2014 IL App (1st) 123454-U
No. 1-12-3454
February 11, 2014
Modified Upon Rehearing April 30, 2014

THIRD DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

KEDVALE STREET PROPERTIES, LLC,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11 M1 017391
	)	
KEDVALE COURT CONDOMINIUM	)	The Honorable
ASSOCIATION and PATRICK BARNUM,	)	James E. Snyder,
	)	Judge Presiding.
Defendants-Appellees.	)	

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: A condominium association is not immunized from liability for damages caused by its negligence (1) where an exculpatory clause in the association's declaration and by-laws does not contain language that exculpates the association from liability for damages caused by its negligence, and (2) where another provision in the association's declaration and by-laws provides that the association is liable for damages caused by its negligence.

¶ 2 Plaintiff, Kedvale Street Properties, LLC (Kedvale), filed a complaint against the defendants, Kedvale Court Condominium Association (Association) and Patrick Barnum[1], alleging that defendants were responsible for the water damage to its condominium unit. The defendants filed a motion to dismiss Kedvale's complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (Code), arguing that section 5.8(g) and (i) of the association's declaration and by-laws barred Kedvale's cause of action. The trial court granted defendants' motion and dismissed Kedvale's complaint with prejudice.

¶ 3 On appeal, Kedvale argues that the trial court erred when it granted defendants' motion to dismiss because the association's declaration and by-laws specifically state that the association is liable for damages caused by its negligence. We find that section 5.8(i) of the association's declarations and by-laws does not immunize the association from liability for damages caused by its negligence and that the association may be held liable for damages if the association is found to have acted negligently in performing the repairs to plaintiff's condominium unit. Accordingly, we reverse the order of the trial court that granted defendants' motion to dismiss.

¶ 4 Background

¶ 5 Condominium unit E-1, located at 3851 North Kedvale, Chicago, Illinois and owned by Kedvale, was damaged when water from the common area of the condominium building leaked into the lower level of the unit. Kedvale filed a complaint against the association and

[1]The complaint also named Susan Torres Pynes as a defendant. However, Ms. Pynes was dismissed pursuant to section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2010)) and is, therefore, not a party to this appeal.

Patrick Barnum, one of its officers. The complaint alleged that sometime prior to July 19, 2011, the lower level of unit E-1 began to flood. Eugene Hardiman, Kedvale's general manager, discovered that the water was coming from a stairwell in the common area. On July 19, 2011, Hardiman notified Barnum about the leak and requested permission from Barnum to have the repairs performed immediately by a plumber who was at the condominium unit. Barnum denied Hardiman's request.

¶ 6 The family that rented the condominium unit from Kedvale was not able to use the lower level of the unit so they stayed in the upper level until they were able to find a new place to live. The tenants did not pay rent for the months of August and September as a result of the flooding.

¶ 7 On August 31, 2011, approximately 43 days later, defendants had the plumbing work performed. Kedvale alleged that the flooding caused insect infestation, stench and mold inside the unit. During September, the lower level of unit E-1underwent repairs, which included carpentry work, re-tiling, painting and carpet replacement. Kedvale re-rented the unit on October 1, 2011, and alleged that it sustained damages in the amount of $2,700 for loss rent and $3,941.79 for repairs.

¶ 8 In count one of its complaint, Kedvale alleged that defendants had a duty to use reasonable care in the management and operation of the premises and that defendants breached that duty when they failed to repair the plumbing in a timely manner. In count II, Kedvale alleged that defendants intentionally allowed water to run into unit E-1 for weeks after having received notice of the problem and that such action constituted trespass.

¶ 9 The defendants did not file an answer, but they filed a motion to dismiss Kedvale's complaint pursuant to section 2-619(a)(9) of the Code and argued that Kedvale's action was

barred by sections 5.8(g) and (i) of the association's declaration and by-laws because Kedvale sought recovery for damages that were required to be covered by insurance. The trial court entered an order granting defendants' section 2-619 motion and dismissed Kedvale's complaint with prejudice. Kedvale appeals.

