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

Cheryl L. Brown, Plaintiff, v. Village of La Grange, La Grange Elementary School District 102, Board of Education of La Grange School District 102, and Commonwealth Edison Company d/b/a ComEd, an Illinois corporation, Defendants.	)	No. 21 L 7195

MEMORANDUM OPINION AND ORDER

A motion to dismiss supported by affirmative matter may be sufficient to avoid the legal effect of or defeat a plaintiff's claim. In this instance, the defendant's affirmative matter is a plat allegedly establishing that the defendant did not own the property where the plaintiff's injury occurred. The plat fails, however, to address the issue of whether the defendant created the dangerous condition regardless of whether the defendant owned the property where the injury occurred. It is plain, however, the defendant is immune from liability for failing to inspect the property. The defendant's motion to dismiss must, therefore, be granted, in part, and denied, in part.

Facts

On August 2, 2020, Cheryl Brown was walking northbound on Ashland Avenue in La Grange when she stepped off the sidewalk to allow unmasked teenagers to pass by her. When Brown stepped back onto the sidewalk, she tripped and fell on the remnants of a sign pole located between the sidewalk and the fence that bordered Cossitt Avenue School. Brown sustained injuries that required emergency medical attention.

On July 15, 2021, Brown filed her complaint against the Village of La Grange ("the Village"), La Grange Elementary School District 102, Board of Education of La Grange School District 102 ("Board of Education"), and Commonwealth Edison Company. Count one is directed specifically against the Village. Brown alleges that each defendant negligently: (1) operated, managed, maintained, and controlled the public way; (2) caused and

permitted the metal base of the removed sign pole to become exposed and create a tripping hazard; (3) failed to place warning signs around the exposed base; (4) failed to maintain the premises in a reasonably safe condition; and (5) failed to implement or enforce an inspection system to detect an unsafe condition. Count four is pleaded in construction negligence against Commonwealth Edison Company.

On September 23, 2021, the Board of Education answered the complaint, admitting it controlled and was responsible for maintaining Cossitt Avenue School, but otherwise denied the other material allegations. On September 29, 2021, Russell Schomig, a professional Illinois land surveyor, signed a certified plat of survey indicating the remnants of the pole base are located east of the school's property line and are on school property. On October 8, 2021, Andrianna Peterson, the Village manager, filed an affidavit incorporating the land survey as an exhibit and stated the strip of land on which the sign post was located was not Village property. Peterson also averred: "The Village of La Grange does not own, possess, control, maintain or have any legal interest whatsoever in the location of Plaintiff's accident, nor did it on or prior to August 8, 2020."

On October 8, 2021, the Village filed a motion to dismiss count one of Brown's complaint. The parties fully briefed the motion.

Analysis

The Village brings its motion to dismiss pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). A court is not to accept as true those conclusions unsupported by facts. *See Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

One of the enumerated grounds for a section 2-619 motion to dismiss is that "affirmative matter" avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense negating the cause of action completely or refuting crucial

conclusions of law or conclusions of material fact contained in or inferred from the complaint. *See Illinois Graphics*, 159 Ill. 2d at 485-86. While the statute requires affirmative matter be supported by affidavit, some affirmative matter has been considered to be apparent on the face of the pleading. *See id.* The defendant bears the initial burden of establishing the existence of an affirmative matter by providing adequate affidavits or other supporting evidence. *Rehfield v. Diocese of Joliet*, 2021 IL 125656, ¶ 22 (citing *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 116 (1993)). Once the defendant satisfies its burden, the burden shifts to the plaintiff to establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Id.* Evidentiary facts asserted in a defense affidavit are deemed admitted unless the plaintiff submits a counteraffidavit to refute those facts. *Id.*

The Village's central argument is that it owed Brown no duty because the Village did not own the land on which Brown was injured. The Village asserts the certified plat of survey demonstrates the sign pole's remnants lay on Board of Education property, not Village property. The Village also relies on Peterson's affidavit that essentially restates the assertions from the plat of survey.

