2018 IL App (1st) 171309-U
No. 1-17-1309

SECOND DIVISION
September 28, 2018

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ADELINE MIKKA, Plaintiff-Appellant, v. SAFEGUARD PROPERTIES, LLC, SAFEGUARD PROPERTIES MANAGEMENT, LLC, CITIMORTGAGE, INC., MARY MCCAIN d/b/a RMT CONTRACTOR, Defendants, (Safeguard Properties, LLC, and Safeguard Properties Management, LLC, Defendants-Appellees).	)	Appeal from the Circuit Court of Cook County. No. 14 L 3326 The Honorable Kathy M. Flanagan, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's grant of summary judgment in favor of the defendant affirmed where there was no genuine issue of material fact regarding whether the defendant owed a duty to the plaintiff to protect her home from water leaking from an adjoining property under theories of contractual duty, voluntary undertaking, or premises liability.

¶ 2 Plaintiff, Adeline Mikka, appeals from the trial court's grant of summary judgment in favor of defendants Safeguard Properties, LLC ("Safeguard Properties") and Safeguard Management, LLC ("Safeguard Management") (collectively, "Safeguard"). On appeal, plaintiff argues that the trial court erred in concluding that Safeguard did not owe a duty to plaintiff to protect her home from water leaking from an adjoining property, which Safeguard managed on behalf of the mortgage holder. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Plaintiff instituted this action against Safeguard in March 2014. Subsequently, plaintiff filed an amended complaint, adding CitiMortgage, Inc. ("CitiMortgage") and Mary McCain d/b/a RMT Contractor ("McCain") as defendants. McCain defaulted, and judgment was entered against her in the amount of $534,679.00. Thereafter, plaintiff filed her "First Amended Complaint" (it was actually her second amended complaint).

¶ 5 In her "First Amended Complaint," plaintiff alleged as follows. She owned the property located at 1818 W. Huron in Chicago. Next door was 1814 W. Huron, on which CitiMortgage held the mortgage. CitiMortgage considered 1814 W. Huron to be an at-risk and/or defaulted property and, thus, contracted with Safeguard for the maintenance and upkeep of 1814 W. Huron. Safeguard then hired McCain as its agent and/or employee to perform the maintenance and upkeep of 1814 W. Huron.

¶ 6 In February 2011, plaintiff and her son, Matthew, noticed large amounts of water infiltrating their home at 1818 W. Huron. In July 2011, Matthew learned that the main water line in the interior of 1814 W. Huron had broken. That water traveled and seeped through and damaged the walls and foundation of 1818 W. Huron. Matthew notified Safeguard of the broken water main in 1814 W. Huron and the resulting damage to 1818 W. Huron. On or about July 14,

2011, Safeguard and/or McCain visited 1814 W. Huron and determined that the interior main water line had broken, filling the crawlspace with water. On that same day, Safeguard informed plaintiff and Matthew that it would contact the City of Chicago ("City") immediately to have the water to 1814 W. Huron shut off. A few days later, Safeguard and/or McCain returned and assured plaintiff and Matthew that the water to 1814 W. Huron had been shut off.

¶ 7 In the following months, plaintiff and Matthew learned that the water to 1814 W. Huron had not been shut off. Instead, the water continued to fill the crawl space at 1814 W. Huron and to flow into the foundation and basement of 1818 W. Huron.

¶ 8 Count I of the "First Amended Complaint" alleged negligence against Safeguard and McCain. Specifically, in Count I, plaintiff alleged that Safeguard and McCain "had a duty to properly maintain the main water line in the interior of the house within 1814 W. Huron, and ensure that said main water line in the interior of the house was in good operating condition and sustained no breaks, leaks, cracks or other faults that would allow water to escape and cause flooding[] and damage to neighboring residences." Plaintiff alleged that Safeguard and McCain, despite knowing that water was running from 1814 W. Huron to 1818 W. Huron and causing damage, breached their duty in the following ways:

> "a. Failed to repair and maintain the main water line in the interior of the house at 1814 W. Huron despite knowledge that it was in disrepair and despite knowledge that severe damage to Plaintiff's Property would result;
>
> b. Failed to inspect the main water line in the interior of the house at 1814 W. Huron for leaks and breaks;

c. Failed to turn off the water to 1814 W. Huron, even after it knew that the broken main water line in the interior of the house was causing water to flow onto 1818 W. Huron in copious amounts and damage Plaintiff's Property;

d. Allowed the main water line in the interior of the house at 1814 W. Huron to become broken and remain in a state of disrepair, creating a hazardous condition for neighboring residents and their property, including Plaintiff;

e. Failed to turn off the water to 1814 W. Huron, despite being asked on more than one occasion to do so;

f. Failed to remedy the dangerous condition and/or hire a plumber or other person when Defendants knew, or should have known, that the broken main water line in the interior of the house left unrepaired would cause widespread damage to property, including the 1818 W. Huron [*sic*];

g. Failed to warn Plaintiff of the hazardous condition caused by the broken main water line in the interior of the house at 1814 W. Huron;

h. Failed to make reasonable inspection of the main water line in the interior of the house at 1814 W. Huron; and

i. Allowed the water from 1814 W. Huron to saturate 1818 W. Huron to such an extent that the damage could not be repaired by contractors engaged by Plaintiff."

Plaintiff alleged that, as a result of one or more of these negligent acts, the masonry walls, foundation, joists, and supporting members of 1818 W. Huron were damaged. Count II of the "First Amended Complaint" contained similar allegations of negligence against CitiMortgage.

¶ 9 In March 2016, the trial court, on the motion of CitiMortgage, dismissed Count II of the "First Amended Complaint" with prejudice on the basis that plaintiff failed to establish that

CitiMortgage owed plaintiff a duty based on a voluntary undertaking. More specifically, the trial court stated that it was not clear that a theory of voluntary undertaking applied to plaintiff's claims against CitiMortgage, because there was no claim of bodily or physical injury and because CitiMortgage was a mortgagee. Even if the theory of voluntary undertaking did apply, the trial court found, plaintiff failed to adequately allege a duty, because plaintiff failed to make specific allegations regarding CitiMortgage's possession and control of 1814 W. Huron at the time of the incident.

¶ 10 Thereafter, Safeguard filed a motion for summary judgment. In that motion, Safeguard argued that there was no genuine issue of material fact regarding whether Safeguard owed a duty to plaintiff to prevent the water damage to 1818 W. Huron. More specifically, Safeguard argued that plaintiff could not establish that Safeguard owed a contractual duty to plaintiff, voluntarily undertook to protect plaintiff's property, or was liable under a theory of premises liability. Safeguard argued that plaintiff could not establish a contractual duty owed by Safeguard, because the only contract involved was the Master Services Agreement ("MSA") entered into by Safeguard and CitiMortgage and to which plaintiff was not a party. In addition, the MSA did not require or authorize Safeguard to maintain or service the interior main water line at 1814 W. Huron. With respect to voluntary undertaking, Safeguard argued that it did nothing to undertake a duty to maintain the interior water line and that if McCain voluntarily undertook a duty, it was only to call the City to have the water shut off, which she did. Safeguard also argued that it was not responsible for McCain's actions, because she was not an agent of Safeguard's. As for premises liability, Safeguard argued that it could not be held liable on such a basis, because it did not have exclusive possession of 1814 W. Huron. Finally, Safeguard argued that it was entitled

to judgment on all claims against Safeguard Management, because Safeguard Management did not exist at the time that plaintiff's claims arose.

¶ 11 Safeguard submitted a number of exhibits in support of its motion for summary judgment. Amongst them was a transcript of a deposition of Matthew Mikka. In that deposition, Matthew testified that he lived in the second floor of 1818 W. Huron, while plaintiff lived on the first floor. In February 2011, Matthew and his mother first observed water entering the foundation of 1818 W. Huron on the east wall, the side of the home neighboring 1814 W. Huron. Concerned that their water main had broken, plaintiff called the water department, trying to figure out where the water was coming from. In March 2011, she also called a water sealing company, whose representative told them that they would need to locate the source of the water before anything could be done. The water continued to flow into 1818 W. Huron, and plaintiff continued to call the water department on a monthly basis. In June or July 2011, Matthew learned from Valentine Rios, the owner of 1814 W. Huron, that a water main had broken in 1814 W. Huron.

¶ 12 In July 2011, plaintiff complained to CitiMortgage. Also that month, Matthew observed McCain and a crew at 1814 W. Huron, cutting grass, picking up garbage, and cleaning the inside of the home. Matthew and plaintiff spoke to McCain and told her about the water coming into their home. McCain told them that everything was fine, but that they would look into the issue and make sure nothing was leaking. She also told them that she and the crew were with Safeguard and that if there were any problems, Matthew and plaintiff should call the number on the door sticker on 1814 W. Huron. Thereafter, Matthew observed workers at 1814 W. Huron on a monthly basis. In September 2011, Matthew and plaintiff spoke to McCain and two of her male coworkers, asking them if they had looked into the water issue, because the damages to

1818 W. Huron were getting worse. The two men told Matthew and plaintiff that everything at 1814 W. Huron was fine. McCain also said that everything was fine and that there was nothing leaking in 1814 W. Huron. In October 2011, workers at 1814 W. Huron told Matthew that the water had been shut off to the home.