¶ 10 Analysis

¶ 11 A motion to dismiss under section 2-619 admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter that defeats the plaintiff's claim. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). On appeal from a section 2-619 motion, the reviewing court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or whether dismissal is proper as a matter of law. *Czarobski*, 227 Ill. 2d at 369. Appellate courts review orders granting section 2-619 motions to dismiss *de novo*. *Czarobski*, 227 Ill. 2d at 369.

¶ 12 Kedvale argues on appeal that the trial court erred when it granted defendants' motion to dismiss because section 4.5(d) of the declaration and by-laws is the controlling provision and not sections 5.8(g) and (i) as argued by the defendants. Kedvale maintains that defendants are liable for damages in this case because the damages suffered by plaintiff resulted from the association's negligence.

¶ 13 Defendants maintain that they are not liable for Kedvale's damages because Kedvale was required to carry personal property insurance to protect against loss to the personal property in the condominium unit in the event of a casualty, the flood in this case. Defendants also maintain that by accepting the association's declarations and by-laws, Kedvale agreed to waive and release all claims against the association for damages to its condominium unit and personal property because such damages were required to be covered by insurance.

¶ 14 The resolution of the dispute in this case requires this court to interpret provisions of the association's declaration and by-laws. Section 4.5 of the association's declaration and by-laws is titled "Maintenance, Repairs and Replacement" and states in pertinent part as follows:

> "(a) By the Association. ***. Maintenance, repairs and replacements of the Common Elements ***, shall be furnished by the Association acting by and through the Board as part of the Common Expenses ***.
>
> * * *
>
> "(d) Nature of Obligation. Nothing contained in this Declaration shall be construed to impose a contractual liability upon the Association for maintenance, repair and replacement of the Common Elements or the Units or any portion or parts thereof; but the Association's liability shall be limited to damages resulting from negligence. The respective obligations of the Association and Unit Owners set forth in this Declaration shall not be limited, discharged or postponed by reason of the fact that any such maintenance, repair or replacement is required to cure a latent or patent defect in material or workmanship in the construction of the Building, nor because they may become entitled to proceeds under policies of insurance.***"

¶ 15 Section 5.8 of the declaration and by-laws is titled "Insurance" and states in pertinent part as follows:

> "(g) Each unit owner shall be responsible for (i) physical damage insurance on the personal property in such Unit Owners Unit and elsewhere on the Property ***;

* * *

> "(i) Each Unit Owner hereby waives and releases any and all claims which such Unit Owner may have against any other Unit Owner, the Association, its officers, members of the Board, Declarant, Developer, the management company of the Property, if any, and their respective employees and agents, for any damage to the Common Elements, the Units, or to any personal property located in the Unit or Common Elements caused by fire or other casualty to the extent that such damage is covered by fire or other form of casualty insurance or would be covered by insurance for which such Unit Owner is responsible pursuant to Section 5.8(g)."

¶ 16 A legal document must be read as a whole, viewing each provision in light of the other provisions and no provision should be viewed in isolation. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The association's declaration and by-laws, when read as a whole, establish that (1) the association is responsible for maintenance, repairs and replacement of the common elements, which includes the interior and exterior stairways and pipes (Declaration and By-Laws, Article 3, § 3.1 (description of common elements); (2) the association's liability concerning any maintenance, repair or replacement of the common elements or unit, is limited to damages resulting from its negligence (Declaration and By-Laws, Article 4, § 4.5(d)); (3) where the association is obligated to perform maintenance, repairs or replacement, it's obligation to perform cannot be limited, discharged or postponed by the fact that any such maintenance, repairs or replacement may become entitled to proceeds under policies of insurance (Declaration and By-Laws, Article 4, § 4.5(d)); (4) each unit owner is

responsible for procuring insurance to protect against loss to the personal property in the condominium unit (Declaration and By-Laws, Article 5, § 5.8(g)); and (5) the association is released from liability for damages caused by fire or other casualty if the damages were covered or required to be covered by insurance (Declaration and By-Laws, Article 5, § 5.8(i)).

