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

Katie Bryan,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	No. 20 L 9324
Butler Animal Health Supply, LLC d/b/a Covetrus North America, Brigid Capital, LLC, and Unknown Contractors,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The dual-capacity doctrine is an exception to the Workers' Compensation Act's exclusive remedy provision only if the defendant acted in two separate legal capacities. The record here does not establish the defendant's dual capacities as an employer and remodeler of a tenant space. For these reasons, the defendant's motion to dismiss is granted and the defendant is dismissed with prejudice.

Facts

On August 31, 2020, Katie Bryan filed three-count complaint in this lawsuit. Bryan alleges that Covetrus North America leased, owned, or operated a building located at 16345 South Harlem Avenue in Tinley Park. Covetrus operated at that address a call center for veterinary supplies. Bryan worked at the call center as a Covetrus employee. Bryan alleges that in and around September 3, 2018, Covetrus hired various contractors to perform remodeling and rehabilitation work at the property. Bryan alleges the work exposed her to toxic mold and other substances.

Count one is a cause of action for negligence directed against Covetrus. Bryan alleges that Covetrus acted in a dual capacity as the remodeler and rehabber of the property. In its dual capacity, Covetrus allegedly knew or should have known of the toxic mold and other substances exposed during the remodeling and rehabbing of the building. Bryan alleges that Covetrus owed a duty of care not to expose her to toxic substances. She claims Covetrus breached its duty by failing, among other things, to: (1) inspect and remedy the dangerous conditions; (2) follow building codes and thereby create and further a hazardous condition; (3) warn of the condition; (4) exercise reasonable care to protect against the toxic substances; (5) obtain permits to perform the remodeling and removal work; and (6) provide a safe workplace. Bryan alleges these acts and omissions proximately caused her injuries.

On November 12, 2020, Covetrus filed a motion to dismiss pursuant to Code of Civil Procedure section 2-619. *See* 735 ILCS 5/2-619. Covetrus attached to its motion various exhibits. One exhibit is a certification by VT Forte, IV, the chief commercial officer of Butler Animal Health Supply, LLC. Forte states that in and around September 3, 2018, Butler conducted business under the trade name "Henry Schein Animal Health." On February 7, 2019, Covetrus was formed through a merger with Butler, resulting in Butler becoming a wholly owned subsidiary of Covetrus.[1] In June 2019, Butler stopped doing business under the Henry Schein Animal Health trade name and began doing business under the Covetrus North America corporate name. Forte states that Covetrus is not in the business of renovating, remodeling, or rehabilitating property and does not advertise, offer, or sell such services.

The Covetrus motion also attaches a certification of Tracy Skirmont, Butler's customer care and facilities manager.

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[1] Covetrus was not formed until six days after Bryan quit; consequently, this court refers to Butler to designate events when Bryan worked there and to Covetrus, the current legal entity.

Skirmont states that Butler leased suite 300 at the Tinley Park building where Butler operated its call center. Bryan worked there from September 3, 2018 to February 1, 2019. Starting in October 2018, the building owner started renovation and remodeling work at the building. Skirmont states that Butler did not conduct any of that work and did not contract with any entity to do so.

Covetrus also attached to its motion a February 19, 2019 letter from the law firm of Katz, Friedman, Eagle, Eisenstein, Johnson & Bareck to Henry Schein and Covetrus enclosing an application for adjustment of claim pursuant to section 12 of the Illinois Workers' Compensation Act (WCA). On the form, Bryan identified her injury as "exposure;" the nature of the injury is listed as "unknown."

Covetrus's central argument in support of its motion to dismiss is that Bryan's exclusive remedy is provided by the WCA admission because she was a Covetrus employee. The statute's exclusive remedy provision reads, in part:

> no common law or statutory right to recover damages from the employer . . . for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act. . . .

820 ILCS 305/5(a). According to Covetrus, Bryan explicitly admits to the WCA's exclusive remedy because she submitted an application for benefits.

In response, Bryan argues the dual-capacity exception to the exclusive remedy provision validates her claim. According to Bryan, Butler acted both as her employer and became and acted in a separate legal capacity during the course of the remodeling. In support of her argument, Bryan attaches various e-mails sent by Skirmont to employees. In the first, she wrote: "The landlord has

agreed to do some remodeling and wall demotion as part of our renewal." In another, she stated: "I met with the contractor today regarding the construction, we are moving forward and look to begin right after Labor Day weekend." In a third e-mail, Skirmont wrote: "The demolition of the office walls will [ ] begin this Saturday." In another, she wrote: "This weekend the contactor will be here to finalize the office construction. . . . On Monday afternoon there will be an inspector in the office testing the air quality in the office since the major construction will have been completed." In Skirmont's final e-mail, she wrote: "On Thursday afternoon there will be a company in the office performing an air test."