¶ 13 Water continued to enter 1818 W. Huron until approximately March 2012 when the water was finally shut off at 1814 W. Huron.

¶ 14 Mathew testified that Safeguard had not told him or plaintiff that they would shut off the water, but instead told them that they would look into the water problem and resolve it if they found anything. Later in his deposition, however, Matthew identified an email that he wrote, stating that in July 2011, Safeguard told him that the water main at 1814 W. Huron had broken, that the crawl space at that home had filled with water, and that they would have the water shut off right away. Matthew testified that, at the time of his deposition, he did not have any recollection of the time frame in which that conversation with Safeguard took place. He then reaffirmed, despite his earlier testimony, that Safeguard did tell him and plaintiff that it would call the city and have the water shut off to 1814 W. Huron, although he did not recall when that happened. Other than saying that it would have the water shut off, Matthew testified that Safeguard did not say that it would do anything further. When asked if Safeguard's representation that it would call the city to have the water shut off to 1814 W. Huron caused Matthew or plaintiff to do anything differently, Matthew testified, "Well, we were kind of out of options at that point."

¶ 15 Safeguard also submitted the deposition of Steven Meyer, the Assistant Vice-President of High Risk and Hazard Claims for Safeguard Properties. He testified that Safeguard Properties is a field service company that sources local independent contractors to perform services on

properties in default held by the clients of Safeguard Properties. The scope of work performed on the properties by the sourced independent contractors was defined by work orders from the clients of Safeguard Properties.

¶ 16 A July 11, 2011, work order directed McCain to winterize 1814 W. Huron. As part of that winterization, McCain was to shut off the water and disconnect the water meters. Meyer also testified to numerous work orders and work order updates that indicated that until February 2012, exterior inspections of 1814 W. Huron indicated that the water was off at the home. In February 2012, an independent contractor ordered the water at 1814 W. Huron to be shut off at the curb and indicated that the main water valve of the home was broken. The following month, Safeguard Properties received a rush work order based on Matthew's complaints that the water to 1814 W. Huron had not been shut off and the resulting water flow was damaging 1818 W. Huron. Thereafter, work order updates indicated that 1814 W. Huron had broken pipes causing water leaks and that the dispatched independent contractors were unable to turn off the water because the city needed to repair the buffalo box that controlled the water flow into the property.

¶ 17 Safeguard also submitted certain work order updates in support of its motion for summary judgment. An update dated July 16, 2011, indicated that the water to 1814 W. Huron had been terminated on May 27, 2011, and was shut off at the curb. The winterization had been performed, but a pressure check was not performed due to the presence of broken pipes in the home. The update also indicated that although there were signs of a roof water leak on the second floor, there was no water to be pumped from the property. A work order update from March 3, 2012, indicated that there was an inch of standing water in the basement and first floor of the home and that the water was on upon the contractor's arrival. Upon departure, however, it was off. Another update from March 12, 2012, indicated that the water to the property was on

both upon arrival and departure, but that there were no active signs of flooding or water. An update from the following day indicated that the water to the property was off at the curb upon arrival and departure and that the ordered pumping of the standing water was not completed because the water was no longer present when the contractor arrived. Subsequent updates in April and July 2012 indicated that the water was off at 1814 W. Huron.

¶ 18 Service requests to the City's water department were also submitted by Safeguard in support of its motion for summary judgment. A service request was made by McCain on July 14, 2011. In the call, McCain indicated that although there was an old water shut off notice posted on 1814 W. Huron, water was still leaking inside the property. The City dispatched an inspector, who noted that he did not find any problems and that the water was off upon his arrival. A service request made in March 2012 indicated that the water shut off at 1814 W. Huron was broken and that water was running inside the property. The City inspector dispatched in response reported that he shut off the water.

