2016 IL App (5th) 150526-U

NO. 5-15-0526

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RHONDA RILEY, Plaintiff-Appellant, v. CITY OF METROPOLIS, ILLINOIS, a Municipal Corporation, Defendant-Appellee-Third-Party Plaintiff, v. MASSAC COUNTY HOSPITAL DISTRICT, d/b/a MASSAC MEMORIAL HOSPITAL, a Municipal Corporation, Third-Party Defendant.	)	Appeal from the Circuit Court of Massac County. No. 13-L-13 Honorable James R. Williamson, Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justice Chapman concurred in the judgment.
Justice Cates specially concurred.

ORDER

¶ 1 *Held*: The trial court erred in dismissing the plaintiff's complaint against the defendant City for damages she allegedly sustained as the result of mold inhalation while working for her employer on premises leased from the City based on its determination that, under the terms of the lease, the City had no duty to clean or remediate mold, mildew, or other impurities on the

premises where the City had an obligation under the lease to repair damages to the premises caused by acts of God, such as the flood here.

¶ 2 The plaintiff, Rhonda Riley, appeals the circuit court's order dismissing with prejudice her third amended complaint against the defendant/third party plaintiff, City of Metropolis, Illinois (City), seeking damages for injuries she allegedly sustained as the result of mold inhalation while working for the third party defendant, Massac County Hospital District, doing business as Massac Memorial Hospital (Hospital), on premises the Hospital leased from the City. The complaint was dismissed based on the circuit court's determination that, under the terms of the Lease Agreement between the City and the Hospital, the City had no duty to clean or remediate mold, mildew, or other impurities on the leased premises. For the reasons that follow, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 The City leased the subject property to the Hospital pursuant to an Intergovernmental Agreement and Lease Agreement executed on June 30, 2011, a copy of which was attached to the complaint. The Intergovernmental Agreement states that the Hospital provides 24 hour medical services, including ambulance services, to the citizens of the City; that the City has available an empty building with heated garage bays, office space, and living quarters, which is not needed for City use; that, since 2008, the Hospital has maintained and operated its ambulance services from the building pursuant to a lease; that it would be in the best interest of the parties for the Hospital to continue leasing the

building, or part of the building, for its ambulance services; and that the parties agree to enter into the Lease Agreement, which is attached.

¶ 5 Article I of the Lease Agreement provides that the City leases to the Hospital the subject property and the buildings and improvements thereon. Article II states that the lease is for two years beginning July 1, 2011. In article III, the Hospital agrees to pay the City $2,000 per month in rent. In article IV, the parties acknowledge that the Hospital is in possession of the premises as a holdover tenant with the City's permission after expiration of a prior lease. In article VIII, the Hospital agrees that the City shall retain possession of the large garage bay and be entitled to exclusive use of it.

¶ 6 In article VII, the Hospital "agrees to keep the premises *** in the same condition as the same are in at the commencement of this lease, ordinary wear and tear [excepted]." Article VII also states that "[the Hospital] shall be liable to [the City] for any replacement cost for any portion of the premises which are damaged under the term of [the Hospital's] occupation other than damages caused by wind, rain, hail, fire, earthquake, other acts of God, or acts of third persons other than employees or agents of [the Hospital]."

¶ 7 Article IX provides that "[d]uring the terms of this lease, [the Hospital] shall be responsible for cleaning and custodial housekeeping of the premises." Article IX further states that "[the City] shall[,] at its' [*sic*] *expense*, maintain the building roof, exterior walls, heating and air conditioning system, electrical system, and plumbing in good condition."

¶ 8 Article X provides that "[the Hospital] shall surrender the premises to [the City] at the end of the lease term in as good or better condition as when it took possession, allowing for reasonable use and wear, and damage by acts of God."

¶ 9 Article XI states that "[i]f the premises are partially destroyed during the term of the lease, [the City] shall repair, when such repairs can be made in conformity with local, state, and federal laws and regulations, within 60 days of the partial destruction." Article XI further provides that "[i]f the repairs cannot be made in 60 days, and if [the City] does not elect to make them within a reasonable time, either party *** has the option to terminate the lease."

