2013 IL App (3d) 120443-U

Order filed June 14, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

CHERYLE A. COLLINS and HEYWOOD FULLER T.,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiffs-Appellants,	)	
v.	)	Appeal No. 3-12-0443 Circuit No. 10-L-1006
BENTZ OF NAPERVILLE, INC., BENTZ OF NAPERVILLE, INC., d/b/a SUBWAY SANDWICHES & SALADS, STORE #20851, and UNNAMED FEMALE SUPERVISOR OF SUBWAY STORE #20851,	)	Honorable Michael J. Powers, Judge, Presiding
Defendants-Appellees.	)	

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in dismissing plaintiffs' third amended complaint for failure to state a claim on which relief may be granted where the facts alleged cannot sustain a legally cognizable claim.

¶ 2 Plaintiffs Cheryle Collins and Heywood Fuller T. filed a complaint alleging negligence, negligent infliction of emotional distress and loss of consortium against defendants, Bentz of

Naperville, Bentz of Naperville, Inc., d/b/a Subway Sandwiches & Salads, Store #20851 (collectively Subway), and an unnamed female supervisor of Subway Store #20851, to recover damages allegedly sustained by Cheryle and Heywood in an incident at the Subway shop. The trial court dismissed the third amended complaint on Subway's motion to dismiss for failure to state a claim. Collins and Heywood appealed. We affirm.

¶ 3 FACTS

¶ 4 In December 2009, plaintiffs Cheryle Collins and Heywood Fuller T. (collectively Collins), who are both registered professional nurses (RPNs), went to the Subway shop owned by defendants Bentz of Naperville, Inc., Bentz of Naperville, Inc., d/b/a Subway Sandwiches and Salads, Store #20851 to purchase sandwiches for lunch. On that date, defendant unnamed female supervisor was managing the shop. While Cheryle and Heywood were going through the sandwich line, they noticed that the sandwich preparer placed a tomato with a "visible blackened area" on Cheryle's sandwich. In response to Cheryle's request, the preparer removed the tomato, apologized and put the rotten tomato on the side of the serving tray. Cheryle and Heywood questioned why the preparer failed to throw the tomato slice away and saw her place the tomato on Heywood's sandwich. Upon their request, the preparer removed the tomato, again placing it on the edge of the serving tray. When Cheryle asked why the preparer put the tomato back on the tray, the preparer stated that "[w]e will throw it away, but there are a lot of people waiting now." Cheryle and Heywood implored the preparer to throw away the rotten tomato. At this point, the Subway supervisor approached Cheryle and Heywood and stated:

> "You people always come in here and start making complaints. She told you that there are people waiting in line. Don't ask her anything else! I

am the supervisor on duty now and I can call the police and have you both removed from the store. So, just leave her alone, or I will call the police and have you both arrested! So, just hurry up and get out! And, don't say anything else to her!"

¶ 5 Cheryle challenged the supervisor's treatment of her and told the supervisor that she and Heywood were RPNs with an obligation to call spoiled food to the restaurant's attention. Cheryle refused to leave until she received her order appropriately served. The supervisor called the Subway owner, and after speaking to him, told Cheryle and Heywood that she was given permission to call the police if they did not leave. Cheryle became distraught and Heywood attempted to console her. He paid for the couple's sandwiches and added $30 to their Subway cards. On leaving the restaurant, other customers stared and laughed at them. Cheryle's distress worsened after they left the Subway and when they got into their car, Cheryle began sobbing and trembling. She continued to sob and tremble after they arrived home and was unable to work for several days. For weeks after the incident, Cheryle continued to cry, could not sleep, and was depressed. She continued to experience the humiliation of the customers staring at her and the supervisor threatening her. Due to her distress, she was unable to participate in the usual family holiday activities. In February 2010, Cheryle was diagnosed with systemic lupus erythematosus.

