2017 IL App (1st) 152332-U

No. 1-15-2332

Order filed July 28, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LOSIRI NUCHJARE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 13 L 552
	)	
BARRINGTON SQUARE V and	)	Honorable
AMERICAN COMMUNITY	)	Janet Adams Brosnahan,
MANAGEMENT, an Illinois Corporation,	)	Judge, presiding.
	)	
Defendant-Appellees.	)	

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's denial of leave to amend complaint was not an abuse of discretion as plaintiff's amendment would not have cured a defective pleading, amendment so close to trial date would have prejudiced defendant, and plaintiff had a previous opportunity to amend.

¶ 2 Plaintiff Losiri Nuchjare brought a negligence suit against defendants Barrington Square V (Barrington) and American Community Management (American) for injuries she sustained

after falling on snow while walking on an outdoor walkway in a townhome complex owned by Barrington and managed by American. After the trial court granted summary judgment in favor of defendants, it denied plaintiff leave to amend her complaint to add a breach of contract claim. Plaintiff appeals, arguing that the trial court abused its discretion in denying her leave to amend her complaint. For the reasons set forth herein, we affirm.

¶ 3 On January 17, 2013, plaintiff filed a complaint in the circuit court of Cook County, law division. Count I of the complaint alleged that Barrington owned the townhome complex within which plaintiff lived and owed her a duty to properly maintain common areas of the complex, which it asserted included the removal of ice and snow from walkways within the complex. The complaint alleged that Barrington breached that duty by allowing "an unnatural amount of ice and snow to accumulate upon the walkways within the complex." Plaintiff alleged that, as a result of Barrington's failure to remove the unnatural accumulation of ice and snow, she fell and sustained "numerous and serious injuries including a fractured wrist." She claimed she suffered medical expenses, loss of income, and loss of a normal life and sought in excess of $100,000 in damages from Barrington.

¶ 4 Count II of the complaint alleged similar theories of negligence against American. The complaint alleged that American had been contracted by Barrington to maintain the common areas of the townhome complex and was, therefore, responsible for the removal of ice and snow from the outdoor walkways. Plaintiff alleged that American's failure to remove an unnatural accumulation of ice and snow from a walkway caused her to slip and fall. As a result, plaintiff allegedly suffered "serious and permanent injuries," and sought in excess of $100,000 in damages from American.

¶ 5 On April 8, 2013, Barrington and American filed an answer to plaintiff's complaint, denying any breach of duty and allegations of negligence. The answer also raised the affirmative defense that plaintiff's own negligence contributed in whole or in part to the injury that she claimed.

¶ 6 Over the course of the proceedings, the trial court set numerous discovery deadlines. On October 10, 2014, it ordered that discovery be completed by November 25, 2014, and set a trial date of March 20, 2015.

¶ 7 On October 30, 2014, defendants filed a motion for summary judgment. They claimed that there was no genuine issue of material fact as to whether the ice and snow on which plaintiff slipped was natural accumulation. Defendants argued that, under Illinois case law, owners of residential property have no duty to remove natural accumulations of snow or ice, and, plaintiff therefore had to show that the ice and snow on which she slipped was an unnatural accumulation.

¶ 8 Defendants attached a copy of plaintiff's discovery deposition, in which she testified that it had been snowing on and off all day and night before she slipped and fell. She also testified that defendants had not cleared the walkway, and asserted that unspecified bylaws stated that they were in charge of shoveling and salting the common areas. Defendants argued that, as plaintiff presented no evidence that she slipped on an unnatural accumulation of ice and snow, and her own deposition testimony suggested that the snow on the walkway was a natural accumulation, summary judgment should be granted in their favor.

¶ 9 On December 23, 2014, plaintiff filed a response to the motion for summary judgment, claiming that her payment of a monthly condominium assessment imposed on Barrington a duty of snow removal. She stated that she did not have a copy of the condominium declarations and

rules and regulations (the regulations), which allegedly detailed this duty, but that she would make a demand upon defendants to provide a copy. Plaintiff's response also stated that her deposition testimony showed that defendants often failed to remove snow from common areas. She argued a genuine issue of material fact therefore existed regarding whether defendants "adequately and properly performed their duties" and summary judgment should not be granted.

¶ 10 On March 12, 2015, in a written memorandum, the trial court granted summary judgment in favor of defendants. The court noted that, even if snow and ice remain on a property for an unreasonable amount of time, "no liability will be imposed on a proprietor as long as the snow and ice is a natural accumulation."[1] The trial court found that plaintiff's uncontradicted testimony established that she fell on a natural accumulation of snow. As such, defendants were entitled to summary judgment.

¶ 11 The court also denied plaintiff's oral motion seeking leave to amend her complaint to allege a breach of contract, and willful and wanton misconduct by defendants. Plaintiff sought to allege that defendants had a contractual duty under the regulations to keep the walkways clear of snow and ice. She also sought to allege that "there is [sic.] always problems with the shoveling," and that defendants were willful and wanton in their snow removal efforts. The court stated that plaintiff did not amend her complaint or request additional discovery time prior to responding to the motion for summary judgment. Noting that plaintiff did not attempt to amend her complaint until after her negligence theory failed, the court stated that it would be inappropriate for plaintiff to "revise the cause of action entirely." The court ordered the March 20, 2015, trial date stricken.

[1] Under Illinois common law, a property owner has no duty to remove a natural accumulation of snow and ice from his property. *Murphy-Hylton v. Lieberman Management Services, Inc.*, 2016 IL 120394, ¶ 19. In order to avoid summary judgment in such cases, a plaintiff must allege sufficient facts for a trier of fact to find that the defendant was responsible for an unnatural accumulation of snow or ice on which the plaintiff fell. *Tzakis v. Dominick's Finer Foods, Inc.*, 356 Ill. App. 3d 740, 746 (2005).

