2011 IL App (1st) 111285-U

No. 1-11-1285

FIFTH DIVISION
December 30, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIEDRA WELLS, As Mother and Next Friend of SHAMAYA NORMAN and SHANAYA NORMAN, Minors,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	No. 10 L 2930
v.	)	
LEE SMITH,	)	Honorable Jeffrey Lawrence,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

HELD: The trial court erred in dismissing plaintiff's claims based on a finding that plaintiff's allegations that the defendant-landlord knew or should have known plaintiff's minor children were residing in the apartment the defendant-landlord owned were insufficient and not supported by the facts alleged.

¶ 1 Plaintiff Diedra Wells, the mother of Shamaya and Shanaya

Norman, brought a lawsuit on behalf of the minors against defendant Lee Smith. In her fourth amended complaint, plaintiff alleged her minor children were harmed by defendant's negligence in allowing lead paint to be present in the apartment plaintiff and her children occupied, in creating a dangerous condition by allowing other materials containing lead paint to remain in the apartment, in failing to abate the lead present in the apartment, and in failing to warn the minor children's parents of the danger posed by the presence of lead in the apartment. Defendant filed a combined motion to dismiss under sections 2-619(a)(9) and 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615, 5/2-619(a)(9) (West 2010)), alleging he did not owe the minor children a duty of ordinary care because the apartment lease was entered between Rose Lee Elam and defendant. Specifically, defendant alleged in his motion and supporting affidavit that he was unaware and never informed that the minor children were residing in the apartment. Defendant also alleged in the motion that plaintiff failed to adequately plead facts to support her claims that defendant was informed or aware the minor children were residing with Elam in the apartment.

¶ 2 The trial court granted defendant's motion to dismiss the fourth amended complaint with prejudice, finding plaintiff's allegations that defendant knew plaintiff and her minor children

were residing in the apartment were insufficient and not supported by the facts alleged. Plaintiff appeals, contending the trial court erred in dismissing her complaint under either section 2-615 or section 2-619(a)(9) of the Code. For the reasons that follow, we reverse the trial court's order and remand the cause for further proceedings.

¶ 3 BACKGROUND

¶ 4 The record reflects Rose Elam leased an apartment from defendant with the term beginning on September 14, 2007. Robert Price is the only other resident listed on the lease.

¶ 5 On March 8, 2010, plaintiff filed her original two-count negligence and strict liability complaint against defendant, alleging her minor children were exposed to dangerously high levels of lead that caused them serious injury while lawfully residing with plaintiff at the apartment. Defendant filed a section 2-619 motion to dismiss, alleging the minor children were trespassers in the apartment. Specifically, defendant alleged he did not owe the minors a duty of ordinary care because he was unaware that either they or plaintiff were residing in the apartment with Elam. In support, defendant attached the lease signed by Elam. In her response to the motion, plaintiff alleged that Elam is plaintiff's mother and the grandmother of the minor children, and that defendant had been informed that the minor

children and plaintiff would be residing with Elam from May 2007 forward prior to when the lease was signed. Plaintiff attached an affidavit from herself and Elam to support her claims. The trial court granted the motion to dismiss with leave for plaintiff to file an amended complaint. The court noted the allegations were deficient because plaintiff had not specifically alleged defendant had knowledge that plaintiff and her minor children were residing in the apartment.

¶ 6 In her second amended complaint[1], plaintiff added allegations that defendant was aware plaintiff and her minor children were residing in the apartment. Plaintiff again attached affidavits from herself and Elam to support her claims. Defendant filed a section 2-619(a)(9) and 2-615 motion to dismiss. Due to a clerical error in the complaint, plaintiff sought and was granted leave by the court to file a third amended complaint. The third amended complaint and defendant's motion to dismiss the third amended complaint mirrored the pleadings filed with regards to the second amended complaint. The trial court granted defendant's motion to dismiss without prejudice, finding more specific allegations were necessary to show defendant had known plaintiff and her minor children were residing in the

[1]Although the complaint was termed as a second amended complaint, it appears the complaint was actually the first amended complaint plaintiff filed.

apartment.