¶ 19 Finally, Safeguard submitted the deposition transcript of plaintiff in support of its motion for summary judgment. Before testifying about the water leak and resulting damage, plaintiff testified that she had a stroke in October 2000, which affected her memory, although she was unaware of when it did so. Moving on to the water issue, plaintiff testified that she did not know when the leak began or when it stopped, although she did know that it stopped when the water was turned off at 1814 W. Huron. With respect to Safeguard, plaintiff testified that she did not know who Safeguard was, did not recall speaking with anyone from Safeguard or anyone from Safeguard making any statements to her about 1814 W. Huron, did not send any correspondence to Safeguard or recall receiving any from Safeguard, and did not contact Safeguard regarding the water issue or discuss the issue with any representative of Safeguard. She further testified that

no one from Safeguard represented to her that they would take any action regarding the water leak and she did not know whether Safeguard made any such representations to anyone else. She did not recall Safeguard or McCain saying that they would have the water to 1814 W. Huron shut off or that the water had already been shut off. She also testified that she did not know who McCain was, who McCain worked for, or what role McCain had with respect to 1814 W. Huron. Plaintiff did not recall seeing any Safeguard people performing maintenance at 1814 W. Huron, and she did not recall ever contacting the City regarding the water.

¶ 20 In her response to Safeguard's motion for summary judgment, plaintiff argued that the MSA imposed a duty on Safeguard to winterize 1814 W. Huron, which included shutting off the water and clearing the pipes of water. Even if the MSA did not impose a duty to maintain 1814 W. Huron and prevent damage from occurring, plaintiff argued, Safeguard voluntarily undertook such a duty and, in doing so, assumed the obligation of shutting off the water as part of the winterization process. Safeguard failed to ensure that McCain performed this work properly. In addition, as an agent of Safeguard, McCain told Matthew that she would shut off the water, and plaintiff relied on the representation of McCain that the water had been shut off. With respect to premises liability, plaintiff's response was brief. In a section entitled, "Plaintiff concedes that any claims for premises liability and claims against Safeguard Property Management, LLC (the subsequently created corporation) should be dismissed," plaintiff stated, "Plaintiff concedes and had no objection to summary judgment being granted on the basis of premises liability and to release Safeguard Property Management, LLC."

¶ 21 The record indicates that plaintiff attached a number of exhibits to her response. Although none of these exhibits initially appeared in the record on appeal, plaintiff later supplemented the record with a copy of the MSA. The MSA provided, in relevant part, that

CitiMortgage retained Safeguard as an independent contractor to provide certain property services as agreed upon by CitiMortgage and Safeguard. Exhibit A of the MSA identified a large number of potential services that might be provided. Included in that list, under the category of "Property Preservation Services," was winterization. That provision provided as follows:

> "Service Provider will winterize vacant properties in accordance with Investor/Insurer guidelines or as indicated by Client. The exact winterization procedures followed may vary by the type of system at the subject property[.] *** A winterization is not a certification of the plumbing system or a guarantee that no freeze damage has occurred or no freeze damage will occur to the subject property. Service Provider will advise the Client of any visible freeze damage actually observed at the time of performance of the winterization. A winterization generally involves, unless the applicable guidelines or Client instructions indicate otherwise:
>
> (a) Draining of all plumbing and heating systems as required;
>
> (b) Using air pressure to clear they system of water;
>
> (c) Adding anti-freeze to all traps and fixtures;
>
> (d) Shutting off water supply to the property;
>
> (e) Disconnecting the water meter, removing it from the cradle and leaving it on the premises;
>
> (f) Disconnecting the feed pipe leading to the main water valve and plugging or capping it;
>
> (g) Placing tags, labels, warning signs and dates on all items winterized, including Service Provider's name, address and telephone number on the tags and labels."

¶ 22 In its reply in support of its motion for summary judgment, Safeguard argued that the exhibits attached to plaintiff's response were not authenticated and thus should not be considered. In addition, Safeguard argued that plaintiff was not an intended third-party beneficiary to the MSA, and the MSA could not serve as the source of Safeguard's duty under both a contractual duty theory and voluntary undertaking theory. Further, Safeguard argued that plaintiff could not be said to have relied on McCain's statements, because McCain did not make the statements to plaintiff directly and because plaintiff did not do or forego doing anything based on McCain's statements.

