 17, 2011, Builtmax and LK stopped work on the project because the building was in foreclosure, and they were worried about being paid for their work. Plaintiffs alleged that, in the alternative, it was "implied" that LK was an agent of Builtmax. In the negligent infliction of emotional distress count, Mr. Kwilas alleged that, at the time of the collapse, he was inside the "target zone" and saw portions of the facade strike a pedestrian which caused him fear of "similar or greater injury to himself."

¶ 12 Builtmax moved to dismiss the counts of the second-amended complaint, in which it was named as defendant, pursuant to section 2-619.1 of the Code. In this combined motion to dismiss, Builtmax argued that dismissal under section 2-615 would be proper because plaintiffs failed to allege sufficient facts to support *respondeat superior* claims, and failed to set forth the elements of the asserted claims including a failure to adequately plead a viable negligent infliction of emotional distress claim. Additionally, Builtmax argued that dismissal should be granted under section 2-619 because: (1) the *Moorman* doctrine barred recovery of purely

economic damages in tort; and (2) Builtmax had not retained control over the work of LK and, therefore, plaintiffs' *respondeat superior* claims against Builtmax failed as a matter of law. Builtmax, again, offered the affidavit of Mr. Markopoulos in support of its section 2-619 motion. Plaintiffs, in responding to the motion to dismiss, presented neither an affidavit, nor other evidence, to controvert the affidavit of Mr. Markopoulos.

¶ 13 After hearing argument, the circuit court, on May 22, 2013, dismissed the four counts of the second-amended complaint brought against Builtmax, with prejudice. The written order does not include findings of fact or conclusions of law, and does not state whether the dismissal was pursuant to section 2-615, or section 2-619. Pursuant to Illinois Supreme Court Rule 304(a), the circuit court found "no just cause exists to delay the enforcement or appeal from this order of dismissal." Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). Plaintiffs subsequently filed a motion to reconsider the dismissal, with prejudice, which was denied on September 17, 2013. On October 17, 2013, plaintiffs filed a notice of appeal from the May 22, 2013, dismissal order only.

¶ 14 On appeal, plaintiffs argue: the *Moorman* doctrine does not apply to their claims against Builtmax; dismissal of its *respondeat superior* claims under section 2-619 was improper as a question of fact exists as to Builtmax's control over LK; and they sufficiently alleged facts to sustain their *respondeat superior* claims to survive a section 2-615 motion. Builtmax argues: the *respondeat superior* claims were not supported by sufficient factual allegations; plaintiffs forfeited review as to the dismissal of the negligent infliction of emotional distress claim; and plaintiffs failed to sufficiently plead the elements of their causes of action against Builtmax.

¶ 15 Section 2-619.1 of the Code allows a party to combine a section 2-615 motion to dismiss and a section 2-619 motion for involuntary dismissal in a single pleading. 735 ILCS 5/2-619.1 (West 2012). "Where, as in this case, the trial court fails to specify the grounds upon which it

relied in granting a motion to dismiss, we will presume it was upon one of the grounds urged by the defendant." *Storm & Associates, Ltd. v. Cuculich*, 298 Ill. App. 3d 1040, 1046 (1998).

¶ 16 "[T]he question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when viewed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. [Citation.] Illinois is a fact-pleading jurisdiction that requires a plaintiff to file both a legally and factually sufficient complaint. [Citation.] When ruling on a section 2-615 motion to dismiss, the circuit court must admit all well-pleaded facts as true and disregard any legal and factual conclusions that are unsupported by allegations of fact." *Illinois Insurance Guaranty Fund v. Liberty Mutual Insurance Co.*, 2013 IL App (1st) 123345, ¶ 14. The standard of review on a section 2-615 dismissal is *de novo*. *Id.*

¶ 17 A section 2-619 motion admits the legal sufficiency of the complaint. *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2014 IL App (1st) 130764, ¶ 77. Indeed, section 2-619(a)(9) allows a complaint to be dismissed by an affirmative matter which is 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); see also 735 ILCS 5/2-619(a)(9) (West 2012). Such a motion provides a means of obtaining summary disposition of issues of law, or of easily proven issues of fact. *Henderson Square Condominium Ass'n, LLC*, 2014 IL App (1st) 130764, ¶ 81.

¶ 18 In determining whether to grant a section 2-619 motion to dismiss, a court must accept as true all well-pled facts and reasonable inferences to be drawn from those facts. *Id.* Further, we must view all the pleadings and supporting documents in a light most favorable to the nonmovant. *Van Meter*, 207 Ill. 2d at 367-68. Thus, we 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 the dismissal is proper as a matter of law. *Henderson Square Condominium Ass'n*,

LLC, 2014 IL App (1st) 130764, ¶ 81. Our review of a motion to dismiss pursuant to section 2-619 is *de novo*. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004).

