THIRD DIVISION
March 16, 2011

No. 1-10-1451

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ENID KUSHNER, Plaintiff-Appellant, v. BOARD OF EDUCATION OF THE CITY OF CHICAGO, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County, Illinois No. 08 L 6116 Honorable Kathy M. Flanagan, Judge Presiding

Justice Murphy delivered the judgment of the court.

Justices Neville and Steele concurred in the judgment.

ORDER

HELD: The trial court did not err in dismissing plaintiff's complaint alleging negligence based on a city ordinance violation where she failed to establish that defendant had notice of the defective condition.

Plaintiff, Enid Kushner, filed an amended complaint against defendant, Board of Education of the City of Chicago, after she tripped and fell on a mat at the entrance of one of defendant's schools. Plaintiff alleged that defendant violated a city ordinance by allowing the mat to obstruct the entrance to the school. The trial court dismissed plaintiff's amended

complaint on the basis that there was no evidence that defendant knew of the condition of the mat. On appeal, plaintiff argues that her amended complaint was erroneously dismissed because she was not required to plead or prove that defendant had notice of the mat's condition in order to maintain a claim for negligence based on an ordinance violation. For the following reasons, we affirm.

I. BACKGROUND

On June 5, 2008, plaintiff filed a single-count premises liability complaint against defendant alleging that plaintiff tripped and fell on a "curled up mat" at Gale Community Elementary School in Chicago.

Defendant moved for summary judgment, arguing that it owed no duty to plaintiff because it did not have actual or constructive notice of the condition as required by section 3-102 of the Local Governmental and Governmental Employees Tort Immunity Act (the Act) (745 ILCS 10/3-102 (West 2006)). The trial court granted the motion, finding that there was no evidence that defendant had notice of the condition and no genuine issue of material fact as to whether it created the complained-of condition.

Plaintiff filed an amended complaint adding count II, which alleged that defendant was negligent based on its violation of section 13-160-070 of the Chicago Municipal Code (Chicago Municipal Code § 13-160-070 (2009)) because it "allowed a bunched-up mat to obstruct the entrance and exitway" of the school. Section 13-160-070 provides that "[t]here shall be no obstruction in any exitway that may hamper travel." Chicago Municipal Code § 13-160-070 (2009).

Defendant moved to dismiss count II pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2006)), arguing that the claim was barred by the applicable statute of limitations. Defendant's reply to its motion to dismiss is not included in the record; however, the parties assert that in its reply, defendant argued that count II should be dismissed because the trial court had previously ruled that defendant did not have actual or constructive notice of the alleged defective condition.

Although the trial court held that count II was timely filed because it related back to the filing of the original complaint, it granted the motion to dismiss based on defendant's notice argument. It found that defendant "correctly points out that this Court has held that there was no notice of the complained of condition as a matter [of] law. Therefore, a claim based on a violation of the municipal code with respect to obstructions in entryways could not stand as there is no notice of the condition."

Plaintiff filed a motion to reconsider the order that dismissed count II, arguing that notice on the part of defendant was not a required element of a claim for negligence based on an ordinance violation. The trial court denied the motion and concluded:

> "While notice of a violation of a code provision is not necessary to prove such a violation, notice of a dangerous condition itself, irrespective of whether it is a code violation, is necessary for liability for negligence. This is so even if negligence is based on a code violation. However, in addition to having found that there was no evidence of notice, the Court also found that there was no evidence whatsoever that Defendant created the condition of the curled up mat.

> Thus, it cannot be said that the Defendant violated the code. If the Plaintiff cannot prove that the Defendant violated the code, there can be no negligence on that basis."

This appeal followed.

II. ANALYSIS

A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that avoids or defeats the claims. 735 ILCS 5/2-619(a) (West 2006); *Duncan v. Church of the Living God*, 278 Ill. App. 3d 588, 594 (1996). When reviewing a motion to dismiss, this court must accept all well-pled facts as true and view them in the light most favorable to the plaintiff. *Gonnella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (2003). We may consider all facts presented in the pleadings, affidavits, and depositions found in the record. *Gonnella Baking Co.*, 337 Ill. App. 3d at 388. We will review a trial court's determination of a section 2-619 motion to dismiss *de novo*. *Woods v. Cole*, 181 Ill. 2d 512, 516 (1988). Further, where a party's motion for reconsideration merely asks the trial court to reexamine its earlier application of existing law, this court's review is also *de novo*. *Jones v. Nissan North America, Inc.*, 385 Ill. App. 3d 740, 745-46 (2008).

Plaintiff contends that the trial court erred in granting defendant's motion to dismiss because she is not required to plead or prove that defendant had notice of the curled-up mat obstructing the doorway to maintain a claim for negligence based on an ordinance violation.

"In a cause of action for negligence, a plaintiff must establish the existence of a duty, a breach of that duty, and an injury proximately resulting from a breach of that duty." *Miller v.*

National Ass'n of Realtors, 271 Ill. App. 3d 653, 656 (1994). In a premises liability case, a property owner owes invitees a duty to exercise ordinary care in maintaining its premises in a reasonably safe condition. *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1063 (2001).

To prevail on a claim of negligence based on a violation of a statute or an ordinance designed to protect human life, the plaintiff must show that (1) the plaintiff is a member of the class of persons the statute or ordinance is designed to protect, (2) the injury is the type of injury that the ordinance was intended to protect against, and (3) the defendant's violation of the statute or ordinance was the proximate cause of the plaintiff's injury. *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 434-35 (1991). "Because evidence of the violation of a statute is *prima facie* evidence of neglect, and *not* negligence *per se*, a defendant can prevail despite an ordinance violation by showing that he acted reasonably under the circumstances." (Emphasis in original.) *Price v. Hickory Point Bank & Trust*, 362 Ill. App. 3d 1211, 1216 (2006), citing *Kalata*, 144 Ill. 2d at 435. In such cases, a plaintiff is not required to show a defendant's awareness of the ordinance violation since the violation itself is *prima facie* evidence of negligence. *McCarthy v. Kunicki*, 355 Ill. App. 3d 957, 970 (2005).

