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

Jason Chester, Plaintiff, v. Michael S. Spencer, Matthew Dyer, Laszlo Simovic, Sunny Beach Corporation, an Illinois corporation, Nic Illief, Clayton Terril, CIS Group of Companies, LLC, a Texas limited liability company, Cezar Leynes, Corp., an Illinois corporation, and Cezar Leynes, Defendants.	)	No. 18 L 9721 consolidated
Raymond Echevarria, Plaintiff, v. Michael S. Spencer, Matthew Dyer, Laszlo Simovic, Sunny Beach Corporation, an Illinois corporation, Nic Illief, Clayton Terril, CIS Group of Companies, LLC, a Texas limited liability company, Cezar Leynes, Corp., an Illinois corporation, and Cezar Leynes, Defendants.	)	No. 18 L 9844
David A. D'Angelantonio II, Plaintiff, v.	)	No. 19 L 8041

Michael S. Spencer, Matthew Dyer, Sunny Beach Corporation, an Illinois corporation, CIS Group of Companies, LLC, a Texas limited liability company, Nic Illief, Clayton Terril, and Cezar Leynes, Corp., and Cezar Leynes, individually and as agent for CIS Group, LLC, Defendants.	)	
Roberto Barron and Arron Martin, Plaintiffs, v. Michael S. Spencer, Clayton Terril, Matthew Dyer, Nic Illief, Edin Begic, Laszlo Simovic and Laszlo Simovic Architects, LLC, CIS Group of Companies, LLC, a Texas limited liability company, and Cezar Leynes, Corp., and Cezar Leynes, individually and as agent for CIS Group of Companies, LLC, and Sunny Beach Corp., Defendants.	)	No. 20 L 6148

MEMORANDUM OPINION AND ORDER

The defendants and third-party defendant raise various legal arguments including the statute of repose and a lack of duty to support their motions to dismiss the plaintiffs' and third-party plaintiffs' complaints. As explained below, some of the arguments are persuasive, while others are not. For those reasons several of the motions are granted while one set of motions is denied.

Facts

From January 29, 2004 until January 25, 2011, Edin Begic owned a two-story residential building located at 5417 North Ashland Avenue in Chicago. On March 4, 2004, Begic applied to the City of Chicago for a permit to construct a two-level, wooden porch at the rear of the building. Around the same time, Begic hired Laszlo Simovic and Laszlo Simovic Architects, LLC (together, Simovic) as the contractor to construct the porch. On March 12, 2004, the City of Chicago issued a permit and, at some point soon thereafter, Simovic constructed the porch.

From January 25, 2011 to November 7, 2016, Matthew Dyer owned the building. During that period, Dyer made various upgrades to the building, including improvements to the porch. On various occasions, including July 22, 2016, the City of Chicago's Department of Buildings inspected the porch and issued violations for its repair or replacement.

In 2016, Michael Spencer contemplated buying 5417 North Ashland Avenue. On or about November 4, 2016, Farmers' Insurance Group, through its subsidiary Foremost Insurance Group, hired CIS Group of Companies, LLC to inspect the property. CIS, in turn, hired Cezar Leynes of Cezar Leynes, Corp. (together Leynes) to inspect the property, which he did soon thereafter. The only hazard noted on Leynes' inspection report was the building's flat roof. Three days later, on or about November 7, 2016, Spencer purchased and took possession of the building.

As of May 1, 2018, Nic Ilieff[1] leased the first-floor apartment at 5417 North Ashland Avenue while Clayton Terril leased the second-floor apartment. At some point, Terril informed Ilieff that Terril planned to host a party and asked Ilieff if he wanted to co-host. Ilieff informed Terril that Ilieff had no interest in participating or attending the party, but acceded to Terril's

[1] This court uses the spelling taken from his affidavit's signature.

request that guests could access the first-floor porch. Ilieff was unaware of any structural defects of the porch either by observation or inquiry.