Analysis

Covetrus brings its motion to dismiss pursuant to Code of Civil Procedure section 2-619. 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). That is the specific subsection on which Covetrus bases its motion to dismiss. 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.

It is uncontested that Bryan was a Butler employee at the time of her alleged injury. That admission alone relegates her recovery to the WCA's exclusive remedy provision, 820 ILCS 305/5(a), unless an exception applies. Bryan argues that Butler acted in a dual capacity at the time of the renovation and rehabbing, a recognized exception to the exclusive remedy provision. *See Ocasek v. Krass*, 153 Ill. App. 3d 215, 217 (1st Dist. 1987). Under the dual-capacity doctrine, "'an employer normally shielded from tort liability by the exclusive remedy principle may become liable in tort to his own employee if he occupies, in addition to his capacity as employer, a second capacity that confers on him obligations independent of those imposed on him as employer.'" *Id.* (quoting 2A Arthur Larson, Workmen's Compensation § 72.80, at 14-112 (1976)). "[A]ny exceptions to the exclusive remedy provision of the Act or any theories which would allow that provision to be circumvented 'must be strictly construed.'" *Garland v. Morgan Stanley & Co., Inc.*, 2013 IL App (1st) 112121, ¶ 51 (quoting *Rosales v. Verson Allsteel Press Co.*, 41 Ill. App. 3d 787, 789 (1st Dist. 1976)). As to the dual-capacity doctrine, its strict construction means that "'a mere separate theory of liability against the same legal person as the employer is not a true basis for use of the dual capacity doctrine; the doctrine, instead, requires a distinct separate legal persona.'" *Sharp v. Gallagher*, 95 Ill. 2d 322, 328 (1983) (quoting *Smith v. Metropolitan Sanitary Dist.*, 77 Ill. 2d 313, 319 (1979)).

The standards for establishing a defendant's dual capacity are well established. A plaintiff alleging the dual capacity exception to the WCA's exclusive remedy provision must show the defendant: (1) operated in a second capacity, separate and distinct from its capacity as the plaintiff's employer; and (2) injured the plaintiff as a result of the defendant's acts performed in its second capacity. *See Kolacki v. Verink*, 384 Ill. App. 3d 674, 678 (3d Dist. 2008) (citing *Kontos v. Boudros*, 241 Ill. App. 3d 198, 200-01 (2d

Dist. 1993)). A plaintiff does not meet its burden if the defendant's duties in its second capacity are related to its duties in its first capacity as employer. *Stewart v. Jones*, 318 Ill. App. 3d 552, 564-65 (2d Dist. 2001).

The record here fails to establish that Butler acted in a dual capacity at any time Bryan worked at the call center. First, Skirmont attests that Butler did not own the building, but merely leased space. Second, she indicates the building owner, not Butler, hired the contractor and directed the renovation and rehabbing work. Third, Skirmont does not identify any other legal entity created by Butler or legally related to it in any way that acted as the renovator or rehabber of the call center space.

Bryan's reliance on Skirmont's e-mails is wholly unavailing. Those communications merely show that Skirmont was keeping Butler employees informed of the contractor's work schedule at the call center. The e-mails do not explicitly identify a separate legal entity or include any facts from which it could be possibly inferred that Butler had created a separate legal capacity to conduct the renovation and rehabbing work.

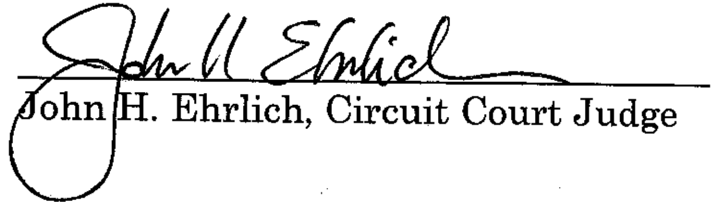
In short, the record is devoid of any evidence that Butler operated in a second capacity, separate and distinct from its role as Bryan's employer. Further, there is nothing in the record to establish or infer that Bryan's injuries resulted from Butler's acts of omissions in a second capacity. Absent such evidence, Bryan has no basis to claim the dual-capacity doctrine applies to save her cause of action.

Conclusion

For the reasons presented above, it is ordered that:

1. Covetrus's motion to dismiss is granted;
2. Covetrus (and Butler) are dismissed with prejudice;

3. Pursuant to Illinois Supreme Court Rule 304(a), there is no just reason for delaying either enforcement or appeal of this court's ruling; and
4. The case continues as Brigid Capital, LLC.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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