Plaintiff, citing *Price* and *McCarthy*, argues that she was not required to show defendant's awareness of the ordinance violation because the violation itself is *prima facie* evidence of negligence. In *McCarthy*, a 13-year-old girl fell down the stairs that went to the defendant homeowners' basement. The plaintiff filed a complaint alleging, *inter alia*, public nuisance premised on the defendants' violation of a section of the Chicago Municipal Code, which required handrails on stairways. The trial court barred evidence that the defendants knew

they were in violation of the Code. On appeal, this court held that "in establishing defendants' negligence based upon an ordinance violation, plaintiff is not required to show defendants' awareness of the violation since the violation itself is *prima facie* evidence of negligence. [Defendants'] knowledge of the violation, therefore, is irrelevant as to whether defendants were negligent." *McCarthy*, 355 Ill. App. 3d at 974.

In *Price*, the plaintiffs alleged that their children suffered lead poisoning after they rented a house owned by the defendants. The complaint alleged negligence based on the defendants' violation of the city's municipal code and federal regulations. The trial court granted the defendants' motion for summary judgment, finding that they had no knowledge that the premises contained lead-based paint, nor did they knowingly violate the municipal code or federal regulations. On appeal, the Fourth District found that the defendants' knowledge of the violations was irrelevant " 'since the violation itself is *prima facie* evidence of negligence.' " *Price*, 362 Ill. App. 3d at 1216, quoting *McCarthy*, 355 Ill. App. 3d at 974.

We find *Price* and *McCarthy* to be readily distinguishable because neither involved a local public entity (see 745 ILCS 10/1-206 (West 2006)), whose "duty *** is limited by section 3-102 of the Local Government and Governmental Employees Tort Immunity Act." *Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 158 (1995). Section 3-102(a) provides as follows:

> "Except as otherwise provided in this Article, a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times

> as it was reasonably foreseeable that it would be used, and shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition."
>
> 745 ILCS 10/3-102(a) (West 2006).

While section 3-102(a) first establishes a duty on the part of a public entity to "exercise ordinary care to maintain its property in a reasonably safe condition," it goes on to immunize the public entity when the plaintiff fails to establish "that it has actual or constructive notice of the existence of such a condition that is not reasonably safe." 745 ILCS 10/3-102(a) (West 2006). "The distinction between an immunity and a duty is crucial." *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 46 (1998). *Price* and *McCarthy* speak in terms of "duty" (see *Price*, 362 Ill. App. 3d at 1216) and have nothing to do with the immunity granted to a public entity under section 3-102(a).

In her reply brief, plaintiff, citing to *First National Bank in DeKalb v. City of Aurora*, 71 Ill. 2d 1 (1978), argues that public entities are not afforded immunity under the Act for the violation of a statute or ordinance. In *First National Bank in DeKalb*, the plaintiff brought a negligence claim against the city of Aurora to recover for injuries sustained in a car accident at an intersection. The plaintiff alleged that the city, in violation of State law and city ordinances, negligently allowed trees and shrubs on city property at the intersection to obscure the vision of motorists approaching the intersection. Our supreme court noted that " 'the violation of a statute or ordinance designed for the protection of human life or property is *prima facie* evidence of

negligence, and *** the party injured thereby has a cause of action, provided he comes within the purview of the particular ordinance or statute, and the injury has a direct and proximate connection with the violation.' " *First National Bank in DeKalb*, 71 Ill. 2d at 9, quoting *Dini v. Naiditch*, 20 Ill. 2d 406, 417-18 (1960). The court went on to state that while the Act "offers seemingly broad protection to the actions of governmental units, that protection or immunity is not absolute" because when a governmental unit adopts a plan to make public improvements, it owes a plaintiff a duty to maintain those improvements. *First National Bank in DeKalb*, 71 Ill. 2d at 11. The city in *First National Bank in DeKalb* did not adopt a plan of public improvement; however, its "own ordinances and the allegation of violations thereof negate the immunity from suit." *First National Bank in DeKalb*, 71 Ill. 2d at 11.

First National Bank in DeKalb is inapplicable where the plaintiff in that case specifically alleged that the city "knew or should have known" of the condition. *First National Bank in DeKalb*, 71 Ill. 2d at 5. Further, the court did not specifically cite or apply any specific section of the Act. Plaintiff also cites cases where the public entity created the dangerous condition that caused the plaintiff's injuries. In those cases, the public entity's affirmatively negligent act constituted notice under section 3-102(a). See *Mark Twain Illinois Bank v. Clinton County*, 302 Ill. App. 3d 763, 769 (1999); *Bernal v. City of Hoopeston*, 307 Ill. App. 3d 766, 772 (1999); *Harding v. City of Highland Park*, 228 Ill. App. 3d 561, 571 (1992). In the instant case, however, the amended complaint does not allege, and there is no evidence suggesting, that defendant or its employees caused the mat to become bunched or curled up. Rather, plaintiff's amended complaint alleges that defendant "allowed" the mat to become bunched up.

Accordingly, we affirm the trial court's order dismissing plaintiff's complaint.

III. CONCLUSION

For the foregoing reasons, we affirm the dismissal of plaintiff's first amended complaint and the denial of her motion for reconsideration.

Affirmed.