On June 10, 2018, Terril hosted a party that Jason Chester, Raymond Echevarria, David D'Angelantonio, Roberto Barron, and Aaron Martin attended. Ilieff averred that he remained in his apartment and did not participate in or attend the party. In contrast, Echevarria averred that Ilieff invited Echevarria to the party and Ilieff allowed guests to use his porch, apartment, and bathroom during the party. Echevarria also averred that Ilieff provided alcohol for party guests and was present and participated in the party.

It is uncontested that party guests congregated on both levels of the rear porch. One estimate is that approximately 25 guests had gathered on the second level. At some point, the porch's second floor collapsed onto the first floor. The collapse injured each of the plaintiffs.

Between September 2018 and June 2020, the five plaintiffs filed their respective complaints. The complaints name nearly all the same defendants and present similar allegations. In essence, each complaint alleges the defendants knew the building and porch had been negligently attached, with some knowing the attachment was by use of nails rather than lag bolts, an attachment that violated industry standards and created a dangerous condition. Despite their knowledge, some or all of the defendants allowed the porch to remain in that condition. Certain defendants are also alleged to have failed to disclose the negligent building-porch attachment when selling the building to a subsequent purchaser. Various defendants are alleged to have failed to inspect, rebuild, or repair the porch. Two of the defendants are alleged to have directed guests onto the porch, failed to monitor the number of people on the porch, and failed to remove them from the porch.

Five defendants—Simovic, Dyer, CIS, Leynes, and Ilieff—filed motions to dismiss. The parties fully briefed the motions.

Analysis

The defendants raise various arguments supporting their motions to dismiss as authorized by the Code of Civil Procedure. *See* 735 ILCS 5/2-615 & 5/2-619. 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 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). 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.

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 also 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). 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. In ruling on such a motion, all pleadings and supporting documents must be

considered in the light most favorable to the nonmoving party. *See Porter v. Decatur Mem. Hosp.*, 227 Ill. 2d 343, 352 (2008).

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 that affirmative matter be supported by affidavit, some affirmative matter has been considered to be apparent on the face of the pleading. *See id.*

I. Simovic's Motion to Dismiss

Simovic seeks to dismiss counts 10 and 11 of Barron and Martin's amended complaint based on an expired statute of repose. The Code of Civil Procedure authorizes such a motion. 735 ILCS 5/2-619(a)(5) ("the action was not commenced within the time limited by law"). Simovic argues the 10-year statute of repose for construction negligence cuts off Barron and Martin's causes of action based on the porch's completion in 2004. The statute on which Simovic relies expressly provides, in part:

> (b) No action based upon tort . . . may be brought against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property after 10 years have elapsed from the time of such act or omission.
>
> (e) The limitation of this Section shall not apply to causes of action arising out of fraudulent misrepresentations or to fraudulent concealment of causes of action.

735 ILCS 5/13-214(b) & (e). The fraudulent concealment exception to the 10-year statute of repose provides that:

> If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such cause of action, and not afterwards.

735 ILCS 5/13-215. Section 13-215 applies equally to statutes of limitation and repose. *De Luna v. Burciaga*, 223 Ill. 2d 49, 73-74 (2006).

A statute of repose is "intended to terminate the possibility of liability after a defined period of time, regardless of a potential plaintiff's lack of knowledge of his or her cause of action." *DeLuna*, 223 Ill. 2d at 61 (citing *Ferguson v. McKenzie*, 202 Ill. 2d 304, 311 (2001)). Statutes of repose "'stem from the basic equity concept that a time should arrive, at some point, that a party is no longer responsible for a past act.'" *Ryan v. Commonwealth Edison Co.*, 381 Ill. App. 3d 877, 882 (1st Dist. 2008) (quoting W. Prosser et al., Torts ch. 12, at 607 (8th ed. 1988)). The construction of an object later alleged to constitute a dangerous condition is considered a design defect and is subject to the 10-year statute of repose. *See O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 869 (1st Dist. 1996) (lack of adequate road median); *Citgo Petroleum Corp. v. McDermott Int'l, Inc.*, 368 Ill. App. 3d 603, 609 (1st Dist. 2006) (defective product installed at time of gas piping construction).