¶ 7 In her unverified fourth amended complaint filed on February 29, 2011, plaintiff again raised two counts of negligence against defendant. Plaintiff omitted the previously pled strict liability count. In Paragraph 4 of Counts I and II of the amended complaint, plaintiff specifically alleged:

> "At all times complained of herein, the Defendant, LEE SMITH, was aware that DEIDRA WELLS was residing in the apartment on the said premises along with [her daughters]. Defendant, LEE SMITH was made aware of Plaintiff's residence in the following ways:
>
> (a) Plaintiff was present at the initial viewing of the apartment, along with her mother, Rose Lee Elam, wherein Defendant, LEE SMITH, was informed that Plaintiff and her minor children would be residing at said apartment;
>
> (b) Defendant, LEE SMITH, was informed prior to May, 2007, by telephone conversation with Robert Price, step-father of the Plaintiff, that DEIDRA WELLS and her minor children would be moving to said apartment;

(c) Defendant, LEE SMITH, made regular visits to the residence from May, 2007 through August, 2008. Defendant, LEE SMITH, was informed by Rose Lee Elam in person during said visits that Rose Lee Elam was responsible for and providing child care to Plaintiff's minor children at said apartment;

(d) Defendant, LEE SMITH, made regular visits to the residence from May, 2007 through August, 2008. Defendant, LEE SMITH, was informed by Rose Lee Elam in person during said visits that Rose Lee Elam was responsible for and providing child care to Plaintiff's minor children at said apartment;

(e) Defendant, LEE SMITH, made regular visits to the residence from May, 2007 through August, 2008. During said visits, Defendant, LEE SMITH witnessed Plaintiff and her minor children residing at said apartment; and

(f) An agent of defendant, Lee Smith, hired for maintenance work at the residence, made regular visits to the residence from May, 2007 through August, 2008. During said

> visits, agent of Defendant, LEE SMITH witnessed Plaintiff and her minor children residing at said apartment and performed maintenance work within said apartment where Plaintiff and her minor children were residing."

¶ 8 Plaintiff again attached her own affidavit and an affidavit from Elam to support her claims. In her own signed and sworn affidavit, plaintiff said "Manager, Lee Smith, was informed and aware that I, along with my children, Shamaya and Shanaya Norman, resided with my mother, Rose Lee Elam." Similarly, Elam said in her signed and sworn affidavit that "Manager, Lee Smith, was informed and aware that my grandchildren, Shamaya and Shanaya Norman, resided with me from approximately May, 2007 through August, 2008."

¶ 9 Defendant again filed a section 2-615 and 2-619(a)(9) combined motion to dismiss, alleging the allegations regarding defendant's knowledge were insufficient and unsupported by fact. Specifically, defendant alleged the amended allegations in paragraph 4 of Counts I and II were conclusory, based on speculation and unsupported by facts. Defendant attached his own affidavit and the signed lease in support of his allegations. In his signed and sworn affidavit, defendant noted he was "never

informed or aware, until I received notice of a claim being made against me, that Diedra Wells, Shamaya Norman and Shanaya Norman were claimed to be residing in the apartment at 5347 W. Race with Rose Lee Elam."

¶ 10 The trial court granted defendant's motion to dismiss the fourth amended complaint with prejudice. Specifically, the court found the allegations regarding defendant's knowledge that plaintiff and her minor children were residing in the apartment were insufficient. The court also found the allegations were not adequately supported by the facts presented. The court did not indicate whether the motion to dismiss was entered under section 2-615 or section 2-619(a)(9) of the Code. Plaintiff appeals.

¶ 11 ANALYSIS

¶ 12 Plaintiff contends the trial court erred in granting defendant's motion to dismiss her fourth amended complaint with prejudice, regardless of whether such dismissal was entered pursuant to section 2-619(a)(9) or section 6-615 of the Code. Specifically, plaintiff contends the detailed factual allegations in Paragraph 4 of Counts I and II--mixed with her and Elam's affidavits indicating defendant was "informed" the minors were residing in the apartment--suggest dismissal under either section 2-615 or section 2-619(a)(9) was inappropriate at this stage.

¶ 13 A section 2-615 motion to dismiss challenges the legal

sufficiency of a complaint based on defects apparent on its face. 735 ILCS 5/2-615 (West 2010); *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). In reviewing the sufficiency of a complaint, we construe the complaint's allegations in the light most favorable to the plaintiff. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12 (2005). We also accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Beretta U.S.A Corp.*, 213 Ill. 2d at 364. A claim should not be dismissed unless it is clearly apparent that no set of facts can be proven that would entitle the plaintiff to recovery. *Canel v. Topinka*, 212 Ill. 2d 311, 318 (2004).

