2017 IL App (4th) 160475-U

NO. 4-16-0475

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

May 26, 2017
Carla Bender
4th District Appellate
Court, IL

STEVEN A. SHAFER, a Disabled Adult, by the Guardian of His Person and His Estate, LORI SHAFER, Plaintiff-Appellant, v. THE CITY OF SPRINGFIELD; THE CITY OF SPRINGFIELD OFFICE OF PUBLIC WORKS; NATHAN BOTTOM, in His Capacity as City Engineer of the City of Springfield Office of Public Works; WOODSIDE TOWNSHIP, a/k/a TOWNSHIP OF WOODSIDE; WOODSIDE TOWNSHIP ROAD COMMISSION; and DONALD DUFFY, in His Capacity as Woodside Township Highway Commissioner, Defendants-Appellees.	)	Appeal from Circuit Court of Sangamon County No. 14L243 Honorable John M. Madonia, Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court properly dismissed plaintiff's complaint with prejudice pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2014)).

¶ 2 In September 2013, Steven A. Shafer, plaintiff, was operating his motorcycle when he was struck and permanently disabled by a motor vehicle at the intersection of Woodward Street and Adlai Stevenson Drive in Springfield, Illinois. In September 2014, Lori Shafer, plaintiff's guardian, filed a complaint against the following defendants: (1) the City of Springfield, the City of Springfield Office of Public Works, and Nathan Bottom, in his capacity

as the City Engineer of the City of Springfield Office of Public Works (collectively, Springfield); and (2) Woodside Township, a/k/a the Township of Woodside; Woodside Township Road Commission; and Donald Duffy, in his capacity as the Woodside Township Highway Commissioner (collectively, Woodside). The complaint alleged defendants negligently and willfully and wantonly failed to maintain the intersection in which the accident occurred.

¶ 3 In December 2014 and January 2015, Woodside and Springfield, respectively, filed motions to dismiss plaintiff's complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2014)). In May 2016, the trial court granted defendants' motions to dismiss.

¶ 4 Plaintiff appeals, asserting the trial court erred by granting defendants' motions to dismiss. For the following reasons, we affirm.

¶ 5 I. BACKGROUND

¶ 6 On September 30, 2013, plaintiff was operating his motorcycle in a westerly direction on Adlai Stevenson Drive in Springfield, Illinois. At the same time, Kaytlynn Foster was operating her motor vehicle in a general southerly direction on Woodward Street. Notably, there was a stop sign to regulate traffic on Woodward Street at the intersection, but traffic on Adlai Stevenson Drive was not regulated by any traffic signals. As plaintiff approached the intersection, Foster pulled out in front of plaintiff's motorcycle, thereby causing an accident that left plaintiff permanently disabled.

¶ 7 In September 2014, Lori Shafer, as plaintiff's guardian, filed a complaint, alleging defendants acted negligently and willfully and wantonly for failing to maintain the portions of the intersection under each entity's control. Specifically, the complaint alleged defendants negligently failed to (1) "remedy a dangerous situation [they] knew, or should have known, was

on [their] premises"; (2) "exercise care to maintain [their] property in a reasonably safe condition for the use of ordinary care of people of who[m] the [d]efendant[s] intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used in violation of 745 ILCS 10/3-102"; and (3) "remedy the aforementioned design despite that it appeared from the use of said roadway that it created a condition that it is not reasonably safe, in violation of 745 ILCS 10/3-103(a)." Additionally, the complaint alleged defendants' negligence was committed with "willful and wanton disregard for the safety of those lawfully upon the property."

¶ 8 In support of the complaint, plaintiff alleged the following: (1) the intersection presented "an extremely high hazard for accidents to occur"; (2) the intersection "was not reasonably maintained, and is unreasonably dangerous as a result"; (3) "the placement of the stop sign on Woodward Street prevents vehicles driving on Woodward from seeing or otherwise appreciating traffic travelling in a westerly direction on Adlai Stevenson Drive"; (4) the visual problem "is exacerbated and made worse by the steep decline of Adlai Stevenson Drive when looking from the stop sign to the east, and attempting to see traffic travelling in a westerly direction"; (5) "the design of [the] intersection is not reasonably safe"; and (6) multiple accidents had occurred at this intersection as a result of the poor design, but defendants failed to take any action to remedy the problem. Due to defendants' negligence, plaintiff argued he suffered severe injuries and permanent disability that prevented him from returning to a normal life.

¶ 9 In December 2014, Woodside filed a motion to dismiss pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2014)). Therein, Woodside argued the State of Illinois, through the Illinois Department of Transportation (IDOT), owned the stop sign and intersection at issue and, thus, Woodside was immune from liability regarding the

maintenance of that intersection under the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 to 10/1-210 (West 2014)). In support, Woodside attached (1) an affidavit from Woodside's foreman of the Road and Bridge Department, who averred the State owned that intersection; and (2) property tax records indicating the State owned that intersection. Woodside also noted the only specific factual allegations related to the placement of the stop sign, which was insufficient to state a cause of action against Woodside.