¶ 23 The trial court granted Safeguard summary judgment. In doing so, the trial court stated that plaintiff had conceded that Safeguard Management was not a proper defendant to this matter and had also conceded that a theory of premises liability did not apply to this case. For the same reasons that the trial court found that a theory of voluntary undertaking did not apply to plaintiff's claim against CitiMortgage, it also found that a theory of voluntary undertaking did not apply to plaintiff's claim against Safeguard. With respect to a contractual duty, the trial court found that the MSA did not impose a general duty on Safeguard to repair or maintain the interior water lines or plumbing at 1814 W. Huron. In addition, the trial court found that the purpose of Safeguard's agreement to winterize 1814 W. Huron was to secure that property and its values, not to protect 1818 W. Huron. To the extent that plaintiff intended to make any claim of breach of contract, the trial court noted that the "First Amended Complaint" did not contain any allegations, and plaintiff did not present any evidence, that plaintiff was an intended third-party beneficiary of the MSA. Finally, the trial court found that Safeguard subcontracted the winterization of 1814 W. Huron to McCain, who was an independent contractor, not an agent of Safeguard. Accordingly, the trial court found that there was no duty owed by Safeguard to

plaintiff. The trial court also entered a finding according to Supreme Court Rule 304(a) (eff. Mar. 8, 2016) that there was no just reason for delaying enforcement or appeal of its decision.

¶ 24 After an unsuccessful motion to reconsider, plaintiff brought this timely appeal.

¶ 25 ANALYSIS

¶ 26 Count I of the "First Amended Complaint" sounded in negligence. A successful cause of action for negligence requires proof of three elements: "(1) the existence of a duty of care owed to the plaintiff by the defendant; (2) a breach of that duty; and (3) an injury proximately caused by that breach." *Guvenoz v. Target Corp.*, 2015 IL App (1st) 133940, ¶89. In granting summary judgment for Safeguard, the trial court concluded that Safeguard did not owe a duty of care to plaintiff to protect 1818 W. Huron from the water leaking from 1814 W. Huron. On appeal, plaintiff argues that this conclusion was erroneous, because (1) plaintiff did not concede all claims of premises liability, (2) Safeguard owed plaintiff a duty of care based on the MSA, (3) Safeguard owed plaintiff a duty based on a theory of voluntary undertaking, and (4) McCain was an agent of Safeguard. We disagree.

¶ 27 Summary judgment is to be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). Because summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is clear and free from doubt, we must view all evidence in the light most favorable to the nonmovant. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 994 (2005).

¶ 28 With respect to the burden of proof, the movant bears the initial burden of production. *Id.* When the moving party is the defendant, the burden of proof operates as follows:

> "A defendant moving for summary judgment may meet its burden of production either by presenting evidence that, left unrebutted, would entitle it to judgment as a matter of law or by demonstrating that the plaintiff will be unable to prove an element of its cause of action. [Citation.] Until the defendant supplies facts that would demonstrate its entitlement to judgment as a matter of law, the plaintiff may rely on the pleadings to create questions of material fact. [Citation.] However, should a defendant present such facts, the burden then shifts to the plaintiff to present some evidence allowing the imposition of liability on the defendant and supporting each element of his cause of action, thereby defining a material issue of fact to be determined at trial. [Citations.]"

Id. at 994-95. We review the trial court's grant of summary judgment *de novo*. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 360 (2006).

¶ 29 Motion to Strike

¶ 30 Before addressing the substance of plaintiff's contentions on appeal, we must first address Safeguard's request that we strike plaintiff's brief on the basis that it does not comply with the requirement of Supreme Court Rule 341(h)(6) (eff. Jan. 1, 2016) that an appellant's statement of facts cite to the record and instead cites to her appendix, which contains documents that are not a part of the record. Plaintiff attempted to rectify this problem after the filing of Safeguard's brief by filing a motion to supplement the record on appeal with the exhibits to her response to Safeguard's motion for summary judgment. We denied that request and, thus, those documents are not a proper part of the record on appeal, and we may not consider them in determining this appeal. *Kensington's Wine Auctioneers & Brokers, Inc. v. John Hart Fine Wine, Ltd.*, 392 Ill. App. 3d 1, 14 (2009). Although we do not find it necessary to strike the

entirety of plaintiff's brief on appeal, to the extent that plaintiff relies on documents outside of the record in support of her contentions on appeal, we disregard them.

