NOTICE
Decision filed 10/16/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 120589-U

NO. 5-12-0589

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

DAVID A. SWIFT, Plaintiff-Appellant, v. LITCHFIELD HOTEL VENTURES, LLC, d/b/a Hampton Inn Litchfield, Defendant-Appellee.	)	Appeal from the Circuit Court of Montgomery County. No. 11-L-30 Honorable Douglas L. Jarman, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The plaintiff's third amended complaint alleges sufficient facts under which the plaintiff may be able to recover under a premises liability theory, warranting the reversal of the complaint's dismissal with prejudice.

¶ 2 The plaintiff, David A. Swift, appeals from the order of the circuit court of Montgomery County dismissing his complaint filed against the defendant, Litchfield Hotel Ventures, LLC, doing business as Hampton Inn Litchfield. For the following reasons, we reverse the order of the circuit court and remand the cause for further proceedings.

¶ 3 This cause of action concerns the plaintiff's stay at the defendant's Hampton Inn Litchfield property. The plaintiff alleges that on February 11, 2011, he slipped and fell on an accumulation of ice and snow as he was exiting his car in the defendant's parking lot. Prior to this incident, the local area had received approximately one inch of snow on February 1, three inches of sleet and two inches of snow on February 2, and two inches of

snow on February 5, 2011. The defendant's agent, J & S Landscaping and Lawn, shoveled the various accumulations in the defendant's parking lot on February 1, and again on February 4, 2011.

¶ 4 The plaintiff filed a complaint on November 16, 2011, claiming that he had suffered significant injuries when he slipped and fell on an unnatural accumulation of ice and snow due to the negligence of the defendant in maintaining its parking lot. On January 17, 2012, the defendant filed a motion to dismiss the plaintiff's complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2010)), arguing that the plaintiff's complaint was legally and factually insufficient under a premises liability theory of negligence. The defendant also argued that the complaint failed to state a cause of action under Illinois law; specifically, it alleged that the plaintiff sought damages based on a fall that occurred on a natural accumulation of ice and snow, and an Illinois premises owner has no duty to clear such accumulations. On January 20, 2012, the plaintiff filed an amended complaint, and on January 31, 2012, the defendant filed a motion to dismiss the amended complaint. A hearing on the motion to dismiss was held on March 28, 2012, at which the plaintiff was given leave to, and did, file *instanter* a second amended complaint. On April 16, 2012, the defendant filed a motion to dismiss the plaintiff's second amended complaint, again pursuant to section 2-615 of the Code and again based on the argument that the plaintiff's factual allegations were insufficient to state a cause of action, and that because any ice and snow on the defendant's lot that day were natural accumulations, the plaintiff was attempting to bring a nonactionable claim under Illinois law.

¶ 5 At issue before this court is the plaintiff's third amended complaint and the defendant's motion to dismiss that complaint. In his complaint filed August 16, 2012, the plaintiff alleged that the ice and snow which was on the parking lot at the time of his fall was not the additional snowfall of February 5, 2011, but was an unnatural accumulation occurring after

that date. Specifically, the plaintiff alleges that the weather between February 5 and February 11, 2011, the date of his injury, was warm enough to allow for thawing, and that the defendant's agent shoveled the accumulation on February 1 and February 4, 2011, in a way that allowed the melting ice and snow to flow back onto the parking lot and refreeze. The plaintiff argues that this was the unnatural accumulation that caused his fall and resulting injury. The plaintiff also alleges that the slope of the parking lot allowed the melting accumulation to flow back onto the lot, and that the defendant's employees ignored warnings of the lot's condition and failed to properly monitor the work of the defendant's agent. On September 4, 2012, the defendant filed a motion to dismiss the plaintiff's third amended complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619(a)(9) (West 2010)), arguing that the plaintiff failed to provide sufficient factual support for his allegation that the defendant had negligently maintained the parking lot, and that the plaintiff's complaint failed to state a cause of action, as any ice and snow on the premises was a natural accumulation under Illinois law. Ultimately, the trial court entered an order dismissing with prejudice the plaintiff's complaint pursuant to section 2-619 of the Code. In the order, the court stated that the plaintiff's allegation that he slipped on an unnatural accumulation of ice and snow was a conclusion of law. The court held that the voluntary removal procedures alleged by the plaintiff failed to state a cause of action, citing *Barber v. G.J. Partners, Inc.*, 2012 IL App (4th) 110992, ¶ 24 (holding that snow removal operations that cause ice to melt, though it may later refreeze, does not aggravate a natural condition so as to form a basis for liability). The court noted that two more inches of snow fell on February 5, and no additional clearing was done before the plaintiff's fall on February 11, 2011. The court found that the plaintiff failed to state a cause of action under Illinois law. The plaintiff appeals.

¶ 6 In reviewing the dismissal of a complaint under either section 2-615 or section 2-619 of the Code, we apply a *de novo* standard of review. *Dopkeen v. Whitaker*, 399 Ill. App. 3d

682, 684 (2010). A motion to dismiss under section 2-615 tests the legal sufficiency of the complaint, whereas a motion to dismiss under section 2-619 admits the legal sufficiency of the complaint, but asserts an affirmative defense outside the complaint that serves to defeat the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). Under either section, we accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Dopkeen*, 399 Ill. App. 3d at 684. In addressing a section 2-615 motion, the role of the trial judge is to determine whether the pleadings present the possibility of recovery–not an absolute certainty. *Carter v. New Trier East High School*, 272 Ill. App. 3d 551, 555 (1995).