¶ 10 The following month, Springfield filed a motion to dismiss pursuant to both section 2-615 and section 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2014)). Pursuant to section 2-619, Springfield argued the State owned the intersection and, therefore, Springfield was immune from liability under the Tort Immunity Act. In support, Springfield attached an affidavit of Springfield's chief surveyor, who stated the intersection was owned by the State and that Springfield had no authority over or obligation to maintain the intersection. Additionally, Springfield attached a property tax assessment, a map, and a dedication of right of way for public road purposes showing that intersection was owned by the State. Pursuant to section 2-615, Springfield asserted the complaint failed to state a cause of action because plaintiff did not allege specific facts as required in a fact-pleading jurisdiction to support his claims of negligence and willful and wanton misconduct.

¶ 11 In December 2015, plaintiff responded to defendants' motions to dismiss, asserting Adlai Stevenson Drive and Woodward Street, prior to the intersection, contribute "to the design and creation of the unsafe condition" that served as the basis for the complaint. As a result, plaintiff asserted defendants were not entitled to governmental immunity under the Tort Immunity Act because they failed to comply with their statutory duty of maintaining a safe

roadway. Plaintiff also argued a genuine issue of material fact existed as to whether the State or defendants owned the intersection, as defendants owned portions of the roads leading up to those intersections. Plaintiff attached a counteraffidavit from Lori Shafer, stating she "believes that there are material facts which are known only to [defendants]" that had not been provided. Plaintiff also attached a freedom of information response from IDOT, which included a map showing Woodward Street, from Culver Avenue to Adlai Stevenson Drive, was owned by Woodside. Plaintiff concluded by requesting leave to amend if the trial court found adequate grounds for dismissal.

¶ 12 In May 2016, the trial court held a hearing on defendants' motions to dismiss. Following arguments, the court granted defendants' motions to dismiss on three grounds. First, the court found defendants established an affirmative matter defeating plaintiff's claim where the documents defendants attached to their respective motions to dismiss demonstrated the intersection was owned by and under the control of the State, which showed there was no issue of material fact remaining regarding ownership of the intersection. Second, the court found the Tort Immunity Act applied because defendants had no obligation to maintain an intersection on property owned by the State. Third, the court found the allegations contained within plaintiff's complaint were conclusory matters of opinion that failed to state sufficient facts to support a cause of action. According to the court, the only fact pleaded with specificity was with respect to the stop sign, which was under IDOT control. The court noted it was dismissing plaintiff's complaint with prejudice.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, plaintiff asserts the trial court erred in granting defendants' motions to dismiss. Specifically, plaintiff asserts (1) a genuine issue of material fact existed as to whether defendants owned the intersection at issue, (2) defendants are not immune from liability under the Tort Immunity Act, (3) he raised sufficient facts to state a claim for negligence and willful and wanton misconduct, and (4) the court abused its discretion by dismissing plaintiff's claim with prejudice.

¶ 16 A. Motion To Dismiss Pursuant to Section 2-619

¶ 17 Plaintiff first asserts the trial court erred by dismissing his claim pursuant to section 2-619 of the Code (735 ILCS 5/2-619) (West 2014)).

¶ 18 A section 2-619 motion to dismiss "admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action." *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31, 988 N.E.2d 984. In determining whether an affirmative matter bars or defeats the cause of action, the trial court should consider whether there is a genuine issue of material fact that would preclude dismissal as a matter of law. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 377-78, 799 N.E.2d 273, 284 (2003). However, "[t]he defendant does not admit the truth of any allegations in plaintiff's complaint that may touch on the affirmative matters raised in the [section] 2-619 motion." *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073, 603 N.E.2d 1215, 1222 (1992). In reaching its decision, the court may rely upon attached pleadings, depositions, and affidavits. *Gray v. National Restoration Systems, Inc.*, 354 Ill. App. 3d 345, 354, 820 N.E.2d 943, 952 (2004). "If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear

and determine the same and may grant or deny the motion." 735 ILCS 5/2-619(c) (West 2014). Our review is *de novo*. *Leetaru v. Board of Trustees of the University of Illinois*, 2015 IL 117485, ¶ 41, 32 N.E.3d 583.

¶ 19 1. *Ownership of the Intersection*

¶ 20 One of the grounds for dismissal under section 2-619 was defendants' evidence that the State owned the intersection and, therefore, defendants were not liable for a lack of maintenance or other factors that may have contributed to plaintiff's accident.