Barron and Martin's complaint alleges that Simovic constructed the porch soon after the City issued its permit. Simovic contends that he completed the porch construction in March 2004, a fact Barron and Martin do not contest. Given that uncontested fact, the 10-year statute of repose for construction negligence provided in section 13-214(b) cuts off Barron and Martin's claims.

The only avenue open to Barron and Martin to save their causes of action is if the fraudulent concealment exception applies and provides a five-year extension. The elements of fraudulent concealment are: (1) the defendant's concealment of a material fact; (2) the defendant's intent to induce a false belief despite a duty to inform; (3) the plaintiff could not have discovered the truth through reasonable inquiry and relied on the defendant's silence that the concealed fact did not exist; (4) the plaintiff would have acted differently had it known of the concealed information, and (5) the plaintiff's reliance resulted in an injury. *Vandenberg v. Brunswick Corp.*, 2017 IL App (1st) 170181, ¶ 31. Generally, a plaintiff alleging fraudulent concealment must show the defendant's affirmative conduct. *See Clay v. Kuhl*, 189 Ill. 2d 603, 613 (2000) (quoting *Hagney v. Lopeman*, 147 Ill. 2d 458, 463, (1992)); *but see DeLuna*, 223 Ill. 2d at 76 (citing *Crowell v. Bilandic*, 81 Ill. 2d 422, 428 (1980) (exception exists for fiduciary relationships)). Fraudulent concealment raised pursuant to section 13-214(e) specifically requires a plaintiff to plead and prove the defendant's affirmative representations or acts were calculated to lull or induce the plaintiff into delaying the filing of a claim or prevent the plaintiff from discovering a claim. *See Orlak v. Loyola Univ. Health Sys.*, 228 Ill. 2d 1, 18 (2007); *see also Barratt v. Goldberg*, 296 Ill. App. 3d 252, 257 (1st Dist. 1998) (allegedly fraudulent statements or omissions "may not constitute the fraudulent concealment in the absence of a showing that they tend to conceal the cause of action").

Barron and Martin argue they sufficiently pleaded fraudulent concealment by alleging their relationship with Simovic—as partygoers on the porch he constructed—created an affirmative duty for Simovic to have disclosed the fact that he used nails rather than lag bolts to attach the porch to the building. Barron and Martin further argue that Simovic fraudulently concealed his professional negligence by failing to disclose his negligence. Those arguments are unavailing both as a matter of law and as a matter of fact.

Even if Simovic made material misstatements on a permit application to the City and later failed to disclose his use of nails rather than lag bolts, such misstatements or omissions do not constitute fraudulent misrepresentation. The reason is that such misstatements or omissions did not lull Barron and Martin into delaying the filing of their claim or discovering their causes of action because they accrued only after Barron and Martin sustained their injuries. There is one final note as to Simovic's motion. Barron and Martin's claim that Simovic owed them a duty based on the Residential Real Estate Disclosure Act, 765 ILCS 77/1, *et seq.*, is unavailing because neither Barron nor Martin lived at 5417 North Ashland Avenue.

II. Dyer's Motions to Dismiss

It is uncontested that Matthew Dyer owned 5417 North Ashland Avenue from January 17, 2011 to October 26, 2016. It is also uncontested that the plaintiffs' injuries occurred on June 10, 2018, approximately 18 months after Dyer sold the property to Spencer. Regardless of those facts, the plaintiffs allege that Dyer owned, operated, maintained, controlled, managed, and supervised the property.

Each plaintiff sued Dyer as the previous owner of the property based on allegations that he knew of the porch's defects and building code violations and failed to inform Spencer of them when Dyer sold the building. In addition, Spencer filed a counterclaim for contribution against Dyer. Spencer alleges that Dyer received notice of the building code violations identified by the city and that the defects noted caused the porch collapse. Spencer alleges that Dyer knew of the violations and negligently concealed the defects at the time of the sale. Dyer's motions seek to dismiss the direct actions against him as well as Spencer's counterclaims for contribution.

