

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
COUNTY DEPARTMENT, LAW DIVISION**

Taurean Bonds,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Jewel Food Stores, Inc., an Illinois	)	No. 18 L 5419
corporation, individually, and d/b/a	)	
Jewel Food Store #3455, Bior Ngong,	)	
individually and as agent of	)	
Jewel Food Stores, Inc.,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

A cause of action for spoliation of evidence must properly plead every essential element. The first amended complaint fails to plead a duty owed by the defendants to the plaintiff or that there exists an exception to the general no-duty rule. Based on these pleading failures, the defendants' motion to dismiss is granted, without prejudice.

**Facts**

This case arises out of an incident that occurred on April 28, 2017 at a Jewel food store located on North Sheridan Road in Chicago. On that day, Taurean Bonds walked out of the store followed by Bior Ngong, a Jewel employee, who proceeded to strike Bonds repeatedly to the face and body, leading to the loss of Bonds' left eye. On May 24, 2018, Bonds filed his original complaint against Jewel and Ngong and on December 18, 2019 filed a first amended complaint. In the latter, Bonds brings eight counts against Jewel and Ngong. The first six counts are for negligence, intentional conduct, and willful and wanton conduct

against Jewel and Ngong as an agent of Jewel. Counts seven and eight are for spoliation of evidence against the two defendants.

The spoliation counts are based on the alleged failure of the defendants to maintain and produce surveillance camera video of the incident. Bonds alleges that the defendants had a duty to preserve the video based on their explicit notice of his complaint as well as their duty to turn over such evidence to the police, state's attorney, and Bonds' defense counsel in the underlying criminal prosecution. Bonds alleges that the defendants breached their duty by destroying the original video footage. He further alleges that, as a result, he has been "severely and unjustly prejudiced in the prosecution of his claim for injuries." First Amd. Cmpl., counts VII & VII, ¶ 8.

The defendants have filed a motion to dismiss pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-615. They argue that counts seven and eight must be dismissed because they fail to state a cause of action for spoliation of evidence. Specifically, the defendants argue as a factual matter that Bonds has received all of the video preserved from April 28, 2017. They also argue that as a legal matter, they owed Bonds no duty to preserve the video and that the lack of it, if there were any, has not deprived Bonds of the evidence necessary to prove his case.

Bonds responds by arguing that on April 29, 2017, Jewel turned over to the police a disk containing video from three surveillance cameras. Bonds' attorney in this case obtained a copy of those videos from Bonds' criminal defense attorney because Jewel did not keep the originals. Of the video from the three cameras, only one was from April 28, 2017 and showed events ~~between Bonds and Ngong in the Jewel liquor department.~~ On August 15, 2018, Bonds issued written discovery to the defendants. In response, the defendants produced a copy of a video depicting different footage of events between Bonds and Ngong inside Jewel.

## Analysis

A section 2-615 motion to dismiss attacks a complaint's legal sufficiency. See *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. Such a motion does not raise affirmative factual defenses, but alleges only defects appearing on the face of the complaint. See *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484-85 (1994). A section 2-615 motion must identify the complaint's defects and specify the relief sought. See 735 ILCS 5/2-615(a) (2008).

A court considering a section 2-615 motion is to consider only the allegations presented in the pleadings. See *Illinois Graphics*, 159 Ill. 2d at 485. All well-pleaded facts and reasonable inferences arising from them must be accepted as true, see *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 28 (2004), but not conclusions unsupported by facts, see *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). Conclusory statements cannot state a cause of action even if they generally inform the defendant of the nature of the claims. See *Adkins v. Sarah Bush Lincoln Health Cntr.*, 129, Ill. 2d 497, 519-20 (1989). The paramount consideration is whether the complaint's allegations construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action for which relief may be granted. See *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. If not, section 2-615 authorizes the dismissal of a cause of action. See *DeHart*, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 488.

In his response to the defendants' motion, Bonds raises various facts outside the pleadings that cannot be considered. This court identified some of those facts above only to give context to what is needed to plead properly a cause of action for spoliation of evidence. ~~Otherwise, this court's ruling is based strictly on the first amended complaint.~~

Illinois common law recognizes a cause of action for negligence based on a spoliation of evidence. See *Dardeen v. Kuehling*, 213 Ill. 2d 329, 335-36 (2004); *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 194-95 (1995); *Martin v. Keeley &*