¶ 21 In this case, plaintiff made allegations regarding the maintenance of the intersection and placement of the stop sign on Woodward Street. Defendants attached to their respective motions to dismiss affidavits, property tax assessments, maps, and a dedication of right of way for public road purposes showing the intersection is owned by the State and maintained by IDOT. Nonetheless, plaintiff asserts a genuine issue of material fact existed as to the jurisdiction of the intersection, relying upon (1) an affidavit from Lori Shafer stating she believed defendants had not provided all material evidence; and (2) a map from IDOT showing Woodward Street, from Culver Avenue up to, but not including, the intersection at Adlai Stevenson Drive, was under the jurisdiction of Woodside. Based on his attached documents, plaintiff argues a factual dispute existed as to ownership of the intersection, and the trial court therefore lacked the authority to make factual determinations based solely upon the parties' affidavits. *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 243 Ill. App. 3d 905, 913, 611 N.E.2d 619, 624 (1993). Rather, plaintiff contends, where "the affidavits present disputed facts, the parties must be afforded the opportunity to have an evidentiary hearing." *Id.*

¶ 22 Despite plaintiff's argument to the contrary, we find no such factual dispute here. None of the attachments to plaintiff's response to defendants' motions to dismiss refute

defendants' affidavits indicating the State owns the intersection and stop sign. Where an affidavit in support of a section 2-619 motion is not refuted by a counteraffidavit, the court must, for purposes of the motion, take the facts contained in the affidavit as true. *Barber-Colman Co.*, 236 Ill. App. 3d at 1071, 603 N.E.2d at 1220. Plaintiff asserts that Woodward Street leading up to the intersection is also part of the "intersection," and defendants were responsible for the maintenance of certain sections of that street. However, as noted below, plaintiff's complaint fails to provide sufficient facts explaining how the maintenance of the streets leading up to the intersection related to the accident.

¶ 23 As plaintiff's claim revolved around the maintenance and safety of the intersection, which is owned by the State rather than defendants, we conclude the trial court properly dismissed plaintiff's complaint pursuant to section 2-619.

¶ 24 2. *Tort Immunity Act*

¶ 25 The trial court also found section 2-619 dismissal appropriate under the Tort Immunity Act. "The purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government." *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490, 752 N.E.2d 1090, 1095 (2001). Relevant to this case, "a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used." 745 ILCS 10/3-102(a) (West 2014)). Nevertheless, under the Tort Immunity Act, the entity is immune from liability for any injury sustained from its failure to maintain the property "unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably

adequate time prior to an injury to have taken measures to remedy or protect against such condition." *Id.* Plaintiff contends he alleged sufficient facts to demonstrate defendants failed to exercise ordinary care in maintaining their property, and defendants were on notice of their failure to maintain the property based on numerous accidents around that intersection.

¶ 26 Plaintiff's argument rests on a finding that an issue of material fact existed as to ownership of the intersection. As we concluded above, defendants demonstrated the State owns the intersection and stop sign at the heart of this dispute. A local public entity does not have a duty to maintain "easements, encroachments and other property that are located on its property but that it does not own, possess or lease." 745 ILCS 10/3-101 (West 2014). Moreover, "[a] local public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, *other than its own*, to determine whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety." (Emphasis added.) 745 ILCS 10/2-105 (West 2014). This same protection extends to employees of local public entities. 745 ILCS 10/2-207 (West 2014). We therefore conclude defendants are immune from liability under the Tort Immunity Act, as the State owned the intersection, and defendants had no obligation to inspect or maintain the property.

¶ 27 B. Motion To Dismiss Pursuant to Section 2-615

¶ 28 Notwithstanding the issues regarding ownership of the intersection, plaintiff argued he alleged sufficient facts to support a claim against defendants in his responses to defendants' motions to dismiss. Plaintiff asserts an intersection consists of more than just the area where the roads meet, but includes the portion of the roads leading up to that intersection.

¶ 29 The purpose of a section 2-615(a) motion to dismiss is to challenge the legal sufficiency of the complaint where defects are apparent on its face. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984. The question is "whether the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, and taking all well-pleaded facts and all reasonable inferences that may be drawn from those facts as true, are sufficient to state a cause of action upon which relief may be granted." *Id.* "The complaint must be construed liberally and should only be dismissed when it appears that the plaintiff cannot recover under any set of facts." *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 14, 13 N.E.3d 350. Our review of the trial court's order granting a motion to dismiss under section 2-615 is *de novo*. *Reynolds*, 2013 IL App (4th) 120139, ¶ 25, 988 N.E.2d 984.

¶ 30 Where a plaintiff alleges negligence or willful or wanton misconduct, that plaintiff must allege a duty owed by a defendant to that plaintiff, a breach of that duty, and an injury proximately caused by that breach of duty. *Kirwan v. Lincolnshire-Riverwoods Fire Protection District*, 349 Ill. App. 3d 150, 155, 811 N.E.2d 1259, 1263 (2004). To support an allegation of willful or wanton misconduct, the plaintiff must additionally plead a deliberate intention to harm or an utter indifference or conscious disregard for the plaintiff's welfare. *Id.* at 155-56, 811 N.E.2d at 1263.