¶ 31 Premises Liability

¶ 32 Plaintiff argues that the trial court erred in concluding that she conceded all claims of premises liability. Rather, plaintiff argues that she intended to concede her premises liability claim only as to Safeguard Management and not Safeguard Properties. The language of plaintiff's concession says otherwise, however. In her response to Safeguard's motion for summary judgment, plaintiff stated, "Plaintiff concedes that any claims for premises liability and claims against Safeguard Property Management, LLC (the subsequently created corporation) should be dismissed" and "Plaintiff concedes and had no objection to summary judgment being granted on the basis of premises liability and to release Safeguard Property Management, LLC." Both of these statements reflect two concessions: (1) that judgment should be granted on any premises liability claims, and (2) that judgment should be entered on any claims against Safeguard Management. We do not believe that the trial court misconstrued plaintiff's concessions but, instead, abided by the plain language of plaintiff's statements.

¶ 33 In any case, even if we were to agree with plaintiff that she conceded her premises liability only as to Safeguard Management, she has offered no argument whatsoever, either here or in the trial court, as to why summary judgment in favor Safeguard Properties on the issue of premises liability was not otherwise appropriate. In its motion for summary judgment, Safeguard argued that plaintiff could not prevail on a theory of premises liability, because it did not exercise possession of 1814 W. Huron. See *O'Connell v. Turner Construction Co.*, 409 Ill. App. 3d 819, 824 (2011) (stating that it is a requirement for liability under section 343 of the Restatement (Second) of Torts that one be a possessor of land). Neither in the trial court nor on

appeal does plaintiff make any argument in response. Given that plaintiff makes no argument that the trial court's grant of summary judgment on this issue was otherwise erroneous, we see no basis to reverse on this ground.

¶ 34 Contractual Duty

¶ 35 Plaintiff next argues that the trial court erred in finding that Safeguard did not owe plaintiff a duty based on the MSA. According to plaintiff, under the MSA, Safeguard had an obligation to winterize 1814 W. Huron and, as part of that winterization, had a duty to shut off the water to the home and to clear the pipes of all water. Plaintiff did not, however, allege any such duty in her "First Amended Complaint." Rather, the only duty that plaintiff alleged Safeguard owed to her was a duty to "properly maintain the main water line in the interior of the house within 1814 W. Huron, and ensure that said main water line in the interior of the house was in good operating condition and sustained no breaks, leaks, cracks or other faults that would allow water to escape and cause flooding[] and damage to neighboring residences." All of plaintiff's subsequent allegations revolved around the alleged presence of a broken water main in 1814 W. Huron, not a failure to properly winterize the property according to the terms of the MSA. In fact, there is no mention at all of the MSA, winterization, or clearing of 1814 W. Huron's pipes in plaintiff's "First Amended Complaint," nor does plaintiff allege that the broken water line was the result of a failure to properly winterize.

¶ 36 Plaintiff argues in response that she alleged that Safeguard owed plaintiff a duty "to be free from negligence," had a duty to maintain 1814 W. Huron, and had a duty to shut off the water at 1814 W. Huron after learning of the leak. We see no support for this position in the language of the "First Amended Complaint." Plaintiff did not allege a general duty owed by Safeguard to protect plaintiff from negligence, nor did she allege that Safeguard had a general

duty to maintain 1814 W. Huron. Instead, again, she only alleged that safeguard had a duty to maintain the interior main water line.

¶ 37 We recognize that plaintiff's "First Amended Complaint" alleges that Safeguard failed to turn off the water at 1814 W. Huron after being asked to do so. Alleging a failure to perform an act is not the same as alleging that a duty exists to perform that act. In other words, just because plaintiff alleged that Safeguard failed to turn off the water does not necessitate a conclusion that Safeguard had a duty to do so. After all, a failure to perform an act only has meaning in the context of the duty that is alleged to have been breached, because a failure to perform an act is not actionable unless and until there is a duty to perform that act. Here, plaintiff's allegation that Safeguard failed to turn off the water was wrongful was only made in the context of a duty to maintain the interior main water line. At no point did plaintiff allege in her "First Amended Complaint" that Safeguard owed a duty to her to turn off the water, either as an independent duty, as part of a contractual duty to winterize, or as a larger, more general duty to protect 1818 W. Huron from damage. Accordingly, because plaintiff failed to allege any contractual duty owed by Safeguard to winterize 1814 W. Huron, turn off the water, or clear the pipes, she is not entitled to recover on breaches of such duties. "A party must recover, if at all, according to the case he has made for himself by his pleadings. [Citation.] Proof without pleadings is as defective as pleadings without proof." *American Standard Insurance Co. v. Basbagill*, 333 Ill. App. 3d 11, 15 (2002); see also *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill. App. 3d 32, 40 (1997) (in reviewing the trial court's summary judgment determination, declining to consider whether the defendant owed the plaintiff a duty to warn, because plaintiff did not allege a duty to warn in its complaint).