At common law, a seller of real property was generally not liable for damages sustained by the purchaser or other persons on the premises subsequent to the transfer of possession and control.

Citgo Petroleum, 368 Ill. App. 3d at 609 (citing Restatement (Second) of Torts § 352 (1965)); *Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 228 (1988)); *see also Dee v. Peters*, 227 Ill. App. 3d 1030, 1032-33 (3d Dist. 1992). The reason is that real estate sellers were not liable for undisclosed defects pursuant to the doctrines of *caveat emptor* and merger. *Mitchell v. Skubiak*, 248 Ill. App. 3d 1000, 1005 (1st Dist. 1993). Rather, silence had to be combined with active concealment. *Dee*, 227 Ill. App. 3d at 1032-33. Moreover, liability would not be imposed if the buyer knew of the defects before the purchase or could have discovered them through a diligent inspection. *Fleisher v. Lettvin*, 199 Ill. App. 3d 504, 511-12 (1st Dist. 1990).

Contemporary common law imposes a duty on real estate sellers to disclose defects a buyer could not discover through a reasonable and diligent inspection. *Mitchell*, 248 Ill. App. 3d at 1005 (citing *Petersen v. Hubschman Constr. Co.*, 76 Ill. 2d 31, 39-40 (1979); *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 162 (1st Dist. 1986); *Posner v. Davis*, 76 Ill. App. 3d 638, 644 (1st Dist. 1979)). Put affirmatively, "[t]he general rule . . . is subject to an established exception when the vendor actively conceals or fails to reveal a dangerous condition to the vendee. In this situation the liability of the vendor continues until the vendee discovers the defective condition and has an opportunity to remedy it." *Anderson v. Cosmopolitan Nat'l Bank of Chicago*, 54 Ill. 2d 504, 507 (1973) (citing Restatement (Second) of Torts, § 353). In Illinois, that modern view has been codified in the Residential Real Property Disclosure Act. *See* 765 ILCS 77/1 – 80.

Unfortunately, there is a substantial gap in the evidentiary record because Dyer has not yet been deposed. It is, therefore, unknown what Dyer admits to or denies regarding what he knew of the building-porch connection at the time he sold the property to Spencer. It is, however, uncontested that the city issued its building violations against 5417 North Ashland Avenue while Dyer owed it. This fact leads to the reasonable inference that Dyer, as the property owner, knew of the defects when the city issued the violations. At a minimum, this inference means that

Dyer's knowledge, if any, is not an easily proved issue, making his motions to dismiss premature. As a result, Dyer's motions to dismiss must be denied and his motions to dismiss Spencer's counterclaims must also be denied.

III. CIS's Motion to Dismiss

Spencer named CIS as a third-party defendant in the Chester case. Later, the other plaintiffs named CIS as a direct defendant in their cases. Regardless of CIS's party status, the allegations against CIS are nearly identical. Spencer and the plaintiffs allege that Spencer hired CIS to inspect the property and that CIS failed to inform them of the porch's unsafe condition.

CIS argues first pursuant to section 2-615 that Spencer and the plaintiffs cannot establish CIS owed them a duty. Duty is a question of law to be decided by the court. *See Choate v. Indiana Harbor Belt R.R.*, 2012 IL 112948, ¶ 22. To evaluate whether a defendant owed a plaintiff a duty, courts are to look to four factors: (1) the reasonable foreseeability of injury; (2) the reasonable likelihood of injury; (3) the magnitude of the burden that guarding against injury places on the defendant; and (4) the consequences of placing that burden on the defendant. *See Bucheleres v. Chicago Pk. Dist.*, 171 Ill. 2d 435, 456 (1996).