¶ 10 Article XII states that "[the City] reserves the right to enter on the premises at reasonable times to inspect them to ascertain that the premises are in good repair and in a clean and sanitary condition [and] to perform required maintenance and repair." Article XII further provides that "[the Hospital] agrees to permit the [City] access at all times during normal business hours."

¶ 11 In her third amended complaint, the plaintiff alleged that, under the terms of the Lease Agreement, the Hospital would be operating an ambulance service on the leased property, and the City knew that Hospital employees would be using the property. She alleged that the City had a duty to keep the property in a reasonably safe condition for those employees. She alleged that, as a paramedic for the Hospital, she was on the property from May 6, 2006, through October 2013.

¶ 12 The plaintiff alleged that, in April 2011, there was a flood on the property. She alleged that, in July 2011, she became ill as a result of exposure to mold, mildew, and

other impurities that existed on the property and that she had respiratory difficulties, nose bleeds, cough, congestion, throat fungus, rashes, and eye irritations. She alleged that, in and after April 2011, the City was aware that the property was not suitable for Hospital employees in that it had standing water, mold, mildew, and other impurities and contaminants that had affected the health of those employees, including her.

¶ 13 The plaintiff alleged that, under the terms of the Lease Agreement, the City was contractually obligated to make all repairs, at its own expense, for damages caused by wind, rain, hail, fire, earthquake, other acts of God, and acts of third persons other than Hospital employees (article VII). She alleged that the City was also obligated to maintain the roof, exterior walls, heating and air conditioning system, electrical system, and plumbing, at its own expense, in order to keep the property in good condition (article IX).

¶ 14 The plaintiff alleged that the damages caused by the rain from the 2011 flood resulted in structural damage to the property, including the exterior walls, central air conditioning system, air ducts, and plumbing. She alleged that the City had a duty to repair the extensive damage to the premises caused by the 2011 flood because, under article VII of the Lease Agreement, the City was responsible for making repairs, at its own expense, to the premises for damages caused by rain and other acts of God.

¶ 15 The plaintiff alleged that, under the terms of the Lease Agreement, the Hospital was contractually obligated to keep the property in the same condition it was in at the beginning of the lease, except for ordinary wear and tear (article VII); to pay for any replacement costs caused by damage other than damage caused by wind, rain, hail, fire, earthquake, or other acts of God (article VII); and to perform cleaning and custodial

housekeeping of the property (article IX). She alleged that the repairs necessary to remediate the extensive damage to the property caused by the 2011 flood, including mold and mildew, go well beyond the Hospital's contractual duty to keep the premises in the same condition they were in at the beginning of the lease.

¶ 16 The plaintiff alleged that the Hospital's contractual obligation to perform cleaning and custodial housekeeping of the premises did not encompass making extensive and costly repairs to the property's structure in order to remediate the damages caused by the 2011 flood. She alleged that the Hospital performed its obligation of cleaning and housekeeping at all relevant times and that the mold and mildew caused by the 2011 flood would not have been prevented or cured from cleaning and custodial housekeeping.

¶ 17 The plaintiff alleged that various rooms throughout the property were uninhabitable, *e.g.*, in one restroom, the ceiling was caving in, with debris and stains covering the walls and toilet. She alleged that, under article XI of the Lease Agreement, the City had a duty to repair partially destroyed areas of the premises. She alleged that, aside from the City's contractual duty to keep the premises in good repair in this type of instance (water infiltration caused by flooding) and the fact that the resulting condition of the property created an unreasonable risk to its occupants, the City failed to exercise reasonable care in repairing the property.

¶ 18 The plaintiff alleged that, under the terms of the Lease Agreement, the City had the right to inspect the property to ascertain if the premises were in good repair and in a clean and sanitary condition (article XII). She alleged that the City entered the property several times after the flood and during the Hospital's possession and tried to cover up

and hide the mold and mildew by spray painting over air vents, where visible mold had accumulated. She alleged that an expert confirmed that Stachybotrys growth was found in a portion of drywall removed from the living quarters bathroom on September 1, 2013, at which time the Hospital was in possession of the property.