*Sons, Inc.*, 2012 IL 113270, ¶¶26-27. A plaintiff raising such a claim must plead and prove that: (1) the defendant owed the plaintiff a duty to preserve evidence; (2) the defendant breached that duty by losing or destroying it; (3) the loss or destruction proximately caused the plaintiff's inability to prove its case; and (4) the plaintiff suffered actual damages. *See Dardeen*, 213 Ill. 2d at 336; *Boyd*, 166 Ill. 2d at 194, 196. As a general rule, there exists no duty to preserve evidence; *see Boyd*, 166 Ill. 2d at 195; nonetheless, *Boyd* set out a two-part test a plaintiff must meet to establish an exception to the general no-duty rule, *see id.* Under the first, or relationship, part, a plaintiff must show there existed an agreement, contract, statute, special circumstance, or voluntary undertaking from which a defendant's duty to preserve evidence arises. *Id.*; *Dardeen*, 213 Ill. 2d at 336. Under the second, or foreseeability, part, a plaintiff must show that the duty encompassed the specific evidence at issue by demonstrating that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd*, 166 Ill. 2d at 195. Should the plaintiff fail either part of the *Boyd* test, the defendant has no duty to preserve evidence. *Dardeen*, 213 Ill. 2d at 336.

Bonds' first amended complaint fails to pled properly either a duty on the defendants' part or an exception to the general no-duty rule based on *Boyd*. For example, there is no sufficient allegation establishing the second duty requirement – that the defendants lost or destroyed any necessary video evidence. Rather, the complaint merely alleges that the defendants breached their duty by "destroying the *original* video footage." First Amd. Cmpl., counts VII & VII, ¶ 7 (emphasis added). Bonds fails to allege that the original video footage is essential evidence compared to the copy his attorney in this case received from Bonds' criminal defense attorney. Further, Bonds does not allege that the defendants destroyed the additional video produced in response to written discovery; indeed he cannot make that allegation. The defendants may have failed to provide that video to the police, but that does not equate to a duty not to destroy evidence since the factual predicate never occurred.

Bonds' first amended complaint also fails to plead the third duty element – that the destruction of evidence makes it impossible for Bonds to prove his case. Rather, Bonds merely alleges that as a result of the defendants' "destruction, and or, failure to produce the original video footage, [he] has been severely and unjustly prejudiced in the prosecution of his claim for injuries." First Amd. Cmplt., counts VII & VII, ¶ 8. Being prejudiced, unjustly or otherwise, is not equivalent to being unable to prove a case as the case law requires. Bonds argues in his response brief that, "there are disputed facts regarding the manner and reason why defendant, Bior Ngong, struck the Plaintiff." Resp. Br. at 8-9. That may be true, but Bonds fails to allege why the video would resolve those disputed facts. Bonds sufficiently pleads that he was struck in the face and body and lost an eye; a video would merely show how the injury occurred, but there is apparently no dispute that he was injured. Further, an objective video will not answer the subjective reason why Ngong struck Bonds; the video would merely show that the incident, something that is, again, not in dispute.

These two obvious pleading failures could be overcome had Bonds pleaded a *Boyd* exception, something he fails to do. First, Bonds has not pleaded that there existed an agreement, contract, statute, special circumstance, or voluntary undertaking to preserve evidence. On this point, it cannot be overlooked that actual possession or control of a video recording is insufficient to sustain a special circumstance that would give rise to a duty to preserve. *See Martin*, 2012 IL 113270, ¶ 45. Second, Bonds fails to allege that the defendants' duty encompassed the specific evidence at issue by demonstrating that "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action." *Boyd*, 166 Ill. 2d at 195. Indeed, Bonds can never meet this requirement given that only original videos, not copies, were destroyed.

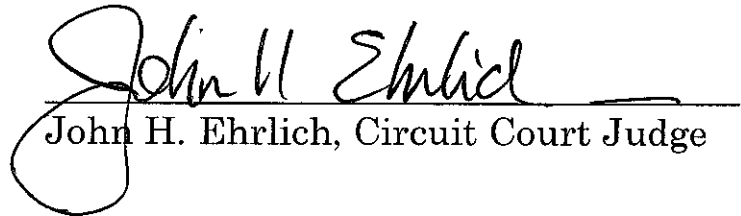
The defendants have requested that this court dismiss counts seven and eight with prejudice. At this point, this court

will deny that request with an explicit warning to the plaintiff: any amended complaint containing spoliation of evidence causes of action must meet the basic pleading requirements set out in the cases cited above. Should the next iterative complaint fail to meet those standards, this court will not hesitate to dismiss those counts summarily and with prejudice.

Conclusion

For the reasons stated above, it is ordered that:

1. The defendants' motion to dismiss counts seven and eight is granted without prejudice;
2. The plaintiff has 28 days from the date of this order to file an amended complaint; and
3. This case will be heard for case management on a date to be scheduled by notification to the parties.

  
John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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