CIS also argues pursuant to section 2-619 that it owed Spencer and the plaintiffs no duty because Spencer did not hire CIS to inspect the property. According to CIS, its inspection of 5417 North Ashland Avenue was subject to a national property inspection agreement executed by Farmer's Group, Inc. and CIS. The agreement explicitly provides that Farmer's subsidiaries, including Foremost Insurance Company, would order property inspections from CIS. Gerald Salas, CIS's chief risk officer, averred that CIS inspectors conduct inspections with the naked eye. They look for obvious defects and dilapidation, not every potential safety hazard or latent construction defect, or to determine conformity with building codes or ordinances. Salas explicitly averred that CIS does not inspect property to determine

what type of hardware was used to connect decks or porches to buildings. He explicitly averred that Spencer never hired CIS to inspect 5417 North Ashland Avenue. Neither Spencer nor the plaintiffs supplied a counter-affidavit or cited to facts indicating Salas is in error.

As to the section 2-615 argument, none of the duty factors is met here. First, it is not reasonably foreseeable a two-level porch would collapse because of a property defect for which CIS did not inspect. Second, if that sort of event is not reasonably foreseeable, neither is the likelihood of injury. Third, it would be a tremendous burden to require a company such as CIS that, as explained above, inspects property solely for underwriting purposes, to inspect the same property, instead, for detailed code violations or construction defects. That is the job of a property purchaser's inspector, not an insurance carrier's inspector. Fourth, to impose such a duty on an underwriting inspector would unnecessarily drive up the costs of inspections and subject insurers' inspectors to liability for unforeseen property calamities far into the future.

CIS's argument is supported by *Callaizakis v. Astor Development Co.*, for the proposition that property inspections do not give rise to a duty to third persons. 4 Ill. App. 3d 163 (1st Dist. 1972). In *Callaizakis*, the court considered whether a savings and loan financing a residential construction project owed a duty to inform original and subsequent owners of property defects. *Id.* at 165. After a careful analysis of case and statutory law, the court concluded that no facts existed showing the saving and loan had inspected the property for the benefit of the purchasers or for any purposes other than for "a usual money lender." *Id.* at 171.

The plaintiffs attempt to distinguish *Callaizakis* by arguing the savings and loan's role under those facts is entirely different than CIS's role here. That argument misses the point, which is not the parties' roles, but the alleged duty owed. Spencer and the plaintiffs claim CIS owed a duty to inform them of the porch's

dangerous conditions; that is precisely the same duty the *Callaizakis* court disavowed. *Callaizakis* concluded the savings and loan—an entity that did not conduct the inspection—owed no duty to inform original or subsequent purchasers of property defects.

CIS goes further to argue that neither Spencer nor the plaintiffs are third-party beneficiaries to the Farmers-CIS agreement. Third-party beneficiaries are of two types, direct or incidental. Direct third-party beneficiary status exists based on a contract's express provision "identifying the third-party beneficiary by name or by description of a class to which the third party belongs." *Turner v. Orthopedic & Shoulder Ctr., S.C.*, 2017 IL App (4th) 160552, ¶ 48 (quoting *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (3d Dist. 2009)); *F.H. Paschen/S.N. Nielson, Inc. v. Burnham Station, L.L.C.*, 372 Ill. App. 3d 89, 96 (1st Dist. 2007). Importantly, only a direct beneficiary has a right against the contracting parties. *People ex rel. Resnik v. Curtis & Davis, Architects & Planners, Inc.*, 78 Ill. 2d 381, 384-85 (1980) (quoting *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 257 (1931)). The plain language of the Farmers-CIS agreement is conclusive that neither Spencer nor any of the plaintiffs are direct beneficiaries.

