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

Willie Harrison,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 21 L 12339
	)	
City of Chicago, a municipal corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Section 2-615 of the Code of Civil Procedure authorizes the involuntary dismissal of a complaint that, when viewed in a light most favorable to the plaintiff, fails to state a cause of action for which relief may be granted. Here, the plaintiff's counts three and four do not sufficiently allege the essential elements of causes of action for malicious prosecution and intentional infliction of emotional distress. The defendant's motion to dismiss is, therefore, denied, in part, and granted, in part, without prejudice.

Facts

On December 19, 2020, police officers employed by the City of Chicago responded to a call at a store at West Monroe Street and South Kostner Avenue. The officers found Willie Harrison in a dispute with the store manager. After the officers unsuccessfully attempted to persuade Harrison to leave the store, they used force. Harrison alleges that the officers struck him in the body and face, punched him in the face and mouth, struck and twisted his wrist, and arrested him. Harrison was treated for injuries at Mt. Sinai Hospital and then was taken to St. Anthony Hospital where X rays and a computed tomography scan revealed that he had sustained a broken wrist. The officers subsequently wrote out criminal complaints against Harrison, and the state charged him with resisting arrest and other charges. On February 3, 2021, a court dismissed the charges against Harrison.

On December 13, 2021, Harrison filed a four-count complaint against the City. Counts one and two alleged assault and battery, respectively; count three alleged malicious prosecution; and count four alleged intentional infliction of emotional distress (IIED). The City filed a combined motion to dismiss pursuant to the Code of Civil Procedure. 735 ILCS 5/2-619.1. The parties fully briefed the

motion. In support of its motion, the City provided footage of the incident taken by the body-worn cameras of two responding officers.

The body-worn camera footage and the parties' briefs reveal that Harrison told officers that the store manager owed him $100 in change. Harrison additionally told officers that the manager had "whooped" on him, pulled a gun on him, and shot at him. Harrison was uncooperative when officers attempted to remove him from the store. The City offers additional evidence showing that officers responded to reports of a single black male wearing a gray sweater who was aggressive and intoxicated, throwing items on the floor, threatening staff, and harassing and trying to fight with customers.

Analysis

Section 2-619.1 authorizes the filing of one pleading incorporating motions to dismiss under sections 2-615 and 2-619. 735 ILCS 5/2-619.1. A section 2-615 motion to dismiss challenges a complaint's legal sufficiency based on facially apparent defects. *K. Miller Constr. Co. v. McGinnis*, 238 Ill. 2d 284, 291 (2010) (citing *Pooh-Bah Enter., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009)). The critical inquiry in a section 2-615 motion is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 19; *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34.

A motion to dismiss pursuant to section 2-619(a) "admits the legal sufficiency of the plaintiff's claim, but asserts certain defects or defenses outside the pleading that defeat the claim." *Solaia Tech., LLC v. Specialty Publ'g Co.*, 221 Ill. 2d 558, 579 (2006). One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by "affirmative matter" that 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 Co. v. Nickum*, 159 Ill. 2d 469, 485-86 (1994). Conversely, defenses that negate a particular essential element of the plaintiff's cause of action are not affirmative matter within the meaning of the Code. *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 120-21 (2008) (quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). A court considering either motion must accept as true all well-pleaded facts and reasonable inferences arising from them, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 23-24 (2004), but not conclusions unsupported by facts, *Pooh-Bah*, 232 Ill. 2d at 473; *see also Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 17.

In support of its section 2-619(a)(9) motion, the City argues that the body-worn camera footage and additional evidence show that the assault and battery of

Harrison was justified and not willful and wanton. Illinois courts recognize justification as an affirmative defense that may be properly raised on a section 2-619(a)(9) motion. *See, e.g., Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶ 120. The body-worn camera footage shows an officer repeatedly punching Harrison in the face while his arms are restrained. Construing facts and reasonable inferences in the light most favorable to Harrison, as required at this stage of litigation, the punches to the face were not justified because Harrison was already restrained. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). Moreover, the footage does not depict the entire altercation between Harrison and the police, including events that may have occurred after the officers placed Harrison in the squad car. Most pertinently, the footage does not show how Harrison's wrist was injured. Without the ability to observe the conduct that injured Harrison's wrist, this court cannot determine whether that conduct was justified. Absent such evidence, the City has not met its burden. *See* 4 Richard A. Michael, Illinois Practice § 41:8, 481 (2d ed. 2011) (defendant "has the burden of proof' on section 2-619(a)(9) motion, "and the concomitant burden of going forward").

The City also argues that the video evidence defeats essential elements of Harrison's IIED claim. A claim for intentional infliction of emotional distress requires a plaintiff to prove the defendant's conduct: (1) was extreme and outrageous; (2) was intended to cause severe emotional distress or the defendant knew there was a high probability it would cause severe emotional distress; and (3) did, in fact, cause severe emotional distress. *Schweihs v. Chase Home Fin., LLC*, 2016 IL 120041, ¶ 50. The extreme-and-outrageous standard requires that the defendant's conduct go beyond "'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988) (quoting Restatement (2d) of Torts § 46 cmt. *d*, at 73 (1965)). The City argues that the video evidence shows the officers' conduct was not extreme and outrageous and was not intended to cause severe emotional distress. Plainly, these arguments attempt to negate the essential elements of Harrison's IIED claim, an improper use of section 2-619(a)(9). *See Smith*, 231 Ill. 2d at 120-21 (quoting *Kedzie & 103rd*, 156 Ill. 2d at 115) ("'Affirmative matter' means some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action.'").

