2013 IL App (4th) 120753-U

NO. 4-12-0753

FILED
May 29, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JUSTIN D. FARRIS Plaintiff-Appellant, v. THOMAS A. SULLIVAN, Defendant-Appellee.	)	Appeal from Circuit Court of Greene County No. 11L3 Honorable James W. Day, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed, concluding plaintiff alleged sufficient facts to state a cause of action for willful and wanton conduct.

¶ 2 In September 2011, plaintiff, Justin D. Farris, filed a lawsuit against defendant, Thomas A. Sullivan, for injuries plaintiff allegedly sustained while riding as a passenger in the car defendant was driving. Count II of plaintiff's first amended complaint alleged defendant engaged in willful and wanton conduct by operating a motor vehicle while intoxicated. In May 2012, defendant filed a motion to dismiss count II of plaintiff's first amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Civil Code) (735 ILCS 5/2-615 (West 2010). Following a hearing later that month, the trial court granted defendant's motion.

¶ 3 Plaintiff appeals, arguing the trial court erred by dismissing count II of his first amended complaint because plaintiff set forth sufficient facts to support a cause of action for

willful and wanton conduct.

¶ 4 We reverse.

¶ 5 I. BACKGROUND

¶ 6 In March 2011, plaintiff filed a complaint against defendant, setting forth claims of negligence (count I) and willful and wanton conduct (count II). Count I of plaintiff's complaint alleged plaintiff was injured while riding as a passenger in defendant's vehicle after defendant, who was intoxicated, lost control of the vehicle, colliding with an embankment, becoming airborne, and striking a tree. Paragraph 9 of plaintiff's complaint claimed defendant was under a duty to act with reasonable care for the safety of others, but despite that duty, defendant:

> "a. Negligently and carelessly operated his vehicle while intoxicated;
>
> b. Negligently and carelessly lost control of his vehicle, thereby causing the vehicle to leave the designated roadway;
>
> c. Negligently and carelessly failed to properly apply the brakes of his vehicle;
>
> d. Negligently and carelessly operated his motor vehicle on the said highway at the time and place in question while under the influence of intoxicating liquors, contrary to the provisions of the Illinois Compiled Statutes, 265 ILCS 5/11-501;
>
> e. Negligently and carelessly operated his vehicle at an excessive rate of speed which was greater than was reasonable and

proper, contrary to the provisions of the Illinois Compiled Statutes, 625 ILCS 5/11-601;

f. Negligently and carelessly failed to reduce or decrease his speed when on a narrow or winding roadway, contrary to the provisions of the Illinois Complied [*sic*] Statute, 625 ILCS 5/11-601;

g. Negligently and carelessly failed to reduce or decrease his speed when a special hazard existed, contrary to the provisions of the Illinois Compiled Statutes, 625 ILCS 5/11-601; and

h. Negligently and carelessly failed to reduce or decrease the speed of said vehicle when approaching and going around a curve, contrary to the provisions of the Illinois Compiled Statutes, 625 ILCS 5/11-601."

¶ 7 Count II of plaintiff's complaint incorporated paragraphs 1 through 8 of count I. It then repeated the allegations set forth in paragraph 9, substituting the word "recklessly" for the words "negligently and carelessly."

¶ 8 In August 2011, defendant filed an answer and affirmative defense to count I of plaintiff's complaint, admitting he was intoxicated on the night of the accident but denying he acted negligently. Defendant also filed a motion to dismiss count II of plaintiff's complaint pursuant to section 2-615 of the Civil Code. Specifically, defendant argued plaintiff's complaint failed to allege sufficient facts to sustain a charge of willful and wanton conduct. Following a September 2011 hearing, the trial court granted defendant's motion, dismissing plaintiff's

complaint but allowing plaintiff 28 days to file an amended complaint.