¶ 6 Collins complained to the Will County health department, which conducted an inspection of the Subway shop on December 17, 2009. The manager denied rotten tomatoes were used and the inspector observed no evidence of spoiled food. Collins filed the instant complaint in December 2010, which was dismissed for want of prosecution in June 2011. Collins filed a motion to reinstate the complaint, which was amended until a fourth amended motion to reinstate under section 2-1401

of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-1401 (West 2010)) was granted by the trial court in December 2011. Collins filed a third amended complaint in March 2012, alleging negligence and negligent infliction of emotional distress against Subway and the supervisor on behalf of Cheryle and loss of consortium claims by Heywood against Subway and the supervisor. Subway moved to dismiss under section 2-615 of the Civil Code (735 ILCS 5/2-615 (West 2010)) for failure to state a claim. A hearing took place on Subway's motion. Collins argued the third amended complaint stated a claim, pointing to Subway's alleged violations of the Nurse Practice Act (Act) (225 ILCS 65/50-1 *et seq.* (West 2010)) and the Food Service Sanitation Code (Code) (77 Ill. Adm. Code 750.5 *et seq.* (2010)). Collins also argued for the first time that they feared for their physical safety as a consequence of reporting the unsafe condition of the sandwich tomato. The trial court found that the third amended complaint failed to state a legally cognizable claim, granted Subway's motion, and dismissed the third amended complaint with prejudice on April 27, 2012.

¶ 7 Collins filed a motion to reconsider on May 21, 2012, arguing the claims under the Act and the Code. Appended to the motion, *inter alia*, were affidavits of Cheryle and Heywood in which they each attested to new facts regarding the Subway incident, including allegations that the supervisor attempted to incite other patrons to physically assault them. On May 24, 2012, the trial court entered an order granted Subway 14 days to respond to the motion and set a hearing date for June 13, 2012. Also on May 24, Collins filed a notice of appeal to this court. At the June 13 hearing, on Subway's motion, the trial court entered an order striking Collins' motion to reconsider. It determined that it was without jurisdiction because Collins had filed a notice of appeal.

¶ 8 ANALYSIS

¶ 9 The issue on appeal is whether the trial court erred when it dismissed the third amended complaint for failure to state a claim. Collins argues that the trial court failed to consider public policy implications in granting the dismissal and that dismissal was improper because the unnamed female supervisor failed to appear.

¶ 10 A motion to dismiss under section 2-615 of the Civil Code (735 ILCS 5/2-615 (West 2010)) challenges the legal sufficiency of a complaint and alleges defects on its face. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). We accept as true all well-pleaded facts and all reasonable inferences drawn from them and construe all allegations in the complaint in a light most favorable to the plaintiff. *Beretta U.S.A. Corp.*, 213 Ill. 2d at 364. A complaint should not be dismissed under section 2-615 unless there is no set of facts under which the plaintiff would be entitled to recover. *Canel v. Topinka*, 212 Il. 2d 311, 318 (2004). We review *de novo* a trial's court's grant of a section 2-615 motion to dismiss. *Wakulich v. Mraz*, 203 Ill. 2d 223, 228 (2003).

¶ 11 To state a cause of action for negligence, a plaintiff must allege facts establishing a duty, breach of the duty, and damages resulting from the breach. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 430 (2006). Whether a duty exists is a matter for the trial court to decide. *Marshall*, 222 Ill. 2d at 430. To state a cause of action for negligent infliction of emotional distress, a plaintiff must allege facts establishing he suffered a direct impact, which caused emotion distress (*Corgan v. Muehling*, 143 Ill. 2d 296, 312 (1991)) or was a bystander in a zone of danger that caused him to fear for his own safety and that he suffered physical injury or illness as a result of his emotional distress. *Rickey v. Chicago Transit Authority*, 98 Ill. 2d 546, 555 (1983).

¶ 12 In the third amended complaint, Collins alleged Subway had a duty to treat its business invitees "with due care, due service and respect and a duty to not disrespect them"; a duty "to not put

its business invitees at risk of eating tainted, rotten or spoiled food"; and a duty "to not humiliate and embarrass" its business invitees. The complaint alleged Subway breached its duties and that Cheryle and Heywood were injured by the breach. Contrary to the assertions in the third amended complaint, we find Subway did not owe Cheryle and Heywood any of the duties alleged in their third amended complaint. As stated by the trial court, humiliation and embarrassment are not legally cognizable causes of action. Subway owed Collins a duty of reasonable care and the complaint does not allege that it breached its duty. *Marshall*, 222 Ill. 2d at 439 (business invitees owed duty of reasonable care).