¶ 7 We first note the defendant's confessed pleading error, where instead of filing both a section 2-615 motion addressing the plaintiff's third amended complaint in its entirety and a separate section 2-619 motion addressing the specific allegations regarding "the standards of Hampton Inn," its single section 2-619 motion technically admitted the legal sufficiency of the plaintiff's allegations and shifted the burden to the defendant to prove its affirmative defense. See *Kean*, 235 Ill. 2d at 361; see also *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115-16 (1993). Regardless of any technical error, however, the plaintiff's complaint sufficiently alleged facts establishing a cause of action for negligence, warranting reversal on this premise.

¶ 8 To prove a claim of negligence, the plaintiff must establish the existence of a duty, a breach of the duty, and an injury to the plaintiff that was proximately caused by the breach. *Vancura v. Katris*, 238 Ill. 2d 352, 373 (2010). Whether a duty exists is a question of law. *Id*. In Illinois, a landowner has no duty to remove natural accumulations of ice, snow, or water from his or her property. *Krywin v. Chicago Transit Authority*, 238 Ill. 2d 215, 227 (2010). However, a property owner may be subject to liability if his or her voluntary undertaking to remove snow and ice is performed in a negligent manner. *Judge-Zeit v.*

General Parking Corp., 376 Ill. App. 3d 573, 581 (2007). Liability may arise if the ice or snow accumulated because the owner either aggravated a natural condition or engaged in conduct which created a new or unnatural condition. *Whittaker v. Honegger*, 284 Ill. App. 3d 739, 743 (1996).

¶ 9 Here, the plaintiff's complaint alleged that "[the defendant] owed a duty to [the plaintiff,] and others, to provide a reasonable means of ingress and egress from its premises," and breached its duty by:

> "a. Allowing an unnatural accumulation of ice and snow and/or;
>
> b. Aggravated by its use, the natural accumulation of ice and snow and/or;
>
> c. Failing to properly clean the ice and snow after, assuming the duty to clean the snow and/or;
>
> d. Cleared the snow in such a manner that allowed the removed snow to accumulate unnaturally."

Thus, the plaintiff has alleged that the defendant negligently undertook this duty, resulting in an unnatural accumulation of ice and snow that caused his fall. The question for this court, then, is whether the facts alleged by the plaintiff in his third amended complaint were sufficient for a trial court to find that the melting snow piles could have created an unnatural accumulation. We find that they are.

¶ 10 While *Barber* does state that snow removal operations do not aggravate a natural condition even when the snow has melted and refrozen, other case law supports the plaintiff's contention that the piling, melting, and refreezing of snow may create an unnatural accumulation. In *Johnson v. National Super Markets, Inc.*, the plaintiff was injured when she fell on an ice-encrusted puddle in the defendant's parking lot, which had snow piled 10 to 15 feet high around the light posts. 257 Ill. App. 3d 1011, 1012 (1994). In that case, the plaintiff's mother testified that water was streaming into the puddle from the snow, and the

private contractor who plowed the snow testified that the grade of the parking lot sloped down toward the building; thus, the safest place to pile the snow was on the sides of the building, where it would drain into the back of the property. *Id.* at 1013-14. In affirming the jury verdict, this court held that the jury properly could have determined that the icy puddle was the product of an unnatural accumulation of ice caused by water running off the snow and refreezing. *Id.* at 1016. Other cases reversing summary judgment for a defendant have held similarly. See *Hornacek v. 5th Avenue Property Management*, 2011 IL App 103502, ¶¶ 31, 36 (holding that the plaintiff demonstrated sufficient evidence of an unnatural accumulation by showing that the defendant's contractor piled snow in the corner of the lot and allowed it to melt and refreeze, providing a plausible link between the snow piles observed against the building and the ice that allegedly caused the fall); see also *Russell v. Village of Lake Villa*, 335 Ill. App. 3d 990, 994 (2002) (holding that the plaintiff alleged sufficient facts to demonstrate an unnatural accumulation where the logical inferences to be drawn from his evidence were that the snow melted off the mound, puddled, and refroze, forming the ice patch that caused the plaintiff to slip and fall).

¶ 11 Though we note that the determination of the existence of a duty is a question of law, resolving that question at the motion-to-dismiss stage requires that the court look favorably at the facts presented by the plaintiff, because "[a] cause of action should be dismissed [under section 2-615] only if it is clearly apparent from the pleadings that no set of facts can be proven which will entitle the plaintiff to recovery." *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 421 (2004). "The crucial inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted." *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Here, sufficient Illinois case law supports the plaintiff's position that his February 11, 2011, slip and fall *could* have been on an unnatural accumulation of ice and

snow; thus, we disagree with the trial court's conclusion that no duty existed as a matter of law.

¶ 12 In sum, the plaintiff's third amended complaint alleges sufficient facts under which the plaintiff *may* be able to recover under a premises liability theory, which is all that is required of him at this stage of the proceedings. We therefore reverse the trial court's dismissal of the complaint with prejudice and remand for further proceedings consistent with this decision.

¶ 13 Reversed and remanded.