In contrast, an incidental third-party beneficiary is one "who receives an unintended benefit from a contract." *Bank of Am. Nat'l Ass'n v. Bassman FBT, L.L.C.*, 2012 IL App (2d) 110729, ¶ 27 (citing *Caswell v. Zoya Int'l, Inc.*, 274 Ill. App. 3d 1072, 1074-75 (1st Dist. 1995)). There exists in Illinois "a strong presumption against creating contractual rights in third parties, and this presumption can only be overcome by a showing that the language and circumstances of the contract manifest an affirmative intent by the parties to benefit the third party." *Estate of Willis v. Kiferbaum Constr. Corp.*, 357 Ill. App. 3d 1002, 1007 (1st Dist. 2005). To overcome that presumption, "the implication that the contract applies to third parties must be so strong as to be practically an express declaration." *F.H. Paschen/S.N. Nielsen*, 372 Ill. App. 3d at 96. "That the parties expect, know, or even

intend that the contract benefit others is insufficient to overcome the presumption that the contract was intended only for the parties' *direct* benefit." *Bank of Am.*, 2012 IL App (2d) 110729, ¶ 27 (emphasis in original); *see also Wilfong v. L.J. Dodd Constr.*, 401 Ill. App. 3d 1044, 1057 (2d Dist. 2010).

Spencer and the plaintiffs argue that inspectors owed a duty to detect defective workmanship and materials and inform Spencer and the plaintiffs of such defects. Such a suggestion is belied by the Farmers-CIS agreement's express language. Even if CIS had a duty to detect property defects, the agreement does not confer on Spencer or the plaintiffs an incidental third-party beneficiary status to be informed of anything CIS identified. Indeed, there is plainly no express or implied declaration in the agreement that Farmers or CIS intended to benefit any third party by providing such information. Quite simply, the agreement consistently refers only to the parties—Farmers and CIS; there is no reference to persons or entities outside the agreement.

The plaintiffs also argue that section 9.2 of the Farmers-CIS agreement acknowledges Spencer as "the customer" to whom CIS owed a duty. That provision is irrelevant for two reasons. First, section 9.2 only requires CIS to treat customer information confidentially. Second, the provision does not impose on CIS a duty to inform the customer of the inspector's findings. In other words, the agreement's plain language in no way morphs the duty to treat customer information confidentially into a duty to inform.

IV. Leynes's Motion to Dismiss

Cezar Leynes and Cezar Leynes, Corp. (together "Leynes") bring a combined motion to dismiss pursuant to the Code of Civil Procedure. *See* 735 ILCS 5/2-619.1. This court need address only the section 2-619(a)(9) portion of Leynes's motion, however, because it is dispositive of the issues here. In essence, Leynes argues that he owed the plaintiffs no duty since: (1) they did not hire him; and (2) his privity of contract did not extend beyond CIS, the company that hired him. Both of Leynes' arguments rely on

affirmative matter that, in this instance, is CIS's motion to dismiss and exhibits, which Leynes adopts.

Leynes argues as a factual matter that Spencer never hired Leynes to conduct an inspection. Rather, Farmers, through its subsidiary, Foremost, hired CIS, which then hired Leynes to inspect 5417 North Ashland Avenue solely to evaluate it for underwriting purposes to determine if Farmers should insure the property. Leynes confirmed in his deposition that his inspections last five to 10 minutes and are limited to a quick visual inspection. He testified that he would verify the address and any readily observable defects, such as habitability. Leynes testified that he looks for dry rot and missing or peeling paint on decks. A CIS representative testified that CIS inspectors do not identify building code or ordinance violations, even if they are noticeable.

Once again, none of the four factors in a duty analysis indicate that Leynes owed a duty to the plaintiffs. First, the plaintiffs' injuries were not reasonably foreseeable based on a mere underwriting inspection as opposed to a safety inspection. Second, there was no reasonable likelihood of injury for the same reason. Third, the magnitude of the burden to guard against injury would place an unreasonably heavy burden on Leynes. Underwriting inspectors are tasked with identifying obvious, general safety issues. To require them to do more during a five- to 10-minute inspection or to take longer would fundamentally alter the nature of their work by imposing a duty outside the parties' contractual agreement. That is a duty no plaintiff can impose. Fourth, the consequences of placing such a burden on Leynes, or any underwriting inspector, would be substantial. To accept the plaintiffs' argument would require Leynes to inform all persons who might attend a party at 5417 North Ashland Avenue and stand on an overloaded porch two-and-one-half years after the inspection. On this issue, it is not surprising the plaintiffs fail to address the role of clairvoyance in establishing Leynes's legal duty.

