THIRD DIVISION
July 13, 2016

No. 1-15-2167

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES P. MCGINLEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
vs.	)	No. 13 L 13524
	)	
HOB CHICAGO, INC.,	)	The Honorable
	)	John P. Callahan, Jr.
Defendant-Appellee.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting defendant's motion to dismiss under section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)), where plaintiff's complaint failed to establish any duty owed by defendant as the descending doors of defendant's freight elevator constituted an open and obvious hazard. Affirmed.

¶ 2 This appeal arises from the trial court's order granting a section 2-615 motion to dismiss filed by defendant HOB Chicago, Inc. (HOB) against plaintiff James P. McGinley (735 ILCS 5/2-615 (West 2014)). On appeal, plaintiff contends that the trial court erred in dismissing the negligence claim because the complaint asserts factual allegations supporting a duty, including that HOB was a business inviter and common carrier. Plaintiff also contends that HOB created

an unpredictable and hazardous condition which caused plaintiff's injury. In addition, plaintiff contends the trial court erred in granting the dismissal of its *res ipsa loquitur* claim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts necessary to understand the issues raised on appeal. On March 22, 2013, plaintiff was working as a delivery driver at the House of Blues in downtown Chicago. In the course and scope of his employment, he was using the establishment's freight elevator to facilitate his delivery of boxes of liquor with a moving dolly. In his initial complaint, plantiff sued both HOB and SYSCO Corporation (SYSCO), another vendor that was using the same freight elevator on the day of the incident. The parties engaged in motion practice, with HOB and SYSCO moving to dismiss the complaint, and the trial court granting leave to amend until the Third Amended Complaint was filed.

¶ 5 Specifically, plaintiff pled that HOB owed him a duty of care and that it negligently failed to protect plaintiff from harm. Plaintiff alleged that he was delivering boxes of liquor to HOB while using the establishment's freight elevator when its downward descending doors unexpectedly struck him, causing injury. Plaintiff further pled that a SYSCO employee, who was previously delivering goods to HOB that day, had left a key in the elevator which caused the unpredictable danger of the door coming down after a period of time. In addition, plaintiff alleged that HOB owed him a duty as a business inviter and common carrier. Further, plaintiff claimed that under the theory of *res ipsa loquitur*, HOB possessed and controlled its elevator and that only its negligence could be attributable to plaintiff's injuries.

¶ 6 In its motion to dismiss, HOB argued that it owed no duty to plaintiff as the condition of the elevator closing was open and obvious, which negated any potential duty on its part to warn plaintiff. Alternatively, HOB argued that no exceptions to the open and obvious doctrine applied.

Subsequently, the trial court dismissed all three counts of the complaint and plaintiff filed a timely notice of appeal.

¶ 7 II. ANALYSIS

¶ 8 A motion to dismiss brought under section 2-615 of the Code challenges the legal sufficiency of the complaint by showing defects on its face. *Young v. Bryco Arms*, 213 Ill. 2d 433, 440 (2004). A complaint should be dismissed under section 2-615 for failure to state a cause of action only when it clearly appears that no set of facts could be proved under the pleadings that would entitle the plaintiff to relief. *McLean v. Rockford Country Club*, 352 Ill. App. 3d 229, 232 (2004). Although a section 2-615 motion to dismiss admits all well-plead facts as true, it does not admit conclusions of law or factual conclusions that are unsupported by allegations of specific facts. *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill. App. 3d 452, 456-457 (1995). If after disregarding any legal and factual conclusions, the complaint does not allege sufficient facts to state a cause of action, the motion to dismiss should be granted. *Id.* at 457. Review under section 2-615 is *de novo. King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005).

¶ 9 On appeal, plaintiff summarily contends that the trial court erred in dismissing the negligence claim because the complaint asserts factual allegations supporting a duty on the part of HOB. In order to recover damages in a common law negligence case, plaintiff must set forth a duty, a breach of that duty and injury proximately caused by the breach. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 63. The crux of a court's duty analysis is whether a relationship existed between the parties that imposed a legal obligation upon one party for the benefit of the other party. *Sameer v. Butt*, 343 Ill. App. 3d 78, 85 (2003). In addition, if a court finds that defendant, by his act or omission, contributed to a risk of harm to plaintiff, it

weighs the following four factors to determine whether a duty ran from defendant to plaintiff: (1) the reasonable foreseeability of the injury; (2) the likelihood of the injury; (3) the magnitude of the burden of guarding against the injury; and (4) the consequences of placing that burden on the defendant. *Stearns v. Ridge Ambulance Service, Inc.*, 2015 IL App (2d) 140908, ¶ 10. Further, application of the open and obvious rule affects the first two factors of the duty analysis. *Bruns v. City of Centralia*, 2014 IL 116996, ¶ 19. Therefore, where the condition is open and obvious, the foreseeability of harm and the likelihood of injury will be slight, thus weighing against the imposition of a duty. *Id.*