¶ 17 Here, Kedvale alleged in its complaint that its general manager contacted Barnum while a plumber was present in the condominium unit and requested permission to have the plumbing work performed to stop the water from entering the unit, that Barnum refused to give permission to have the work done, that defendants did not perform the repairs until 43 days later, and that as a direct result of defendants' unreasonable delay in performing the necessary repairs, plaintiff's unit was damaged.

¶ 18 We find, based upon the association’s declaration and by-laws, that the defendants had a duty to maintain the common elements of the building to protect the individual units from damage, and that if the association was negligent in making the necessary repairs to plaintiff's condominium unit, it may be held liable for damages.

¶ 19 Defendants invite us to hold that the waiver provision of section 5.8(i) of the declarations and by-laws, in all instances, immunizes them from any responsibility for damage to an individual unit regardless of their negligence or fault. Section 5.8(i) of the declarations and by-laws waives or releases all claims against the association for damages caused by fire or other casualty to the extent that such damage is covered by fire or other form of casualty insurance or would be covered by insurance for which each unit owner is responsible. Declaration and By-Laws, Article 5, § 5.8(i).

¶ 20 Section 5.8(i) is an exculpatory clause or disclaimer because it releases the association from liability for damages that are required to be covered by personal property insurance. Contractual provisions releasing parties from future liability, commonly referred to as exculpatory clauses or disclaimers, are not favored in Illinois and they are strictly construed against the benefitting party. *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 395 (1986). In order to be enforced, an exculpatory clause must spell out the intention of the parties with great particularity and will not be construed to defeat a claim which is not explicitly covered by its terms. *Scott & Fetzer Co.*, 112 Ill. 2d at 395. Section 5.8(i) does not contain any explicit language that waives or releases the association from liability for damages if the association is found to have acted negligently. Therefore, plaintiff's claim for damages based on the association's alleged negligence is clearly not covered by the exculpatory clause.

¶ 21 We find that section 4.5(d) of the declarations and by-laws provides that the association is liable for damages caused by its negligence. Declaration and By-Laws, Article 4, § 4.5(d). Section 4.5(d) also provides that the "obligations of the Association *** set forth in this Declaration shall not be limited, discharged or postponed *** because they may become entitled to proceeds under policies of insurance." Declaration and By-Laws, Article 4, § 4.5(d). A party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract. *Jewelers Mutual Insurance Co. v. Firstar Bank Illinois*, 213 Ill. 2d 58, 65 (2004). Given the fact that we must read all provisions in the declaration and by-laws as a whole and view each provision in light of the other provisions, we find that the exculpatory clause does not bar Kedvale's action to recover damages if such damages resulted from defendants'

negligence. Therefore, the trial court erred when it construed the exculpatory clause to defeat Kedvale's negligence claim for damages.

¶ 22 Finally, Kedvale also states on appeal that the trial court erred when it dismissed count II of its complaint for intentional trespass. We note, however, that Kedvale has not argued this issue or cited to any relevant authority to support such a cause of action against the defendants. Our supreme court has held that both argument and citation to relevant authority are required in order to comply with Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013). *Vancura*, 238 Ill. 2d at 369-70. The supreme court has stated that "[a]n issue that is merely listed or included in a vague allegation of error is not 'argued' and will not satisfy the requirements of the rule." *Vancura*, 238 Ill. 2d at 370. Therefore, we find that Kedvale has forfeited review of its claim of error on the intentional trespass issue because it has failed to provide an argument or relevant authority to support this cause of action.

¶ 23 Conclusion

¶ 24 We find that the exculpatory clause in the association's declaration and by-laws does not immunize defendants from liability for negligence, where the exculpatory clause lacks particularity and another provision in the by-laws provides that the association is liable for damages caused by its negligence. Accordingly, we reverse the trial court's order that granted defendants' motion to dismiss plaintiff's negligence action and we remand to the trial court for further proceedings consistent with this order.

¶ 25 Reversed and remanded.