¶ 9 Later that month, plaintiff filed a first amended complaint. Count I of plaintiff's first amended complaint retained the allegations plaintiff made in his original complaint. Count II retained plaintiff's original allegations but added allegations that defendant knew (1) a statute existed in Illinois prohibiting the operation of motor vehicles while intoxicated; (2) liquor caused intoxication; (3) defendant could not safely operate a vehicle while intoxicated; (4) intoxication lessened defendant's ability to react to dangers and situations commonplace to operating a vehicle; (5) intoxication lessened defendant's ability to pay attention while operating a motor vehicle; (6) intoxication impaired defendant's coordination; (7) intoxication placed defendant "in a state of emotional dysregulation (labile mood)"; and (8) intoxication caused defendant to have poor judgment. Count II further alleged defendant knew operating a motor vehicle while intoxicated presented a danger to himself, his passengers, and other people using the highway, but despite that knowledge, defendant chose to operate his vehicle.

¶ 10 In May 2012, defendant filed (1) an answer to count I of plaintiff's first amended complaint and (2) a motion to dismiss count II of plaintiff's first amended complaint pursuant to section 2-615 of the Civil Code. With respect to count I, defendant denied he was intoxicated on the night of the accident but admitted "he consumed alcohol prior to the occurrence and plead [*sic*] guilty to [driving under the influence (DUI)] citation." With respect to count II, defendant asserted plaintiff's motion failed to sufficiently allege willful and wanton conduct against defendant. Specifically, defendant argued count II lacked an allegation that defendant acted with actual or deliberate intent to harm or with an utter indifference to or conscious disregard for his own safety or the safety of others. The motion further claimed plaintiff did not allege facts

demonstrating defendant was intoxicated. Following a May 2012 hearing, the trial court granted defendant's motion to dismiss.

¶ 11 In June 2012, plaintiff requested the trial court make a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). The court entered its Rule 304(a) finding in July 2012, and plaintiff filed a notice of appeal in August 2012.

¶ 12 II. ANALYSIS

¶ 13 On appeal, plaintiff asserts the trial court erred by dismissing count II of his first amended complaint because it set forth sufficient facts to support a cause of action for willful and wanton conduct. We agree.

¶ 14 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. *Bell v. Hutsell*, 2011 IL 110724, ¶ 9, 955 N.E.2d 1099. " '[A] cause of action should not be dismissed, pursuant to a section 2-615 motion, unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief.' " *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 8, 960 N.E.2d 18 (quoting *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161, 920 N.E.2d 220, 223 (2009)). In ruling on such a motion, a court may consider facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions contained in the record. *K. Miller Construction Co., Inc. v. McGinnis*, 238 Ill. 2d 284, 291, 938 N.E.2d 471, 477 (2010). In reviewing the sufficiency of a complaint, a court must accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34, 970 N.E.2d 1. The inquiry is whether, when viewing the allegations of the complaint in a light most favorable to the plaintiff, the allegations are sufficient to state a cause

of action upon which relief can be granted. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 348, 798 N.E.2d 724, 733 (2003).

¶ 15 We review *de novo* a trial court's order granting a section 2-615 motion. *Bell,* 2011 IL 110724, ¶ 9, 955 N.E.2d 1099.

¶ 16 Here, the trial court granted defendant's motion to dismiss after finding count II of plaintiff's first amended complaint failed to sufficiently allege defendant's conduct was willful and wanton. To plead wilful and wanton conduct, plaintiff must allege duty, breach, proximate cause, and either a deliberate intention to harm or an utter indifference to or conscious disregard for the welfare of the plaintiff. *Yuretich v. Sole,* 259 Ill. App. 3d 311, 313, 631 N.E.2d 767, 769 (1994). "An actor's 'utter indifference' or 'conscious disregard' for the safety of others may be inferred from the outrageous nature of the conduct committed." *Kirwan v. Lincolnshire-Riverwoods Fire Protection District*, 349 Ill. App. 3d 150, 156, 811 N.E.2d 1259, 1263 (2004). In setting forth a claim of willful and wanton conduct, a plaintiff " 'is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts.' " *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369, 821 N.E.2d 1099, 1113 (2004) (quoting *Chandler,* 207 Ill. 2d at 348, 798 N.E.2d at 733). However, Illinois is a fact-pleading jurisdiction; therefore, a plaintiff may not rely on conclusions of law or facts unsupported by specific factual allegations. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 26, 965 N.E.2d 1092.