The same reasoning forecloses the City's argument that count three should be dismissed because the video evidence negates the malice element of Harrison's malicious prosecution claim. A section 2-619(a) motion "admits the legal sufficiency of the plaintiff's cause of action." *Id.* Applied to the malicious prosecution claim here, this means that the City admits that: (1) it originated a criminal proceeding against Harrison; (2) the proceeding terminated in Harrison's favor in a manner indicative of innocence; (3) the officers did not have probable cause; (4) the officers' conduct was malicious; and (5) that Harrison was injured as a result. *See Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 26 (citing cases). Given that admission, a section

2-619(a) motion is not the proper mechanism for the City to raise a factual dispute over whether the officers' conduct was malicious. *See Smith*, 231 Ill. 2d at 121.

Similarly, the City's argument that Harrison did not sufficiently plead the lack of probable cause element of his malicious prosecution claim is misplaced. Section 2-615 provides the proper procedural mechanism for attacking a complaint's legal sufficiency by alleging defects that appear on the complaint's face. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18; *Illinois Graphics*, 159 Ill. 2d at 484-85. Such mislabeling of motions to dismiss based on the Code of civil Procedure's authorizing provisions is not uncommon. Illinois courts have responded to these errors by holding that a court may consider a mislabeled motion to dismiss as if it had been brought under the correct authorizing provision as long as a plaintiff is not prejudiced by the defendant's improper labeling. *See Safford-Smith, Inc., v. Intercontinental East, LLC*, 378 Ill. App. 3d 236, 240 (1st Dist. 2007) (citing *Gouge v. Central Ill. Pub. Serv., Co.*, 144 Ill. 2d 535, 541-42 (1991)). Accordingly, this court considers the City's argument with respect to the lack of probable cause element as if it had been brought pursuant to section 2-615.

The City's arguments in support of its section 2-615 motion are much stronger. For the malicious prosecution claim, Harrison was required to plead that: (1) Chicago initiated an original criminal proceeding against him; (2) the proceeding terminated in his favor in a manner indicative of his innocence; (3) the officers lacked probable cause; (4) the officers' conduct was malicious; and (5) that he suffered damages as a result. *See Beaman*, 2019 IL 122654, ¶ 26. With respect to the second element, it is not enough for Harrison to show that the charges against him were dismissed. *See Swick v. Liautaud*, 169 Ill. 2d 504, 513 (1996). As explained: "The abandonment of the proceedings is not indicative of the innocence of the accused when the *nolle prosequi* is the result of an agreement or compromise with the accused, misconduct on the part of the accused for the purpose of preventing trial, mercy requested or accepted by the accused, the institution of new criminal proceedings, or the impossibility or impracticability of bringing the accused to trial." *Id.* (citing Restatement (2d) of Torts §§ 660-61 (1977)). Harrison must plead "the circumstances surrounding the abandonment of the criminal proceedings" sufficient to "compel an inference that there existed a lack of reasonable grounds to pursue the criminal prosecution." *Id.* (citation omitted). At the very least, Harrison must plead the non-existence of the circumstances referenced in *Swick* as not indicative of innocence, from which a reasonable inference of his innocence could be drawn. Harrison also does not allege that he suffered damages in his malicious prosecution claim, and no reasonable inference of damages can be drawn without understanding the circumstances behind the dismissal of his charges. *See Joiner v. Benton Cmty. Bank*, 82 Ill. 2d 40, 46 (1980) (plaintiff was not damaged by prosecution terminated pursuant to agreement).

Harrison's IIED claim runs into a similar problem. Harrison was required to plead that the officers' conduct: (1) was extreme and outrageous; (2) was intended to cause severe emotional distress or the defendant knew there was a high probability it would cause severe emotional distress; and (3) did, in fact, cause severe emotional distress. *See Schweihs*, 2016 IL 120041, ¶ 50. Regarding the second element, Harrison baldly asserts that the officers "intended to disregard, or recklessly disregarded, the probability that their conduct would cause Willie Harrison to suffer emotional distress." In addition to the fact that this statement does not accurately reflect an IIED claim's intent element, such bald assertions are not enough. *See Kelso v. Watson*, 204 Ill. App. 3d 727, 730 (3d Dist. 1990). The body-worn camera footage gives reason to believe that facts may exist to support Harrison's assertion, but these facts do not appear on the face of the complaint. Notably, additional facts may also help Harrison plead the other two elements of an IIED claim that are arguably insufficient in their current form. *Cf. Bianchi v. McQueen*, 2016 IL App (2d) 150646, ¶¶ 83-87.

Turning to counts one and two, Harrison adequately pleads his assault and battery claims. An assault is an intentional act that places another reasonable apprehension of an immediate battery. *Parrish v. Donahue*, 110 Ill. App. 3d 1081, 1083 (3rd Dist. 1982). A battery is an intentional, harmful or offensive touching of another. *Id.* Harrison pleads that the officers struck him in his body and face, punched him in the face and mouth, and struck and twisted his wrists. There is no question that these acts were intentional and the record reveals that Harrison was conscious throughout the altercation, so a reasonable inference may be drawn that he reasonably apprehended them.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendant's section 2-619 motion to dismiss is denied;
2. The defendant's section 2-615 motion is granted without prejudice; and
3. The plaintiff has until November 23, 2022 to file and amended complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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