¶ 13 At the hearing on Subway's motion to dismiss, Collins raised for the first time that they suffered violations under the Nurse Practice Act (225 ILCS 65/50-1 *et seq.* (West 2010)) and the Food Service Sanitation Code (77 Ill. Adm. Code § 750.5 *et seq.* (2010)) and that they were victims of retaliation and threats of physical assault as a result of their reporting unsafe food conditions as required by their status as professional nurses. They failed, however, to set forth the statutory bases in their third amended complaint. *Evers v. Edward Hospital Ass'n*, 247 Ill. App. 3d 717, 724 (1993) (in determining a section 2-615 motion to dismiss the court considers only allegations in the pleadings). Moreover, there is no private cause of action available to Collins for violations under either the Nurse Practice Act or the Food Sanitation Code and thus amendment would not cure the deficiencies.

¶ 14 The Act creates a licensing scheme for nurses. 225 ILCS 65/50-1 (West 2010); *Kurle v. Evangelical Hospital Ass'n*, 89 Ill. App. 3d 45, 49 (1980). Its purpose is protect the public health, safety and welfare by ensuring that only licensed nurses practice within the state and the Act is to be liberally construed to effect its purpose. 225 ILCS 65/50-5 (West 2010); *People ex rel. Sherman v.*

Cryns, 327 Ill. App. 3d 753, 763 (2002). The Act prohibits any person from retaliating against a "nurse who reports unsafe, unethical, or illegal health care practices or conditions." 225 ILCS 65/50-50(a)(17) (West 2010). The Code requires that food "be in sound condition, free from spoilage, filth, and other contamination and shall be safe for human consumption." 77 Ill. Adm. Code 750.100 (2010). The regulations set forth in the Code are applicable to the Illinois Food, Drug and Cosmetic Act (410 ILCS 620/21 (West 2010)) and the Sanitary Food Preparation Act (410 ILCS 650/11.1) (West 2010)), and the Food Handling Regulation Enforcement Act (410 ILCS 625/1 (West 2010)). See 77 Ill. Adm. Code 750 (2010).

¶ 15 To maintain a private right of action for a statutory violation, four requirements must be satisfied by the plaintiff: (1) he is a member of the class for whose benefit the statute was enacted; (2) his injury is one that the statute was designed to prevent; (3) a private cause of action is consistent with the statute's underlying purpose; and (4) an implied private right of action is necessary to provide an adequate remedy for statutory violations. *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 460 (1999).

¶ 16 Cheryle is not a member of the class for whom the Nurse Practice Act was enacted to protect. The Act promotes the public policy favoring safe nursing care and protects the public from unlicensed nurses. 225 ILCS 65/50-5 (West 2010); *Illinois Nurses Ass'n v. Board of Trustees of the University of Illinois*, 318 Ill. App. 3d 519, 530 (2000) (discussing "well-defined and dominant public policy favoring safe nursing"). It also protects from retaliation nurses who report unsafe health care practices or conditions. 225 ILCS 65/50-50(a)(17) (West 2010). Cheryle does not assert she sustained any injury that resulted from nursing without licensure. 225 ILCS 65/50-5 (West 2010); *Murry v. Department of Professional Regulation*, 279 Ill. App. 3d 655, 658 (1996) (purpose of

licensing is to prevent injury to the public from unskilled nurses). Indeed, the evidence is undisputed that no physical injury occurred at the Subway shop. Similarly, Cheryle does not contend that she suffered retaliation for reporting an unsafe health care condition. The third amended complaint alleged Cheryle suffered humiliation and embarrassment. These are not the types of injury the Act was designed to protect against. Even if Cheryle had suffered some sort of physical injury, the facts cannot support a claim under the Act because Collins does not raise any licensing issues or retaliation claims based on an unsafe health care condition. Collins' claims arise from Cheryle and Heywood's requests that a tomato with a black spot be removed from their sandwiches. The tomato was removed and ultimately discarded. The unnamed supervisor asked Cheryle and Heywood to take their sandwiches and leave the store. There are no facts that can establish a unsafe health care condition was reported or retaliation occurred. Of note, the health department inspection following Collins' complaint found no violations.