¶ 19 In count I of her third amended complaint, the plaintiff alleged that the City was negligent in that it (1) failed to maintain and/or repair the property by allowing mold, mildew, water, and other impurities and contaminants to accumulate on the property when it knew or should have known someone would likely be injured thereby; (2) failed to maintain and/or repair the premises when it knew of the unsafe condition of the property; (3) failed to warn her of the unsafe condition of the property when it knew or should have known someone would likely be injured thereby; (4) allowed the Hospital to use the property when it knew or should have known the property was unsafe due to the standing water, mold, mildew, and other impurities and contaminants on the property; and (5) failed to exercise reasonable care in performing its obligation to keep the property in good condition. In count II, she alleged that the City's acts and omissions were willful.

¶ 20 In its amended motion to dismiss the third amended complaint, the City first argued that the complaint should be dismissed under section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)) for failure to state a cause of action in that the plaintiff failed to allege facts giving rise to a duty on the part of the City under the terms of the Lease Agreement or at law to clean or remediate mold, mildew, or other impurities from the premises leased by the Hospital. In the alternative, the City argued that the complaint should be dismissed under section 2-619(a)(9) of the Code (735

ILCS 5/2-619(a)(9) (West 2014)) because, as a matter of law, the City had no duty under the terms of the Lease Agreement to clean or remediate mold, mildew, or other impurities on the premises leased by the Hospital.

¶ 21 After a hearing, the circuit court granted the City's motion and dismissed the third amended complaint with prejudice under section 2-615 for failure to state a cause of action in that the plaintiff failed to allege facts giving rise to a duty on the part of the City under the terms of the Lease Agreement or at law to clean or remediate mold, mildew, or other impurities from the premises leased by the Hospital or, in the alternative, under section 2-619(a)(9) because, as a matter of law, the City had no duty under the terms of the Lease Agreement to clean or remediate mold, mildew, or other impurities on the premises leased by the Hospital. The plaintiff appeals.

¶ 22 ANALYSIS

¶ 23 The issue before us is whether the circuit court properly dismissed the plaintiff's third amended complaint based on its determination that the City had no duty to clean or remediate mold, mildew, or other impurities on the premises leased by the Hospital. The City's combined motion to dismiss was brought under section 2-619.1 of the Code, which allows a party to move for dismissal under both sections 2-615 and 2-619 in a single motion. 735 ILCS 5/2-619.1 (West 2014). "A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint." *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29. "A section 2-619 motion to dismiss admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter defeating the plaintiff's claim." *Skaperdas v.*

Country Casualty Insurance Co., 2015 IL 117021, ¶ 14. "[R]eview of a dismissal under either section 2-615 or section 2-619 is *de novo*." *Lutkauskas*, 2015 IL 117090, ¶ 29.

¶ 24 Under section 2-615, the question on review is "whether the allegations of the complaint, construed in the light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 61. "In making this determination, all well-pleaded facts must be taken as true." *Id.* A complaint should not be dismissed under section 2-615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Id.*

¶ 25 The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact early in the litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). The issue of whether the defendant owed the plaintiff a duty of care is a question of law that is properly asserted in a section 2-619 motion. *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 274 (2007). Under section 2-619, the question on review is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993).

¶ 26 In the present case, the plaintiff argues that the circuit court erred in dismissing her third amended complaint because she properly stated a cause of action against the City that set forth a duty on the part of the City to repair and maintain various portions of the premises that caused her injury. The City responds that dismissal was proper because, as

a matter of law, under the terms of the Lease Agreement, it had no duty to clean or remediate mold, mildew, or other impurities on the premises leased by the Hospital.

¶ 27 To prevail in a negligence action, the plaintiff must plead and prove that the defendant owed her a duty, that the duty was breached, and that she suffered an injury as a proximate result of that breach. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12.