¶ 14 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that defeat the claims. 735 ILCS 5/2-619(a)(9) (West 2010); *Valdovinos v. Tomita*, 394 Ill. App. 3d 14, 17 (2009). The question on review is whether a genuine issue of material fact precludes dismissal or whether dismissal is proper as a matter of law. *Fuller Family Holdings, LLC v. Northern Trust Co.*, 371 Ill. App. 3d 605, 613 (2007).

¶ 15 Although the trial court did not make clear under what section of the Code it was granting defendant's motion to dismiss, we note we may affirm the trial court's judgment upon

any ground appearing in the record, regardless of whether it was relied upon by the court and regardless of whether the court's adopted reasoning was correct. *Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 460 (2006). Accordingly, we must ultimately consider in this case whether dismissal was warranted under either section 2-615 or section 2-619(a)(9) of the Code.

¶ 16 While a trial court's decision to dismiss a complaint with or without prejudice is generally reviewed for an abuse of discretion (*Hirsch v. Feuer*, 299 Ill. App. 3d 1076 (1998)), we review a trial court's dismissal of a case under either section 2-615 or section 2-619(a)(9) of the Code *de novo* (*Canel*, 212 Ill. 2d at 318; *Valdovinos*, 394 Ill. App. 3d at 18).

¶ 17 I. Dismissal under Section 2-615 of the Code

¶ 18 Because Illinois is a fact pleading jurisdiction, a plaintiff must set forth facts sufficient to bring her claim within the cause of action asserted. *Rabin v. Karlin and Fleisher, LLC*, 409 Ill. App. 3d 182, 186 (2011). Conclusions of fact or law unsupported by any allegation of specific fact are insufficient to withstand a motion to dismiss. *Kaczka v. The Retirement Board of the Policeman's Annuity & Benefit Fund of the City of Chicago*, 398 Ill. App. 3d 702, 707 (2010). However, we note " '[a] plaintiff is not required to prove his case in the

pleading stage; rather, he must merely allege sufficient facts to state all elements which are necessary to constitute his cause of action.' " *Visvardi v. Eric P. Ferleger, P.C.*, 375 Ill. App. 3d 719, 725 (2007) (quoting *Claire Associates v. Pontikes*, 151 Ill. App. 3d 116, 123 (1986)).

¶ 19 To state a cause of action for negligence, a plaintiff must allege: (1) the existence of a duty owed to the plaintiff; (2) a breach of that duty; (3) an injury proximately caused by the breach; and (4) damages. *Boyd v. Traveler's Insurance Co.*, 166 Ill. 2d 188, 194-95 (1995).

¶ 20 It is undisputed in the pleadings that neither plaintiff nor her minor children were listed as residents on the lease signed by Elam. Accordingly, defendant contends that in order to show plaintiff owed a duty to plaintiff and her minor children, plaintiff was required to plead facts to overcome the general rule that an owner or person in possession or control of property is not under a duty to keep the premises safe against trespassers. See *Garcia v. Jiminez*, 184 Ill. App. 3d 107, 109-10 (1989). Even assuming the minor children were "trespassers" here, our supreme court has recognized an exception to the general rule as applied to minors where a plaintiff shows that:

> "(1) the owner or person in possession of the property knows or has reason to know that

> minors frequent the premises; (2) there is a defective or dangerous condition on the premises; (3) because of their immaturity, the minors are incapable of appreciating the risks of the defective or dangerous entity and are likely to be injured by it; and (4) the expense or inconvenience of remedying the condition is slight compared to the risk to the children." *Garcia*, 184 Ill. App. 3d at 110 (citing Kahn v. James Burton Co., 5 Ill. 2d 614, 625 (1995)).

Defendant contends plaintiff's fourth amended complaint failed to adequately set forth any facts to support her assertion that defendant knew or was aware that plaintiff's minor children resided in the apartment. See *Kahn*, 5 Ill. 2d at 625; *Slevy v. Beigel*, 283 Ill. App. 3d 532, 538 (1996) (In affirming trial court's grant of summary judgment in landlord's favor in a negligence action based on a minor's exposure to lead paint, this court noted the plaintiffs failed to establish the landlord "knew or should have known that there were children on the premises."). ¶ 21 In construing the complaint's allegations in the light most favorable to the plaintiff, we find plaintiff's fourth amended complaint alleged sufficient facts to support her cause of

action. With regards as to whether defendant "knew" plaintiff's minor children resided in the apartment, we note plaintiff specifically alleged "Plaintiff was present at the initial viewing of the apartment, along with her mother, Rose Lee Elam, wherein Defendant, LEE SMITH, was informed that Plaintiff and her minor children would be residing at said apartment." Plaintiff also specifically alleged that "[defendant] was informed prior to May, 2007, by telephone conversation with Robert Price, step-father of the plaintiff, that [plaintiff] and her minor children would be moving in to said apartment," and that defendant "was informed by [Elam] in person" during defendant's regular visits to the apartment between May 2007 and August 2008 that "Plaintiff and her minor children were residing at said apartment."