¶ 19 We first note that plaintiffs have failed to present any argument as to Builtmax's position that the second-amended complaint failed to set forth a viable negligent infliction of emotional distress claim against Builtmax. Plaintiffs, therefore, have forfeited any challenge to the dismissal of this count for failure to state a cause of action. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 55 ("Where an appeal is from dismissal of multiple counts of the complaint but the appellant only argues certain counts in the brief on appeal, the other counts are not considered as they are deemed forfeited pursuant to Illinois Supreme Court Rule 341(h)(7) ***."). Accordingly, we turn to consider whether the dismissal of the trespass, trespass to chattel, and negligence counts against Builtmax, based on the acts of LK, was proper either under section 2-615 or section 2-619.

¶ 20 According to the second-amended complaint, Builtmax "employed [d]efendant LK Precision Tuckpointing *** as a sub-contractor for its masonry needs," and "LK was responsible for the work relating to the masonry of 201 Harrison." The second-amended complaint further alleges that LK's work on the project caused the partial collapse of the building's facade, causing damages to plaintiffs. Thus, plaintiffs seek to impose *respondeat superior* liability on Builtmax for their damages based on Builtmax's subcontract agreement with LK.

¶ 21 Generally, a party who entrusts an independent contractor will not be held vicariously liable for the tortious acts or omissions of the independent contractor. *Fonseca v. Clark Construction Group, LLC*, 2014 IL App (1st) 130308, ¶ 26 (citing *Madden v. F.H. Paschen/S.N. Nielson, Inc.*, 395 Ill. App. 3d 362, 381 (2009)); Restatement (Second) of Torts § 409 (1965) ("Except as stated in §§ 410-429, the employer of an independent contractor is not liable for

physical harm caused to another by an act or omission of the contractor or his servants."). " 'This is because one who hires an independent contractor usually does not supervise the details of the contractor's work and is therefore not in a good position to prevent the contractor from acting negligently.' " *Fonseca*, 2014 IL App (1st) 130308, ¶ 26 (quoting *Madden*, 395 Ill. App. 3d at 381).

¶ 22 There are exceptions to this general rule, including "the retained control exception" set forth in section 414 of the Restatement (Second) of Torts. *Madden*, 395 Ill. App. 3d at 380. Section 414 provides:

"One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." Restatement (Second) of Torts § 414, at 387 (1965).

"Illinois has adopted the approach of section 414 of the Restatement (Second) of Torts." *Fonseca*, 2014 IL App (1st) 130308, ¶ 26.

¶ 23 Under section 414, there can be both vicarious and direct liability depending on the degree of control which a general contractor retains over its independent contractor. *Madden*, 395 Ill. App. 3d at 380-81. Comments a and c of section 414 offer guidance as to the application of section 414:

"a. If the employer of an independent contractor retains control over the operative detail of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor engaged therein, under the rules of that part of the law of Agency which deals with the relation of master and servant. The employer may, however,

retain a control less than that which is necessary to subject him to liability as master. He may retain only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others. Such a supervisory control may not subject him to liability under the principles of Agency, but he may be liable under the rule stated in this Section unless he exercises his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

* * *

c. In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way."

Restatement (Second) of Torts § 414, Comments a, c (1965).

In essence, under section 414, " 'the general contractor, by retaining control over the operative details of its subcontractor's work, may become vicariously liable for the subcontractor's negligence; alternatively, even in the absence of such control, the general contractor may be directly liable for not exercising his supervisory control with reasonable care.' " *Madden*, 395 Ill. App. 3d at 381 (quoting *Cochran v. George Sollitt Construction Co.*, 358 Ill. App. 3d 865, 876-77 (2005)).

¶ 24 Based on plaintiffs' allegations in the second-amended complaint, and their arguments below and on appeal, that they sufficiently alleged that Builtmax "supervised and controlled" LK, it appears they are seeking to impose *respondeat superior* liability on Builtmax under section 414. See, generally *Connaghan v. Caplice*, 325 Ill. App. 3d 245, 249 (2001) (stating that "[t]he theory of recovery expressed in section 414 is based upon a master/servant relationship or *respondeat superior*").

¶ 25 The second-amended complaint identifies the trespass, trespass to chattel, and negligence counts against Builtmax as *respondeat superior* claims. Plaintiffs have never argued that they seek to impose direct liability on Builtmax under section 414. Plaintiffs, therefore, have forfeited this issue. *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8. Accordingly, as to the section 2-615 motion, we will consider whether the second-amended complaint sufficiently alleged that Builtmax had retained a right of supervision or control over LK such that LK was not entirely free to do the masonry work in its own way in order to create vicarious liability against Builtmax for LK's conduct. See *Madden*, 395 Ill. App. 3d at 382.

¶ 26 In the second-amended complaint, plaintiffs set forth only conclusory allegations that Builtmax controlled LK's work and that Builtmax "had the ability to effect the terms and conditions of LK's work." Plaintiffs did not allege any specific facts to support these conclusions. There are no allegations of any contract, agreement, or understanding that Builtmax retained control over LK's work and, in particular, LK's removal of the building's facade. Plaintiffs do not make any specific allegations of supervision or control by Builtmax over LK's performance of the masonry work. The second-amended complaint does not specifically allege that any employee of Builtmax was present during the performance of any part of the masonry work and the removal of the facade, or present at, or around the time of the collapse. There are

no allegations of fact that Builtmax directed LK's masonry work, or was involved in determining the manner of conducting the masonry work, including the removal of any facade.