¶ 28 "There is no separate, independent tort of willful and wanton conduct." *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 19. "Rather, willful and wanton conduct is regarded as an aggravated form of negligence." *Id.* "In order to recover damages based on willful and wanton conduct, a plaintiff must plead and prove the basic elements of a negligence claim–that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that the breach was a proximate cause of the plaintiff's injury." *Id.* "In addition, a plaintiff must allege either a deliberate intention to harm or a conscious disregard for the plaintiff's welfare." *Id.*

¶ 29 The only element at issue here is duty. Thus, to determine whether dismissal was proper, we must determine whether the plaintiff alleged sufficient facts that, if proven, establish that the City owed her a duty of care. "Whether a duty exists is a question of law for the court to decide" (*Bruns*, 2014 IL 116998, ¶ 13), and the standard of review is *de novo* (*Jablonski v. Ford Motor Co.*, 2011 IL 110096, ¶ 83). Without a showing from which the court could infer the existence of a duty, no recovery by the plaintiff is possible as a matter of law. *Bruns*, 2014 IL 116998, ¶ 13.

¶ 30 "In Illinois, it is well settled that a landlord is not liable for injuries caused by a defective or dangerous condition on premises that the landlord leases to a tenant and are

under the tenant's control." *Richard v. Nederlander Palace Acquisition, LLC*, 2015 IL App (1st) 143492, ¶ 38. Therefore, a lessor that relinquishes control of property to a lessee owes no duty to a third party who is injured while on the leased property. *Id.* However, "[t]his premise, which is commonly referred to as 'lessor immunity,' is not absolute, and a landlord may be liable if any of the following exceptions apply: (1) a latent defect exists at the time of the leasing that the landlord should know about; (2) the landlord fraudulently conceals a dangerous condition; (3) the defect causing the harm amounts to a nuisance; (4) the landlord has contracted by a covenant in the lease to keep the premises in repair; (5) the landlord violates a statutory requirement of which a tenant is in the class designated to be protected by such requirement; or (6) the landlord voluntarily undertakes to render a service." *Id.* Where a landlord is charged with negligence because of its failure to perform an act allegedly required by contract, the question of whether the landlord actually had a duty to act will be determined by the terms of the contract. *Gilley v. Kiddel*, 372 Ill. App. 3d 271, 275 (2007).

¶ 31 As the plaintiff correctly alleged in her third amended complaint, under the terms of the Lease Agreement, the Hospital was responsible for cleaning and custodial housekeeping of the premises (article IX); keeping the premises in the same condition they were in at the beginning of the lease, ordinary wear and tear excepted (article VII); and paying to repair damages to the premises caused by things other than wind, rain, hail, fire, earthquake, other acts of God, or acts of third persons other than Hospital employees (article VII). The City was responsible for repairing damages to the premises caused by wind, rain, hail, fire, earthquake, other acts of God, or acts of third persons other than

Hospital employees (article VII); maintaining the building roof, exterior walls, heating and air conditioning system, electrical system, and plumbing in good condition (article IX); and repairing partially destroyed areas of the premises (article XI).

¶ 32 In her third amended complaint, the plaintiff alleged that the rain from the 2011 flood resulted in structural damage to the property, including the exterior walls, central air conditioning system, air ducts, and plumbing. She alleged that various rooms throughout the property were uninhabitable, *e.g.*, in one restroom, the ceiling was caving in, with debris and stains covering the walls and toilet.

¶ 33 The plaintiff alleged that the repairs necessary to remediate the extensive damage to the property caused by the flood, including mold and mildew, go well beyond the Hospital's contractual duty to keep the premises in the same condition they were in at the beginning of the lease. She alleged that the Hospital's obligation to perform cleaning and custodial housekeeping of the premises did not encompass making extensive and costly repairs to the property's structure in order to remediate the damages caused by the flood. She alleged that the Hospital performed its obligation of cleaning and housekeeping at all relevant times and that the mold and mildew caused by the flood would not have been prevented or cured from cleaning and custodial housekeeping.