¶ 38 Turning to the duty actually alleged in plaintiff's "First Amended Complaint," Safeguard argued on summary judgment, and the trial court agreed, that the MSA did not impose any duty on Safeguard to maintain, service, or repair the interior main water line at 1814 W. Huron. At no point, either in the trial court or on appeal, has plaintiff contested this contention. After reviewing the terms of the MSA, we also find no language in the MSA imposing an ongoing obligation on Safeguard to maintain or service the interior main water line of 1814 W. Huron. Rather, the MSA was a general contract, retaining Safeguard as an independent contractor to perform services on CitiMortgage's properties "as agreed by the Parties." It did not require Safeguard to perform any services as a matter of course. This was confirmed by Meyer, who testified in his deposition that the scope of Safeguard's work on a property would be defined by the work orders received from CitiMortgage.

¶ 39 In sum, because plaintiff did not allege in her "First Amended Complaint" that Safeguard owed her a contractual duty under the MSA to winterize 1814 W. Huron, shut off the water, or clear the pipes, the trial court properly granted summary judgment on any such claims. With respect to the duty actually alleged in the pleadings, the trial court properly granted summary judgment in favor of Safeguard, because the MSA did not impose an obligation on Safeguard to maintain or service the interior main water line at 1814 W. Huron.

¶ 40 Voluntary Undertaking

¶ 41 Plaintiff also argues that the trial court erred in concluding that Safeguard did not voluntarily undertake a duty to winterize 1814 W. Huron, including shutting off the water and clearing the pipes of water. According to plaintiff, Safeguard also sent out inspectors on a bimonthly basis between July 2011 and February 2012 to "ensure the property was not being damaged and to ensure that the work orders of CitiMortgage were being completed," including

the work order to winterize the property. In addition, plaintiff argues that McCain, as an agent of Safeguard, told plaintiff and Matthew that she would shut off the water and that "the situation would be handled."

¶ 42 Illinois has adopted section 324A of the Restatement (Second) of Torts, which provides for liability to a third party when one negligently performs a voluntary undertaking. *Andrews v. Marriott International, Inc.*, 2016 IL App (1st) 122731, ¶35. Section 324A provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if:
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Restatement (Second) of Torts §324A (1965). The theory of voluntary undertaking is narrowly construed and "the duty of care to be imposed upon a defendant is limited to the extent of the undertaking." *Bell v. Hutsell*, 2011 IL 110724, ¶ 12. We determine the extent of a voluntary undertaking on a case-by-case basis, looking to the specific act undertaken and an assessment of its underlying purpose. *Andrews*, 2016 IL App (1st) 122731, ¶ 35.

¶ 43 Again, we observe that plaintiff only alleged in her "First Amended Complaint" that Safeguard had a duty to maintain the interior main water line and did not allege any duty—voluntarily taken or otherwise—owed by Safeguard to winterize 1814 W. Huron, shut off the water at that property, or to clear its pipes of water; for this reason, plaintiff has waived this basis

of recovery. See *American Standard Insurance*, 333 Ill. App. 3d at 15. Plaintiff contends that this was all part of Safeguard's duty of maintaining the interior main water line. Even if that were the case, plaintiff failed to include in the "First Amended Complaint" any allegations that Safeguard's failure to winterize or clear the pipes constituted a breach of Safeguard's duty to maintain the interior main water line.

¶ 44 Even putting aside the shortcomings in plaintiff's pleadings, we conclude that the trial court did not err in finding that Safeguard did not owe plaintiff a duty to winterize 1814 W. Huron under a theory of voluntary undertaking, because the undisputed evidence was that the winterization of 1814 W. Huron was undertaken for the purpose protecting the value of 1814 W. Huron, not preventing damage to 1818 W. Huron. The recitals of the MSA state that CitiMortgage requested, *on its own behalf*, that Safeguard perform the identified services. There is no indication that CitiMortgage requested the performance of those services for the benefit of anyone else. In addition, in the list of potential services to be performed by Safeguard, winterization is listed under the category of "property preservation services," indicating that the purpose was to preserve the property at issue, *i.e.*, 1814 W. Huron. Finally, Steve Meyer testified that only exterior inspections were conducted between September 2011 and February 2012, suggesting that the purpose of Safeguard's work and inspections was not to prevent interior water leaks or to ensure that no water was reaching the house.