¶ 22 Contrary to defendant's contention, we find plaintiff's factual allegations were not merely speculative factual and legal conclusions. Plaintiff's allegations in Paragraph 4 of Counts I and II do much more than simply allege in a conclusory fashion that defendant was aware plaintiff's minor children were actually residing in the property. Instead, the allegations-- which we note must be taken as true at this stage of the case--allege defendant was specifically "informed" in person by plaintiff and Elam that plaintiff and her minor children would be residing in the apartment. Plaintiff also specifically alleged Price, who

was listed on the signed lease as a resident of the apartment, "telephoned" defendant prior to May 2007 and "informed" him plaintiff and her minor children would be moving into the apartment.

¶ 23 While defendant seems to suggest on appeal that the unverified factual allegations in plaintiff's complaint are discredited by defendant's own affidavit and the subsequently signed lease listing only Price and Elam as residents, we note we must accept as true all well-pled facts and all reasonable inferences that may be drawn from those facts at this stage in the proceedings. *Beretta U.S.A Corp.*, 213 Ill. 2d at 364. Moreover, we note plaintiff is not required to prove her case in the pleading stage; rather, she must merely allege sufficient facts to state all elements which are necessary to constitute her cause of action. *Visvardi,* 375 Ill. App. 3d at 725. We find plaintiff clearly did so here in her fourth amended complaint.

¶ 24 Accordingly, we find dismissal of plaintiff's amended complaint was not justified under section 2-615 of the Code.

¶ 25 II. Dismissal under Section 2-619(a)(9) of the Code

¶ 26 A section 2-619(a)(9) motion to dismiss alleges the claim asserted against the defendant is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Unlike a section 2-615 motion to

dismiss, a section 2-619(a)(9) motion admits the legal sufficiency of the plaintiff's cause of action and all well-pleaded facts alleged in the complaint are taken as true. *Johnson v. Du Page Airport Authority*, 268 Ill. App. 3d 409, 414 (1994). However, conclusions of law or fact unsupported by specific factual allegations may be disregarded. *Johnson*, 268 Ill. App. 3d at 414.

¶ 27 We recognize "[e]vidence which merely refutes [an] ultimate fact and well-pled allegation is not an 'affirmative matter' under section 2-619." *Malanowski v. Jabamoni*, 293 Ill. App. 3d 720, 724 (1997), citing *Evergreen Oak Electric Supply and Sales Company, Inc. v. First Chicago Bank of Ravenswood*, 276 Ill. App. 3d 317, 319 (1995) ("Affirmative matter within the meaning of 2-619(a)(9) must be something more than evidence offered to refute well-pled facts in the complaint, since the well-pled facts must be taken as true for purposes of a motion to dismiss.") However, a defendant's section 2-619 motion only admits all well-pleaded facts that are proper within the limited context of what is necessary to establish plaintiff's claim. *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992). A defendant "does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the 2-619 motion." *Barber-Colman Co.*, 236 Ill. App. 3d

at 1073. "If the facts alleged in the complaint are the basis of the claim, the section 2-619 motion admits them. If, however, the allegations are not part of the claim, and most particularly, if they challenge the affirmative factual matters raised by the section 2-619 motion, they are not admitted." *Barber-Colman Co.*, 236 Ill. App. 3d at 1073.

¶ 28 If a party moving for dismissal supplies facts which, if not contradicted, would entitle the party to a judgment as a matter of law, the opposing party cannot rely on bare allegations alone to raise issues of material fact. *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 835 (2006). "Facts contained in an affidavit in support of a motion to dismiss which are not contradicted by counter-affidavit must be taken as true for purposes of the motion." See *Atkinson*, 369 Ill. App. 3d at 835; The rule assumes, however, that the affidavit supports an allegation of affirmative matter, not "material that contests facts that support the claim." *Evergreen Oak Electric Supply and Sales Company, Inc.*, 276 Ill. App. 3d at 319.