¶ 10 Here, plaintiff pleads no factual allegations that establish HOB, by act or omission, contributed to a risk of harm. As we will discuss at length below, the elevator presented an open and obvious condition negating the first two factors. Further, plaintiff's contention that installing freight elevator sensors or warning sounds for the close of the doors would be "neither significant nor costly" is disingenuous. As HOB properly highlights, requiring it to retrofit or replace all freight elevators would create a significant burden on *all* Illinois freight elevator owners who would be affected by a ruling in plaintiff's favor. Nonetheless, a duty may still run from HOB to plaintiff if they were in a special relationship. See *Stearns*, 2015 IL App (2d) at ¶ 10

¶ 11 Plaintiff contends that HOB owed him a duty as a business inviter and common carrier. A person is a business invitee on the land of another if (1) the person enters by express or implied invitation; (2) the entry is connected with the owner's business or with an activity conducted by the owner on the land; and (3) the owner receives a benefit. *Leonardi v. Bradley University*, 253 Ill. App. 3d 685, 689-690 (1993). Generally, a business operator owes its invitees a duty to exercise reasonable care in maintaining the premises in a reasonably safe

condition for use by its invitees. *Miller v. National Ass'n of Realtors*, 271 Ill. App. 3d 653, 656 (1994).

¶ 12 Further, a common carrier is "one who undertakes for the public to transport from place to place such persons or goods of such as choose to employ him for hire." *Doe v. Rockdale School District, No. 84*, 287 Ill. App. 3d 791, 793 (1997). Common carriers have a duty to exercise the highest standard of care in protecting their passengers. *Fillpot v. Midway Airlines, Inc.*, 261 Ill. App. 3d 237, 242 (1994). In cases involving elevators, Illinois courts have held that a common carrier is required to exercise the highest degree of care for the safety of the persons riding in its elevators and have the duty of furnishing cars which are safe and equipped with protective appliances. *Cobb v. Marshall Field & Co.*, 22 Ill. App. 2d 143, 153 (1959), see *Shoemaker v. Rush-Presbyterian-St. Luke's Medical Center*, 187 Ill. App. 3d 1040, 1045 (1989). The rationale for the imposition of the highest degree of care on common carriers is that the degree of care should be commensurate with the danger to which the passenger is subjected. *Katamay v. Chicago Transit Authority*, 53 Ill. 2d 27, 29-30 (1972), see *Fillpot*, 261 Ill. App. 3d at 242.

¶ 13 In the case *sub judice*, a special relationship existed between plaintiff and HOB. Plaintiff entered HOB's premises as a business invitee providing a delivery service for HOB's benefit. Further, as an owner of an elevator carrying passengers, HOB is a common carrier owing plaintiff a duty. *Jardine v. Rubloff*, 73 Ill. 2d 31, 41 (1978). But in either event, HOB does not have a duty to protect against open and obvious dangers.

¶ 14 In Illinois, the open and obvious doctrine is an exception to the general duty of care owed by a landowner. See *Park v. Northeast Illinois Regional Commuter Railroad Corp.*, 2011 IL App (1st) 101283, ¶ 12 quoting Restatement (Second) of Torts § 343A(1) (1965) ("[a] possessor of

land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness"); see also *Sandoval v. City of Chicago*, 357 Ill. App. 3d 1023, 1028 (2005) ("[a]ccordingly, no duty to warn or protect may be imposed upon a defendant where the danger is open and obvious"). Open and obvious denotes that "both the condition and the risk are apparent to and would be recognized by a reasonable [person], in the position of the visitor, exercising ordinary perception, intelligence, and judgment." *Deibert v. Bauer Bros. Construction Co., Inc.*, 141 Ill. 2d 430, 435 (1990) *quoting* Restatement (Second) of Torts § 343A, at 218 (1965). There is no duty to warn against open and obvious dangers because property owners are entitled to the expectation that those who enter upon their property will exercise reasonable care for their own safety. *Sandoval*, 357 Ill. App. 3d at 1028.

¶ 15 Plaintiff contends that the open and obvious defense does not apply because the issue is HOB's "active negligence" and not merely the condition of the elevator. That is, that HOB allowed the key that made the elevator operational to remain in the elevator while plaintiff was performing work on the premises. This argument conveniently ignores the fact that plaintiff could only do his work while using the elevator with the key in its operational position. Furthermore, plaintiff does not allege that leaving the key in the elevator created some additional risk beyond that inherent in the normal function of a freight elevator- the risk of the door closing after a certain amount of time. Nor does plaintiff allege that HOB, by and through any of its agents, affirmatively acted to close the elevator door at the time of the incident.