¶ 45 As for plaintiff's contention that McCain voluntarily undertook to turn off the water by saying that she would turn off the water to 1814 W. Huron, it fails because there is no evidence in the record that plaintiff relied on that statement to her detriment. When a plaintiff alleges a claim of nonfeasance based on a voluntary undertaking, it is an essential element of that claim that the plaintiff relied on the defendant's promise. *Bourgonje*, 362 Ill. App. 3d at 997. Here,

there is no evidence in the record that plaintiff relied on McCain's statement in any way. In her deposition, plaintiff testified that she did not know McCain and did not have any recollection of McCain or anyone else from Safeguard telling her that they would have the water to 1814 W. Huron shut off or that it had been shut off. Given that plaintiff could not recall McCain making such a statement, her testimony certainly did not offer any support for a conclusion that she relied on McCain's statement.

¶ 46 Putting that lack of recollection aside, even Matthew's testimony indicates that neither he nor plaintiff did anything differently as a result of McCain's statement that she would have the water shut off. More specifically, Matthew testified that after July 2011—when McCain made this alleged statement—plaintiff continued to call the City and CitiMortgage regarding the water issue and to talk to the people performing maintenance at 1814 W. Huron—the same things that she was doing before McCain stated that she would have the water shut off. In addition, when asked if Safeguard's representation that it would call the city to have the water shut off to 1814 W. Huron caused Matthew or plaintiff to do anything differently, Matthew testified, "Well, we were kind of out of options at that point," indicating that neither he nor plaintiff did anything differently as a result of McCain's statements as there was nothing left to be done. All of this indicates that plaintiff did not rely on McCain's statements. Although plaintiff argues that McCain's statement caused her and Matthew to forego any further attempts to rectify the water problem, she does not cite to anything in the record to support that assertion, and it directly contradicts Matthew's deposition testimony that plaintiff continued to call the City and CitiMortgage regarding the water.

¶ 47 Statutory Violation

¶ 48 Finally, we note that in plaintiff's opening brief, she stated that Safeguard hired McCain to winterize 1814 W. Huron after the City issued a citation "for the abandoned property and leaking." Plaintiff then went on to cite caselaw for the proposition that the violation of statute designed to protect human life is *prima facie* evidence of negligence. See *Lynch v. Board of Education*, 82 Ill. 2d 415, 436 (1980). No further argument was offered. To the extent that plaintiff intended to make a substantive argument that summary judgment should have been denied because she established Safeguard's negligence by way of statutory violation, such contention is waived for a couple of reasons. First, plaintiff does not make any substantive argument on this point; she simply states that a citation was issued and that citations are *prima facie* evidence of negligence. She does not explain what statute was supposedly violated or how it was designed for the protection of human life. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017) (providing that an appellant's brief must contain "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on"); *CE Design, Ltd. v. Speedway Crane, LLC*, 2015 IL App (1st) 132572, ¶ 18 ("The failure to provide an argument and to cite to facts and authority, in violation of Rule 341, results in the party forfeiting consideration of the issue."). Second, the citation that she refers to is not in the record on appeal, and thus cannot be considered. *Kensington's*, 392 Ill. App. 3d at 14.

¶ 49 McCain's Agency

¶ 50 Plaintiff also argues that the trial court erred in finding McCain was not an agent of Safeguard. We need not address this issue, as the purpose of establishing McCain's agency was to extend the scope of Safeguard's potential liability to include her acts. Because, however, we

conclude that the trial court properly determined that Safeguard did not owe any duty to plaintiff, whether McCain was Safeguard's agent is irrelevant.

¶ 51 Scope of Our Holding

¶ 52 We pause to clearly state the scope of our holding in this decision. The only issue before us in this appeal is whether the trial court correctly concluded that Safeguard did not owe a duty to plaintiff, and, for the reasons stated above, we conclude that the trial court was correct in that conclusion. We do not, however, pass any judgment on whether CitiMortgage or Rios owed a duty to plaintiff to protect her property from water damage or to ensure that Safeguard properly performed its work. (Plaintiff did not name Rios as a defendant to her claims, nor did she contest the trial court's dismissal of CitiMortgage.) We also do not pass any judgment on whether Safeguard owed or breached a duty to CitiMortgage to properly perform its work on 1814 W. Huron. (There are no claims against Safeguard by CitiMortgage apparent from the record.) None of these issues were presented to us for decision in this appeal and, accordingly, our decision should in no way be construed as speaking to those questions.

¶ 53 CONCLUSION

¶ 54 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 55 Affirmed.