V. Ilieff's Motion to Dismiss

Under the common law, a tenant generally has a duty to inspect a premises for safety and suitability. *A.O. Smith Corp. v. Kaufman Grain Co.*, 231 Ill. App. 3d 390, 395 (3d Dist. 1992) (citing *Greenlee v. First Nat'l Bank*, 175 Ill. App. 3d 236, 239 (2d Dist. 1988)). This general rule is subject to various exceptions, both contractual and factual. As to contractual exceptions, a lessee is responsible for the expense of repairing subsequently discovered defects, but only if a lease imposes such a burden. *Mandelke v. Int'l House of Pancakes*, 131 Ill. App. 3d 1076, 1080 (1st Dist. 1985). And even if a lease contains a clause making a lessee generally responsible for repairs, "if the required alterations or additions are of a substantial or structural nature and are made necessary by extraordinary or unforeseen future events not within the contemplation of the parties at the time the lease was executed, the onus of making such alterations and additions falls on the lessor." *Expert Corp. v. La Salle Nat'l Bank*, 145 Ill. App. 3d 665, 668 (1st Dist. 1986).

Exceptions also exist based on particular facts. For example, an exception to the general rule exists if the landlord knows or should know of a latent defect that could not have been discovered by a tenant's reasonable examination. *Wanland v. Beavers*,130 Ill. App. 3d 731, 732 (1st Dist. 1985). A landlord may also be liable if the property defect violates an applicable statute or ordinance prescribing a duty for the protection and safety of persons or property. *Mangan v. F. C. Pilgrim & Co.*, 32 Ill. App. 3d 563, 569 (1st Dist. 1975). If a portion of the premises is for common use and under the landlord's control, the landlord has a duty to keep the common area in safe condition for the tenant as well as the tenant's invitees and social guests. *Loveless v. Warner*, 37 Ill. App. 2d 204, 207 (1st Dist. 1962); *Shiroma v. Itano*, 10 Ill. App. 2d 428, 431 (1st Dist. 1956); *Fugate v. Sears, Roebuck & Co.*, 12 Ill. App. 3d 656, 672 (1st Dist. 1973).

The plaintiffs' claims against Ilieff run counter to nearly each of the contractual and factual exceptions noted. First, the

plaintiffs have failed to identify any residential lease provision imposing on Ilieff a duty to inspect and inform. Further, the plaintiffs have failed to plead that, even if Ilieff had inspected the building-porch connection, he would have appreciated that lag bolts should have been used rather than nails. Finally, since the porch was a common area, the plaintiffs fail to address the exception that makes those spaces subject to the landlord's duty of care and safety.

Conclusion

For the reasons presented above, it is ordered as to each motion that:

Simovic

1. Simovic's motion to dismiss is granted; and
2. Simovic is dismissed with prejudice from 20 L 6148.

Dyer

1. Dyer's motions to dismiss the complaints are denied; and
2. Dyer's motions to dismiss Spencer's counterclaims for contribution are denied.

CIS

1. CIS's motion to dismiss is granted; and
2. CIS is dismissed with prejudice from all consolidated cases, including cross claims or third-party claims.

Leynes

1. Leynes' motion to dismiss is granted; and
2. Leynes is dismissed with prejudice from all consolidated cases, including cross claims and third-party claims.

Ilieff

1. Ilieff's motion to dismiss is granted; and

2. Ilieff is dismissed with prejudice from all consolidated cases, including cross claims and third-party claims.

Pursuant to Illinois Supreme Court Rule 304(a) there exists no just reason to delay the appeal or enforcement of this order.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

MAR 30 2021

Circuit Court 2075