¶ 27 Therefore, we conclude that the second-amended complaint does not sufficiently allege facts to support *respondeat superior* liability against Builtmax for the conduct of LK. The circuit court properly dismissed the trespass, trespass to chattel, and negligence counts against Builtmax which sought to impose liability on Builtmax on *respondeat superior* grounds for LK's conduct. Further, even if these counts did seek to impose direct liability on Builtmax under section 414 of the Restatement (Second) of Torts, there are insufficient factual allegations that Builtmax had retained any right to supervise or control the work of LK which could give rise to such an action. The dismissal of the *respondeat superior* claims under section 2-615 was proper.

¶ 28 Even assuming that the trespass, trespass to chattel and negligence counts against Builtmax based on *respondeat superior* were sufficiently pled in the second-amended complaint, we would find that dismissal of those counts would have been proper under section 2-619. Builtmax presented the affidavit of Mr. Markopoulos in support of its section 2-619 motion. In his affidavit Mr. Markopoulos averred that Builtmax did not perform any of the masonry work which plaintiffs alleged caused the collapse. Further, Mr. Markopoulos stated Builtmax had no supervision or control over LK's performance of the masonry work which is the subject of plaintiffs' action. The agreement between Builtmax and LK attached to the affidavit does not provide for any retention, control, or supervision by Builtmax over LK's work. See *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 74 ("The best indicator of whether an employer has retained control over the independent contractor's work is the parties' contract, if one exists."). The agreement plainly provides that the responsibility for the performance of the masonry work was placed on LK alone.

¶ 29 Plaintiffs offered no evidence to contradict or controvert the affidavit of Mr. Markopoulos. Accordingly, there was no question of material fact as to this issue. The dismissal of the counts of the second-amended complaint alleged against Builtmax was proper under section 2-619 in that Builtmax established, as a matter of law, it had not retained control or supervision over LK's masonry work and section 414 was inapplicable.

¶ 30 Plaintiffs direct us to paragraph 136 of the second-amended complaint where they allege "Builtmax specifically ordered LK to terminate further work on the subject property on or about July 17, 2011." Plaintiffs argue this allegation is sufficient to raise a question of fact as to whether Builtmax had a right to control LK and precludes dismissal under section 2-619. Additionally, plaintiffs contend this allegation "must be accepted as true and is and of itself sufficient to state a cause of action for *respondeat superior*" and, therefore, dismissal under section 2-615 was in error. We disagree with plaintiffs on both points.

¶ 31 This single allegation of fact is not sufficient to support claims based on *respondeat superior* against Builtmax. As discussed above, to impose *respondeat superior* liability upon Builtmax, Builtmax must have retained control over the "operative detail of doing any part of the work" done by LK. Restatement (Second) of Torts § 414, Comment a (1965). It is not enough that Builtmax had "a general right to order the work stopped." *Id.*, Comment c. Further, this allegation that Builtmax ordered the work to be stopped must be read with the allegation in the second-amended complaint that "[o]n or about July 17, 2011, [d]efendants Builtmax and LK stopped work on the property because they had heard that the building was in foreclosure and they were worried about how they were to be paid." Thus, according to this additional allegation, the decision to stop work on the project, whether made mutually by both LK and Builtmax, or made solely by Builtmax, was motivated by financial concerns and was not

necessarily done pursuant to any retained control over the performance of LK's masonry work. This single allegation as to an order to stop work on the building does not suffice to state *respondeat superior* claims against Builtmax and does not raise a question of fact as to whether Builtmax retained such control over the manner and operative details of LK's masonry work that it may be held vicariously liable in light of the uncontroverted affidavit of Mr. Markopoulos. This allegation did not prevent entry of the dismissal order under either section 2-615 or section 2-619.

¶ 32 As stated, the circuit court dismissed the counts against Builtmax, with prejudice. Plaintiffs have not presented any arguments on appeal as to the circuit court's decision to grant the dismissal, with prejudice, and, therefore, have forfeited any challenge as to this issue. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). Because plaintiffs were given two opportunities to replead, and plaintiffs did not propose further amendments to their second-amended complaint below, we affirm the dismissal, with prejudice. *Bellik v. Bank of America*, 373 Ill. App. 3d 1059, 1065 (2007).

¶ 33 For the reasons stated, we find that the circuit court properly dismissed the trespass (count II), trespass to chattels (count VI), and negligence (count X) claims of the second-amended complaint against Builtmax, with prejudice, as there were insufficient facts pled to support *respondeat superior* liability or, in the alternative, no question of fact existed that Builtmax had retained control over the masonry work of LK. Further, the dismissal, with prejudice, of the negligent infliction of emotional distress claim (count XV) against Builtmax is affirmed in that plaintiffs presented no argument as to that count. Because we have found the dismissal with prejudice of these counts against Builtmax was proper on these grounds, we will not address the other issues raised on appeal.

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¶ 34 Affirmed.