¶ 17 Affording Collins an implied private cause of action under the Act does nothing to further its underlying purpose. Significantly, the Act authorizes the Department of Financial and Professional Regulation, and the State, through the Attorney General, to penalize persons who practice nursing without the proper license. 225 ILCS 65/50-20 (West 2010); *Cryns*, 327 Ill. App. 3d at 763 (Illinois Department of Financial and Professional Regulation vested with the "authority and power to investigate any and all unlicensed activity"); 225 ILCS 65/70-75 (West 2010) (authorizing Attorney General to seek injunctive relief for unlicensed practice of nursing). Thus, an adequate remedy exists for statutory violations and a private right of action is unnecessary to remedy the violations as alleged by Collins.

¶ 18 The Act does not expressly set forth a private cause of action, and under the facts here, we will

not imply a private cause of action under the Act. In addition, the regulations under the Code do not provide a cognizable claim. The Code regulations relied on by Collins apply to statutes that are not at issue here. Even if the regulations were applicable, Collins cannot satisfy the requirements necessary to sustain a private cause of action under the Code. The regulations are promulgated as directives regarding various aspects related to food service sanitation. While as a member of the public Collins may be considered a member of the class to benefit from the issuance of the regulations, Collins does not claim an injury from improper food service sanitation. Collins argues section 750.100 of the Code, which states that "[f]ood shall be in sound condition, free from spoilage, filth, and other contamination and shall be safe for human consumption" was violated. 77 Ill. Adm. Code 750.100 (2010). However, as stated above, the third amended complaint alleges that Cheryle suffered humiliation and embarrassment. It does not allege an injury from spoiled food. Because the tomato with the "visibly blackened area" was removed from Cheryle's and Heywood's sandwiches and ultimately discarded and their sandwiches were satisfactorily prepared, Collins cannot allege an injury based on the "visibly blackened" tomato. Without an injury, Collins cannot sustain a Code violation, and no remedy is required. Moreover, the statutes to which the Code applies provide remedies for their violation. 410 ILCS 620/4, 5 (West 2010) (enforcement authority vested in Department of Public Health), (criminal penalties for statutory violations); 410 ILCS 650/11, 11.1, 12 (West 2010) (enforcement authority vested in departments of Public Health and Agriculture), (Administrative Procedure Act applies), (State's Attorney to prosecute statutory violations). Accordingly, even if Collins had sustained a cognizable injury to which the Code applied, there are available statutory remedies and an implied private right of action is not necessary.

¶ 19 We conclude there are no facts under which Collins can sustain a complaint based on statutory

and regulatory violations and that amendment of the complaint cannot cure the deficiencies. Because Collins cannot maintain a private right of action, we consider that the trial court's dismissal of the third amended complaint with prejudice was appropriate.

¶ 20 In their brief, Collins argues the unnamed Subway supervisor threatened Cheryle and Heywood with physical violence and attempted to incited the other customers to "attack, intimidate, physically harm" Cheryle and Heywood, causing them to fear for their physical safety. These allegations are supported by affidavits submitted by Cheryle and Heywood as attachments to their motion to reconsider. In the briefs, Collins cites to the affidavits to support the claim of negligent infliction of emotion distress. According to Collins, the threat to their physical safety they experienced at the Subway caused Cheryle severe distress resulting in a diagnosis of lupus and resulted in loss of consortium as to Heywood.

¶ 21 The motion to reconsider was filed after Collins filed the notice of appeal and was subsequently stricken by the trial court on Subway's motion. Accordingly, we will not consider any facts asserted in the affidavits or arguments raised in the motion to reconsider. To allege negligent infliction of emotional distress, Cheryle must establish an injury either to herself directly or to someone which she observed as a bystander. The third amended complaint does not allege any physical injury occurred at Subway. It asserts only that unnamed supervisor humiliated and embarrassed Cheryle and Heywood and that the other customers gazed, laughed and chuckled at them as they left the Subway. Moreover, it is undisputed that the rotten tomato was discarded and that Collins purchased the sandwiches that had been in preparation when the tomato incident began and Heywood, at least, ate them without ill effect.

¶ 22 Lastly, we consider Collins' argument that dismissal was improper because the unnamed

supervisor never appeared and should have been defaulted. Collins failed to file a motion for default and has waived this issue. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 344 (2002) (questions not raised in trial court cannot be raised for the first time on appeal). Moreover, for the same reasons as discussed above, Collins cannot sustain a cause of action for negligence or negligent infliction of emotional distress against the unnamed supervisor. We find the trial court's dismissal of Collins' third amended complaint for failure to state a claim was not in error.

¶ 23 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 24 Affirmed.