¶ 17 Defendant cites *Campbell v. A.C. Equipment Services Corp., Inc.*, 242 Ill. App. 3d 707, 610 N.E.2d 745 (1993), for the proposition plaintiff may not merely reallege a negligence count and add a conclusory statement that defendant's actions amounted to willful and wanton

conduct to satisfy pleading requirements. However, *Campbell* goes on to state, "[f]acts must be alleged in the complaint which support the allegations' willful and wantoness." *Campbell,* 242 Ill. App. 3d at 716, 610 N.E.2d at 751. Plaintiff has satisfied the requirements of *Campbell* by alleging additional facts that support the allegations' willful and wantoness. *Campbell*, 242 Ill. App. 3d at 716, 610 N.E.2d at 751. When considering the allegations in the first amended complaint in a light most favorable to plaintiff and drawing all reasonable inferences from the allegations in the first amended complaint, the amended complaint states a cause of action for willful and wanton conduct. In summary, the first amended complaint alleges defendant chose, prior to the accident, to consume alcohol to the extent he was accused of and pleaded guilty to DUI. Moreover, it goes on to allege that in spite of being aware of the criminal nature of his actions and the impact consuming alcohol to the extent he did would have on his ability to operate a motor vehicle, defendant chose to operate his motor vehicle and transport a passenger; but due to his consumption of alcohol and inability to properly operate his motor vehicle, he was involved in an accident which caused injury to the plaintiff.

¶ 18 Defendant also argues plaintiff's allegations of willful and wanton conduct are insufficient in that they are premised on the allegation defendant was "intoxicated" at the time of the accident and "intoxication" is a legal conclusion, not an allegation of fact. Plaintiff responds his allegation that defendant was intoxicated is the ultimate fact plaintiff intends to prove, and thus, plaintiff's allegations were sufficient.

¶ 19 We note the following from the hearing held May 29, 2012, on defendant's motion to dismiss count II of plaintiff's first amended complaint: (1) counsel for defendant exclusively argued the alleged conduct did not rise to the level of willful and wanton, and (2) the trial court

appeared to base its ruling solely on the fact counsel could not provide authority for the proposition that operating a vehicle while intoxicated can constitute willful and wanton conduct. During the hearing, neither counsel nor the court discussed the assertion in the motion to dismiss that the allegation defendant was intoxicated was a legal conclusion. Prior to ruling, the court stated, "You'd think there'd be a case somewhere that would say being drunk while you're driving either is or is not willful and wanton."

¶ 20 In this case defendant made judicial admissions related to the intoxication issue. In his answer to count I of the first amended complaint, defendant admitted, "he consumed alcohol prior to the occurrence and plead [*sic*] guilty to DUI citation." Defendant's answer to count I constitutes a judicial admission appropriate for consideration by the trial court. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 557, 836 N.E.2d 640, 658 (2005). Moreover, if the dismissal was based on the trial court's agreement with the assertion the allegation of intoxication is a conclusion, the deficiency can easily be remedied with an amended complaint. "Unless it clearly appears that no set of facts could be established which would entitle plaintiff to relief, a dismissal with prejudice should not be made." *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 924, 596 N.E.2d 1269, 1272 (1992).

¶ 21 Based on the foregoing, we conclude the trial court improperly dismissed count II of plaintiff's first amended complaint for failure to state a cause of action. The trial court is directed to reinstate count II of the first amended complaint.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 24 Reversed and remanded for further proceedings.