¶ 12 On April 10, 2015, plaintiff filed a motion to reconsider the granting of summary judgment and denial of her motion for leave to amend her complaint. She argued that, under the regulations, defendants had a duty to remove the snow. She attached to the motion the section of the regulations which she claimed imposed this contractual duty on defendants. Plaintiff cited section 5/2-1005(g) of the Illinois Code of Civil Procedure (735 ILCS 5/2-1005(g) (West 2014)), which provides that "[b]efore or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms."

¶ 13 Defendants' response to the motion to reconsider argued that it is improper to add claims or causes of action after judgment if those claims or causes of action were available at the time of the original complaint. The response claimed that the plaintiff had previous opportunities to amend the complaint, but she failed to do so.

¶ 14 In an order dated July 15, 2015, the trial court denied plaintiff's motion to reconsider.

¶ 15 Plaintiff appeals, arguing that the trial court erred in denying her motion to amend her complaint to allege a breach of contract by defendants.

¶ 16 Initially, we note that plaintiff did not comply with Illinois Supreme Court Rule 341(h)(6), which mandates that appellant briefs must contain a statement of facts "which shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. Jan. 1, 2016). Notably, plaintiff's statement of facts is five sentences long, is argumentative, and contains no citations to the record. Appellate courts have the right to strike an appellant's brief and dismiss the appeal as a result of appellant's failure to provide an adequate statement of the facts. *Burmac Metal Finishing Co. v. West Bend Mutual Insurance*

Co., 356 Ill. App. 3d 471, 478 (2005). However, whether to dismiss an appeal due to the appellant's brief's violation of Illinois Supreme Court Rule 341(h)(6) is a matter in a reviewing court's discretion. *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶21. As defendants' appellee brief provides a clear and direct statement of the facts, we will proceed with review.

¶ 17 Section 2-1005(g) states that "[b]efore or after the entry of a summary judgment, the court shall permit pleadings to be amended upon just and reasonable terms." 735 ILCS 5/2-1005(g) (West 2014). Whether to allow an amendment of a complaint is a matter within the discretion of a trial court, and we review a court's denial of leave to amend under the abuse of discretion standard. *Hachem v. Chicago Title Insurance Co.*, 2015 IL App (1st) 143188, ¶ 16. In determining whether a trial court abused its discretion by denying leave to amend, Illinois courts must determine "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

¶ 18 Applying the first factor, whether the proposed amendment would cure a defective pleading, we note that the grant of summary judgment was not a determination that plaintiff's pleadings were defective. Rather, it was a determination that there was no genuine issue of material fact regarding the natural origin of the accumulation of snow and that defendants prevailed as a matter of law. Plaintiff's adding of a breach of contract count to the complaint would, therefore, not cure a defective pleading, but would create an entirely different pleading.

This factor, therefore, weighs in favor of affirming the trial court. See *Lajato v. AT & T, Inc.*, 283 Ill. App. 3d 126, 140 (1996) ("[T]he question of whether plaintiff's proposed amendment would cure the defective pleading is not relevant, because * * * [defendant] succeeded in * * * summary judgment not because plaintiff's complaint was improperly pleaded, but because the evidence presented * * * shows no genuine issue of material fact regarding the allegations in the complaint.")

¶ 19 Considering the second and third factors together, whether other parties would sustain prejudice or surprise by virtue of the proposed amendment and whether the proposed amendment is timely, plaintiff argues that defendants would not be prejudiced "in any manner" by adding a breach of contract claim because defendants "were aware of [the regulations]." "Prejudice to the party opposing an amendment is the most important of the *Loyola* factors, and 'substantial latitude to amend will be granted when there is no prejudice or surprise to the nonmovant.' " *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525 (2007) (quoting *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill. App. 3d 628, 638 (2004)). Prejudice exists where a delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial. *Id.* We cannot agree with plaintiff.

¶ 20 Plaintiff made her motion for leave to amend on March 12, 2015, which was eight days before the set trial date of March 20, 2015, and two years after she filed her complaint. See *Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525-26 (2007) ("The stage of litigation at which a proposed amendment is brought is certainly a relevant consideration.") Although the record shows that defendants were aware of and had copies of the regulations, there was no indication prior to plaintiff's proposed amendments, made after the court granted defendants' motion for

summary judgment, that defendants would have to defend against breach of contract allegations. As defendants were focusing on plaintiff's negligence claims, they did not have an opportunity to preserve or obtain evidence relating to an alleged breach of contract. Allowing plaintiff to add a breach of contract allegation eight days before trial, after more than two years in which plaintiff did not raise the issue, would not leave sufficient time for defendants to prepare to respond at trial. Therefore, we find that plaintiff's amendment would have been untimely and prejudiced defendants.

¶ 21 The final *Loyola* factor is whether previous opportunities to amend the pleading could be identified. Plaintiff claims that the first opportunity to amend her complaint came about after summary judgment was granted. We disagree. As the trial court noted, plaintiff did not amend her complaint or request additional time for discovery when defendants filed their motion for summary judgment in October 2014. Plaintiff could have sought leave to amend before she responded to the motion in December 2014. In fact, she had two years in which to amend her complaint, as her original complaint was filed in January 2013. Plaintiff gives no explanation as to why she did not attempt to amend her complaint until after summary judgment was granted. As such, this factor weighs in favor of affirming the trial court.

¶ 22 As all four of the *Loyola* factors support the trial court's decision to deny plaintiff's motion for leave to amend her complaint, we hold that the trial court did not abuse its discretion.

¶ 23 For the foregoing reason, we affirm the decision of the trial court.

¶ 24 Affirmed.