¶ 16 We agree with HOB's reliance on *Murphy v. Ambassador East*, 54 Ill. App. 3d 980, 984 (1977), where the court was tasked with determining whether or not a landowner had a duty to protect against the closing of a normally operating freight elevator door. The court ultimately

ruled against the plaintiff in stating "we cannot say that the mere fact that this elevator had doors which met horizontally in the middle [was] a danger which constitute[d] an unreasonable risk of harm." It further explained that "the danger of catching one's hand in normally operating elevator doors, whether horizontal or vertical, [was] obvious to all." *Id.* at 984-985. In essence, HOB argues that this condition is open and obvious because what goes up (the elevator door) will surely come down, leaving a landowner with no duty to protect an invitee. See *Id* at 986.

¶ 17 Illinois courts have recognized two exceptions to the open and obvious doctrine: the distraction exception and the deliberate-encounter exception. First, under the distraction exception, a possessor of premises should anticipate harm to an invitee when the possessor "has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." *Ward v. K Mart Corp.*, 136 Ill. 2d. 132, 149-150 (1990) *quoting* Restatement (Second) of Torts § 343A cmt. f, para. 2 (1965). Further, the distraction exception does not apply where the plaintiff chooses to look at something besides the alleged hazard. See *Whittleman v. Olin Corp.*, 358 Ill. App. 3d 813, 817-818 (2005). Rather, the exception applies only where the plaintiff was "distracted from the open and obvious condition because circumstances required that she focus her attention on some other condition or hazard." See *Sandoval*, 357 Ill. App. 3d at 1028.

¶ 18 The distraction exception does not apply in this case, despite plaintiff's claims that he was distracted by his work duties and because his vision was obscured by the hat he was wearing. Plaintiff did not allege that he was distracted by another condition or hazard on the premises or that HOB somehow was responsible for the purported distractions that he says contributed to causing the accident. In sum, it is not reasonably foreseeable that plaintiff would become so

distracted by his work and clothing that he would be unable to recognize the open and obvious risk of a closing elevator door.

¶ 19 Furthermore, under the deliberate-encounter exception, a possessor of land has reason to anticipate or expect that an invitee will proceed to encounter an open and obvious danger because, to a reasonable person in the invitee's position, the advantages of doing so outweigh the risk. *Kleiber v. Freeport Farm and Fleet, Inc.*, 406 Ill. App. 3d 249, 258 (2010). This exception recognizes that individuals will make deliberate choices to encounter hazards when "faced with employment concerns and those encounters are reasonably foreseeable by possessors of property." *Id.*

¶ 20 We reject the application of the deliberate-encounter exception in this case. Although plaintiff suggests that the exception should apply because Illinois courts have applied it in multiple cases involving workers performing their work tasks, plaintiff makes no allegation suggesting that he deliberately encountered the closing elevator door or that he was aware of a hazard and consciously chose to encounter it. *Cf Simmons v. American Drug Stores, Inc.*, 329 Ill. App. 3d 38, 40-41 (2002) (where plaintiff had to encounter the danger to leave the store area and to get to his car); *LaFever v. Kemlite Co.*, 185 Ill. 2d 380 (1998) (where a driver of an industrial waste truck deliberately walked through and slipped and fell on manufacturing debris lying on the floor of a facility to fulfill his employment obligations).

¶ 21 Finally, plaintiff contends HOB owed plaintiff a duty under the *res ipsa loquitur* doctrine. The purpose of the *res ipsa loquitur* doctrine is to allow proof of negligence by circumstantial evidence when the direct evidence concerning cause of injury is primarily within the knowledge and control of the defendant. *Collins v. Superior Air-Ground Ambulance Service, Inc.*, 338 Ill. App. 3d 812, 816 (2003). The doctrine, however, cannot apply unless a duty of care is owed by

defendant to plaintiff. See *Heastie v. Roberts*, 226 Ill. 2d 515, 532 (2007) ("the requisite control is not a rigid standard, but a flexible one in which the key question is whether the probable cause of the plaintiff's injury was one which the defendant was under a duty to the plaintiff to anticipate or guard against"). As already established, HOB owed plaintiff no duty, thus, his claim for *res ipsa loquitur* fails. Consequently, the trial court properly dismissed plaintiff's Third Amended Complaint.

¶ 22 CONCLUSION

¶ 23 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.