¶ 29 In an affidavit filed in support of his motion to dismiss, defendant said that he was "never informed or aware, until I received notice of a claim being made against me, that Diedra Wells, Shamaya Norman and Shanaya Norman were claimed to be residing in the apartment at 5347 W. Race with Rose Lee Elam,"

and that he was "never advised at the initial showing of the apartment to [Elam], or at any time thereafter, that Diedra Wells, Shamaya Norman and Shanaya Norman would be living in the apartment." Defendant averred that plaintiff never signed a lease, and that neither plaintiff nor her minor children were ever disclosed in the application for lease as persons who would be residing in the apartment with Elam. Defendant also averred that the only people he ever agreed could reside in the apartment were the people identified in the application for lease, which did not include plaintiff or her minor children.

¶ 30 Plaintiff contends a material question of fact exists regarding whether defendant knew the minor children would be residing in the apartment. We agree.

¶ 31 Although we recognize defendant alleged in his affidavit in support of his motion to dismiss that he was unaware plaintiff's minor children were residing in the apartment, we note plaintiff properly alleged in her fourth amended complaint that "Plaintiff was present at the initial viewing of the apartment, along with her mother, Rose Lee Elam, wherein Defendant, LEE SMITH, was informed that Plaintiff and her minor children would be residing at said apartment."

¶ 32 Plaintiff and Elam also both averred in signed and sworn affidavits attached to plaintiff's amended complaint that

defendant was "informed and aware" that plaintiff and her minor children would be residing in the apartment. Defendant contends his motion to dismiss was properly granted because the affidavits were too conclusory and insufficient to support plaintiff's allegations. Even if we were to find the affidavits conclusory and insufficient under Supreme Court Rule 191, we note the fourth amended complaint's factual allegations alone were sufficient to create a question of fact regarding defendant's knowledge of the minors' presence in the apartment. Although defendant notes several times on appeal that the allegations in the fourth amended complaint were unverified, defendant does not cite any case law to suggest well-pled allegations in an unverified complaint are not to be accepted as true at this stage of proceedings.

¶ 33 Because the facts alleged in plaintiff's amended complaint formed the basis of her claim and must be accepted as true at this stage, we find the facts alleged in defendant’s affidavit merely refute well-pled allegations. Since an affirmative matter must be based on something more than evidence offered to refute a well-pled fact, we find the trial court erred to the extent it dismissed plaintiff's claim under section 2-619(a)(9) of the Code. Plaintiff is correct that the issue of defendant's knowledge regarding the minor children's presence in the

apartment amounts to a factual dispute that should not have been decided in a section 2-619(a)(9) motion. See *Evergreen Oak Electric Supply and Sales Company, Inc.*, 276 Ill. App. 3d at 319 ("Affirmative matter within the meaning of 2-619(a)(9) must be something more than evidence offered to refute well-pled facts in the complaint, since the well-pled facts must be taken as true for purposes of a motion to dismiss.")

¶ 34 Notwithstanding, defendant contends his section 2-619(a)(9) motion to dismiss establishes he did not owe a duty of care to the child trespassers because the residential lease the "residents." Defendant contends he did not owe the minor children a duty because, pursuant to the terms of the lease, "[o]nly persons listed as Residents may live in the apartment. Persons not listed as Residents may occupy apartment for no more than 14 days without prior written consent of Management."

¶ 35 As previously noted, our supreme court has recognized an exception where minors are involved to the general rule that an owner or person in possession or control of property is not under a duty to keep the premises safe against trespassers. To fall under the exception, a plaintiff must show the landlord knew or should have known the minor children were present in the apartment. *Garcia*, 184 Ill. App. 3d at 110 (citing Kahn, 5 Ill. 2d at 625). As we recognized above, the allegations pled in

plaintiff's fourth amended complaint raised a question of material fact as to whether defendant knew or should have known the minor children were present in the apartment. Such a factual dispute should not be decided in a section 2-619(a)(9) motion.

¶ 36 Accordingly, we find the trial court erred in granting defendant's motion to dismiss.

¶ 37 CONCLUSION

¶ 38 We reverse the trial court's order granting defendant's motion to dismiss plaintiff's claims and remand the cause for further proceedings.

¶ 39 Reversed and remanded.