¶ 34 The plaintiff noted that, under the terms of the Lease Agreement, the City had the right to inspect the property to ascertain if the premises were in good repair and in a clean and sanitary condition. She alleged that the City entered the property several times after the flood and during the Hospital's possession and tried to cover up and hide the mold and mildew by spray painting over air vents, where visible mold had accumulated. She

alleged that an expert had confirmed that Stachybotrys growth was found in a portion of the drywall removed from the living quarters bathroom on September 1, 2013, at which time the Hospital was in possession of the property.

¶ 35 We agree with the plaintiff that, under the terms of the Lease Agreement, the City was contractually obligated to repair the damages to the premises caused by the flooding in this case, including the resulting mold and mildew. We, therefore, conclude that the circuit court erred in dismissing the plaintiff's third amended complaint based on its determination that, under the terms of the Lease Agreement, the City had no duty to clean or remediate mold, mildew, or other impurities on the leased premises.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, the judgment of the circuit court of Massac County is reversed, and the cause is remanded for further proceedings consistent with this decision.

¶ 38 Reversed and remanded.

¶ 39 JUSTICE CATES, specially concurring:

¶ 40 I concur in the order. I write separately, however, to call attention to a recurring problem in pretrial motion practice, namely, the failure to comply with the procedural requirements for combined motions to dismiss under section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2014)).

¶ 41 Section 2-619.1 of the Code provides that motions under section 2-615, section 2-619, and section 2-1005, may be filed together in a single pleading. 735 ILCS 5/2-619.1

(West 2014). Section 2-619.1 further provides that a combined motion shall be separated into parts, and that each part shall be limited to and shall specify the specific section upon which the movant is seeking relief. 735 ILCS 5/2-619.1 (West 2014). Additionally, each part must clearly show the points or grounds relied upon under the section upon which it is based. 735 ILCS 5/2-619.1 (West 2014). Section 2-619.1 does not authorize the commingling of distinctive claims pursuant to section 2-615, section 2-619, or section 2-1005. *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 20. Each part of a combined motion under section 2-619.1 is procedurally distinct, and a party may not ignore these distinctions when filing a combined motion. *Reynolds*, 2013 IL App (4th) 120139, ¶ 20.

¶ 42 Judicial resources are wasted when a trial court is asked to sort through and disentangle the grounds and basis supporting a motion to dismiss. When faced with a motion that does not comply with section 2-619.1, a trial court should *sua sponte* reject the motion and provide the moving party with an opportunity to file a motion that meets the statutory requirements. See *Reynolds*, 2013 IL App (4th) 120139, ¶ 21. Alternatively, the court could allow the moving party to file separate motions under section 2-615 and section 2-619 to avoid running afoul of the procedural requirements of section 2-619.1. *Reynolds*, 2013 IL App (4th) 120139, ¶ 21.

¶ 43 In this case, the defendant filed its "Amended Motion Attacking Plaintiff's Third Amended Complaint Pursuant to 735 ILCS 5/2-615(a), (c), and (d), Or In The Alternative, 735 ILCS 5/2-619(a)(9) Of The Illinois Code Of Civil Procedure." In the motion, the defendant failed to separate its arguments into distinct parts as required by

section 2-619.1. Instead, the defendant's motion to dismiss was a lengthy pleading with 19 paragraphs of argument. Here, the trial court recognized that the defendant had filed a procedurally deficient motion, and directed it to file an amended motion, setting forth the particular grounds relied upon under section 2-615 and those relied upon under section 2-619. By requiring compliance with section 2-619.1, the trial court was able to consider and rule upon the specific grounds supporting each part of the motion to dismiss. This provided the reviewing court with a clear record of the basis for dismissal.

¶ 44 The failure to divide a combined motion into specific parts and to outline the specific grounds supporting each part is an undisciplined motion practice that violates the explicit requirements of section 2-619.1, and makes the task of considering the merits of the motion more arduous for both trial courts and courts of review. Counsel who fail to comply with the procedural rules regarding combined motions do so at their own peril.