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

Lisa Captain, Plaintiff, v. Eileen Rosselli-McDermott, individually and as agent, apparent agent, and/or employee of the County of Cook, and the County of Cook, individually and/or by and through its agents, apparent agents, and/or employees including without limit, Eileen Rosselli-McDermott, Defendants.	)	No. 20 L 3111

MEMORANDUM OPINION AND ORDER

State's Attorneys' employees are state, not county, employees. The Cook County State's Attorney's office has certified the individually named defendant in this case is a state employee. Since the plaintiff has named the wrong institutional defendant, the defendants' motion to dismiss must be granted, Cook County dismissed with prejudice, the individual defendant dismissed without prejudice, and leave granted to the plaintiff to amend the complaint and name the correct institutional defendant.

Facts

On June 6, 2019, a vehicle driven by Lisa Captain collided with another driven by Eileen Rosselli-McDermott on Lower Columbus Drive in Chicago. At the time of the collision, Rosselli-McDermott worked for the Cook County State's Attorney's Office (CCSAO). Captain was injured as a result of the collision.

On March 13, 2020, Captain filed her initial complaint against Rosselli-McDermott and the Cook County Sheriff's Office. On May 20, 2020, Captain filed an amended complaint substituting Cook County for the Sheriff's Office. The amended complaint raises two causes of action. Count one is for negligence and is directed against Rosselli-McDermott. Count two is also for negligence, but is directed against Cook County under the *respondeat superior* doctrine.

On August 3, 2020, the CCSAO filed a motion to dismiss the amended complaint. The CCSAO presents three arguments: (1) it is an improper entity for suit; (2) this court lacks jurisdiction over Rosselli-McDermott as a state employee under the Court of Claims Act (CCA), 705 ILCS 505/1, *et seq.*; and (3) Local Governmental and Governmental Employees Tort Immunity Act (TIA) section 2-202, 745 ILCS 10/2-202, immunizes CCSAO because Captain has failed to plead willful and wanton conduct. On September 1, 2020, Captain filed a response brief. She argues the CCSAO's position as to Rosselli-McDermott's employment fails as a matter of law, this court has jurisdiction over the CCSAO, and TIA section 2-202 is inapplicable. On September 14, 2020, the CCSAO filed its reply.

After this court received the parties' briefs, this court still questioned Rosselli-McDermott's status at the time of the collision. This court asked the defendant for additional information. On November 24, 2020, the CCSAO submitted a certified statement from Katherine Wallace, the office's human relations director. Wallace stated that Rosselli-McDermott was, in fact, a CCSAO employee and that the office directed Rosselli-McDermott "in all manners of her job function."

On November 30, 2020, this court further inquired as to who paid Rosselli-McDermott's salary. The CCSAO answered the question as a legal matter in a December 23, 2020 sur-reply. On February 5, 2021, Captain filed her sur-response, closing out all briefing.

Analysis

The CCSAO brings its motion to dismiss pursuant to Code of Civil Procedure section 2-619. 735 ILCS 5/2-619. A section 2-619 motion 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 plaintiff may not rely on factual or legal conclusions unsupported by factual allegations. *Davis v. Dyson*, 387 Ill. App. 3d 676, 682 (1st Dist. 2008) (citing *Gore v. Indiana Ins. Co.*, 376 Ill. App. 3d 282, 285 (1st Dist. 2007)). 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.

The CCSAO raises two provisions of section 2-619 in support of its motion. First, the CCSAO argues that pursuant to subsection (a)(1), "the court does not have jurisdiction of the subject matter of the action. . . ." 735 ILCS 5/2-619(a)(1). Illinois courts are consistent in finding sovereign immunity implicates a court's subject matter jurisdiction. *See Giovenco-Pappas v. Berauer*, 2020 IL App (1st) 190904, ¶ 24 (citing *Leetaru v. Board of Trustees of the Univ. of Ill.*, 2015 IL 117485, ¶¶ 41-42, and *Currie v. Lao*, 148 Ill. 2d 151, 157 (1992)). Second, the CCSAO argues that, "the claim asserted against defendant is barred by other affirmative matter. . . ." 735 ILCS 5/2-619(a)(9). Affirmative matter is something in the nature of a defense that negates the cause of action completely or refutes 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 to be supported by affidavit,

some affirmative matter has been considered to be apparent on the face of the pleading. *See id.*