Brown correctly point out that Peterson's averment that "The Village of La Grange does not own, possess, control, maintain or have any legal interest whatsoever in the location of Plaintiff 's accident, nor did it on or prior to August 8, 2020" is an impermissible legal conclusion. Peterson's affidavit is, therefore, unpersuasive. The same cannot be said, however, for the plat of survey. Here, Brown failed to file a counteraffidavit or provide other proof to refute the facts asserted in the Village's affidavit or exhibits; consequently, this court may deem those facts admitted. *Rehfield*, 2021 IL 125656, ¶ 22. Thus, the remnants of the pole base may, therefore, be deemed to be located on the Board of Education's property.

The mere identification of the property owner does not, however, mean the Village owed Brown no duty. Duty is a question of law to be decided by the court. *Doe v. Coe*, 2019 IL 123521, ¶ 36; *Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22. Courts look to the common law to identify and determine a local governmental entity's duties, if any. *See Bruns v. City of Centralia*, 2014 IL 116998, ¶ 15 (citing *Vesey v. Chicago Housing Auth.*, 145 Ill. 2d 404, 414 (1991)). In other words, if there exists no common-law duty, there is no cause of action. "It is firmly established in Illinois that a party that creates a dangerous condition will not be relieved of liability because that party does not own or possess the premises upon which the dangerous condition exists." *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 324 (1978).

Despite the Village's assertions to the contrary, the facts of *Corcoran* do not change its applicability here because Brown has argued that the Village created the dangerous condition. Specifically, in count one Brown claims the Village "[c]aused and/or permitted the metal base of a removed sign pole to become and/or remain exposed; thus, posing a tripping hazard to those intended and permitted to use the property, including Plaintiff." This allegation is factually distinct from the cases cited by the Village in which there were no allegations the defendants had created the dangerous conditions. In other words, although the Village established it does not own the land where the remnants of the sign pole are located, that fact does not mean the Village did not create the dangerous condition by placing the sign on property it did not own or failing to remove it without creating a dangerous condition.

The Village also urges this court to apply *Grabinski v. Forest Preserve Dist. of Cook Cnty.* 2020 IL App (1st) 191267. The facts in this case are distinguishable from *Grabinski* because, in that case, it was clear who created the dangerous condition. *Grabinski,* 2020 IL App (1st) 191267, ¶ 19. In contrast here, the mere existence of the dangerous condition on property not belonging to the Village does not answer of who created the dangerous condition.

The Village also attempts to use the Board of Education's answer that it maintained their property to conclude that the Board of Education was responsible for the remnants of the sign pole. That might be a legitimate argument had the Village provided evidence as to the type of sign that had been installed, what entity installed the sign, and what entity removed the sign. The Board of Education's answer that it controls the Cossitt Avenue School does not shed light on these important unknown facts.

The Village argues that sections 3-102 and 2-105 of the Local Governmental and Governmental Employee Tort Immunity Act support the Village's position. Notably, the TIA does not create duties; it merely articulates the common law duty owed by the local public entity and confers upon it immunity for certain delineated acts or omissions that would otherwise fall within the scope of its duty. *Swett v. Village of Algonquin,* 169 Ill. App. 3d 78 (1988). Section 3-102(a) states, in part, that:

> 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). Section 2-105 provides that:

> 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.

745 ILCS 10/2-105.

Brown argues the Village's assertion that section 3-102 applies is at odds with the Village's position that the accident did not occur on its property. For section 3-102 immunity to apply, the injury must arise from a condition on the local governmental entity's property. At this point, whether section 3-102 applies is undetermined because the facts fail to show which entity created the dangerous condition regardless of which entity owned the property.

In contrast, section 2-105 immunizes the Village from Brown's claim that it failed to inspect the property. The reason is that, even if the Village created the dangerous condition on property other than its own, the plain language of section 2-105 immunizes local governmental entities from having to inspect for property conditions on property other than its own. That immunity is absolute. *Ware v. City of Chicago*, 375 Ill. App. 3d 574, 582-83 (1st Dist. 2007).

At this nascent point in the litigation, the Village has failed to establish affirmative matter answering the central question of what entity created the dangerous condition on which Brown was injured. Absent such affirmative matter, dismissal of the entire complaint as to the Village is premature. Nonetheless, section 2-105 immunizes the Village from Brown's failure-to-inspect claims.

Conclusion

For the reasons presented above, it is ordered that:

1. The Village's motion to dismiss count one is granted, in part and denied, in part;
2. The plaintiff's claims of failure to inspect are dismissed with prejudice, while the remainder of count one stands; and
3. The Village has until May 5, 2022 to answer the complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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