¶ 31 In the complaint, plaintiff specifically alleges the stop sign and the lack of maintenance at the intersection caused the accident. Having determined defendants presented uncontroverted evidence that the intersection in question was owned by the State, not defendants, we look at the remaining allegations against defendants. Other than the facts alleged regarding the stop sign, the complaint contains general allegations and conclusory statements, such as (1) the intersection presented "an extremely high hazard for accidents to occur"; (2) the intersection

was not reasonably maintained, and is unreasonably dangerous as a result"; (3) the visual problem "is exacerbated and made worse by the steep decline of Adlai Stevenson Drive when looking from the stop sign to the east, and attempting to see traffic travelling in a westerly direction; (4) "the design of [the] intersection is not reasonably safe"; and (5) multiple accidents had occurred at this intersection as a result of the poor design, but defendants failed to take any action to remedy the problem. These conclusory allegations fail to satisfy the requirements of a fact-pleading jurisdiction. Moreover, plaintiff fails to allege how the poor maintenance of the roads leading up to the intersection proximately caused Shafer's injuries. For that matter, the complaint does not even provide details of the accident to support plaintiff's claims that defendants' alleged failure to maintain any roads—including the intersection—proximately caused plaintiff's injury.

¶ 32 To satisfy the pleading requirements in Illinois, "[a] plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." *Beahringer v. Page*, 204 Ill. 2d 363, 369, 789 N.E.2d 1216, 1221 (2003). As the trial court found, the complaint in this instance offers no such facts. Accordingly, we conclude the court did not err in granting defendants' motion to dismiss pursuant to section 2-615.

¶ 33 C. Dismissal With Prejudice

¶ 34 Plaintiff argues, even if the trial court properly dismissed the complaint, it should have done so without prejudice, thus giving plaintiff an opportunity to amend the complaint. In determining whether a plaintiff should be granted leave to amend the complaint, we consider "(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, 586 N.E.2d 1211, 1215-16 (1992). "To be entitled to an order granting leave to amend, a party must meet all four *Loyola* factors." *Devyn Corp. v. City of Bloomington*, 2015 IL App (4th) 140819, ¶ 89, 38 N.E.3d 1266. We will not overturn the court's decision to dismiss the complaint with prejudice absent an abuse of discretion. See *Loyola*, 146 Ill. 2d at 273, 586 N.E.2d at 1215.

¶ 35 Defendants assert plaintiff's argument has been forfeited, as plaintiff failed to provide the trial court, or this court, with an amended complaint to determine whether the amendment cured any defects. See *Lowrey v. Malkowski*, 20 Ill. 2d 280, 285, 170 N.E.2d 147, 150 (1960); *Dick v. Gursoy*, 124 Ill. App. 3d 185, 187, 471 N.E.2d 195, 197 (1984) (the reviewing court will not review the trial court's decision to deny leave to amend a complaint where the amended complaint is not included in the record on appeal). Rather, plaintiff attempts to outline possible amendments to the complaint for the first time in the body of his appellant brief.

¶ 36 Plaintiff asserts the aforementioned cases relied upon by defendants are effectively abrogated by the supreme court's decision in *Loyola*, and the court must consider the *Loyola* factors despite the absence of an amended complaint. At a minimum, the absence of a proposed amended complaint lessens a court's ability to analyze the *Loyola* factors. Additionally, plaintiff overlooks several cases published after *Loyola* that find the failure to tender a proposed amendment to the complaint forfeits our review of the court's dismissal with prejudice. See, *e.g.*, *Sellers v. Rudert*, 395 Ill. App. 3d 1041, 1054-55, 918 N.E.2d 586, 597-98 (2009); *Illinois Non-Profit Risk Management Ass'n v. Human Service Center of Southern Metro-East*, 378 Ill. App. 3d 713, 726, 884 N.E.2d 700, 712 (2008); *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 532, 648 N.E.2d 285, 293 (1995); *Mendelson v. Ben A. Borenstein & Co.*, 240 Ill. App. 3d

605, 619, 608 N.E.2d 187, 196 (1992). Moreover, "courts have found a presumption does not exist that a proposed amendment will be a proper one and it is not error to refuse to grant leave to amend where the party has not provided a basis to determine whether the amendment will be sufficient to state a cause of action." *Sellers*, 395 Ill. App. 3d at 1055, 918 N.E.2d at 598.

¶ 37 Accordingly, we conclude the trial court did not abuse its discretion by denying plaintiff's leave to amend the complaint and dismissing the complaint with prejudice.

¶ 38 III. CONCLUSION

¶ 39 Based on the foregoing, we affirm the circuit court's judgment.

¶ 40 Affirmed.