At this stage in the litigation, the defendants' section 2-619(a)(1) motion is not dispositive. The reason is that the issue of Rosselli-McDermott's duty, if any, to Captain, in Rosselli-McDermott's role as a state employee, has not been properly addressed as a factual matter. As a legal matter, the CCSAO's argument is patently incorrect. Circuit courts do have jurisdiction over the state and its employees if they are negligent in a way that is not unique to their office. As the Supreme Court has explained:

> Where the alleged negligence is the breach of a duty imposed on the employee *solely* by virtue of his state employment, the Court of Claims has exclusive jurisdiction. If, however, the duty that he is accused of breaching is imposed independently of his state employment, the claim may be heard in circuit court. Thus, this court concluded that a "State employee who breaches a duty he owes regardless of his State employment is no more entitled to immunity than is a private individual who breaches that same duty."

Loman v. Freeman, 229 Ill. 2d 104, 113 (2008) (emphasis in original, citing and quoting *Currie*, 148 Ill. 2d at 159-60). The court in *Currie* specifically applied this principle in a motor vehicle case. As the court had previously explained:

> the rule has evolved that claims based on the negligent operation of an automobile by a State employee are generally outside the doctrine of sovereign immunity. The reasoning underlying this rule is apparent: negligence that arises from the ordinary operation of a motor vehicle is based on the breach of the duties every driver owes to every other driver. As noted, sovereign immunity attaches only when a State employee is charged with breaching a duty imposed on him solely by virtue of his State

> employment. Therefore, it will not aid an employee who is charged with breaching only those duties imposed on him as an ordinary driver of a motor vehicle.

Currie, 148 Ill. 2d at 160 (citing *Bartholomew v. Crockett*, 131 Ill. App. 3d 456, 462-63 (1st Dist. 1985) and *Gocheff v. State Comm. Coll.*, 69 Ill. App. 3d 178, 184 (5th Dist. 1979)). Since Rosselli-McDermott's duty, if any, is not Cook County's argument to make, this issue awaits a different defendant.

This court turns, instead, to the CCSAO's section 2-619(a)(9) argument. It is well settled that the state's attorney's office is created by the Illinois constitution. *Ingemunson v. Hedges,* 133 Ill. 2d 364, 367 (1990) (citing Ill. Const. art. VI, § 19 (1970)). What remained unsettled after *Ingemunson* was whether a specific county's state's attorney was a state or county official since state's attorneys are elected by county. *See Sneed v. Howell*, 306 Ill. App. 3d 1149, 1155 (5th Dist. 1999). Resolution of the question was important in *Sneed* because, if state's attorneys are county employees, their conduct is subject to the TIA, not the CCA. *Id.* The *Sneed* court found the answer in the debates of the Sixth Illinois Constitutional Convention of 1969-70. *Id.* Those debates adopted the Illinois Supreme Court's opinion in *Hoyne v. Danisch*, 264 Ill. 467, 470-71 (1914), explaining that state's attorneys are constitutionally authorized state employees. *See also White v. City of Chicago*, 369 Ill. App. 3d 765, 779 (1st Dist. 2006) (adopting *Sneed*).

In this case, it remained unclear after the first round of pleading whether Rosselli-McDermott was a state or county employee. The CCSAO argued that various public documents showed Rosselli-McDermott to be a state employee, but the CCSAO failed to present an affidavit or other documentation to support its position. (This court should not need to point out that it was incumbent on the CCSAO to attach affirmative matter as exhibits to its section 2-619(a)(9) motion rather than making this court do the work or searching for and examining un-cited

websites.) Given the state of the pleadings, this court requested the affirmative matter from the CCSAO.

On November 24, 2020, the CCSAO submitted Wallace's certified statement. Wallace makes plain that Rosselli-McDermott was, in fact, a CCSAO employee. Wallace further stated that the CCSAO directed all of Rosselli-McDermott's work. With those facts now of record, it is beyond question that, as a matter of fact, Rosselli-McDermott was a state, not a Cook County, employee.

The determinative issue at this point is not the duty Rosselli-McDermott owed to Captain, if any, but whether Captain named the correct defendant to defend Rosselli-McDermott's alleged negligence. Wallace's certified statement makes plain the correct defendant is not the CCSAO, but the State of Illinois. Given that Captain named the wrong defendant and that error is dispositive as to Cook County, this court need not address any other arguments.

Conclusion

For the reasons presented above, it is ordered that:

1. Cook County's motion to dismiss is granted;
2. Cook County is dismissed with prejudice;
3. Rosselli-McDermott is dismissed without prejudice; and
4. Captain is given until March 10, 2021 to file an amended complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

FEB 10 2021

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