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

Fernando Maldonado, as independent administrator of the estate of Nancy Rainey, deceased,	)	
Plaintiff,	)	
v.	)	No. 20 L 11298
Paul Stenson, individually and as agent, servant and/or employee of Jam Trucking, Inc., an Illinois corporation, Jam Trucking, Inc., an Illinois corporation, Sky Chefs, Inc., a Delaware corporation, Pace Suburban Bus Service, a division of the Regional Transportation Authority, and the City of Des Plaines, a municipal corporation,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

An employer generally owes no duty of care for the safety of an employee after work hours and off site. In this case, the plaintiff's decedent crossed a public street at night after her shift had ended when she was struck by a semi tractor-trailer and killed. Given that the defendant-employer owed the decedent no duty of care, the motions to dismiss the employer and the counterclaims against it brought by other defendants must be granted with prejudice.

Facts

On October 29, 2019, Sky Chefs, Inc. employed Nancy Rainey at its facility at 200 East Touhy Avenue in the City of Des Plaines. After Rainey finished work at approximately 10:30 p.m.,

she left Sky Chefs' facility and walked to a Pace bus stop located near 333 East Touhy Avenue. To get to the south side of the street, Rainey had to cross the six lanes of East Touhy Avenue. There is no designated crosswalk in the vicinity. While Rainey walked across the three westbound lanes, a semi tractor-trailer owned by Jam Trucking, Inc. and driven by Paul Stenson struck and killed Rainey.

On October 22, 2020, Fernando Maldonado, the independent administrator of Rainey's estate, filed suit against various defendants, including Sky Chefs. In count three, Maldonado alleges that Sky Chefs regularly provided its employees a shuttle service to the Rosemont CTA Blue Line station during peak shift changes, but did not provide such service during off-peak shift changes. Maldonado further alleges that Sky Chefs knew or should have known that employees ending their shifts at off-peak times would walk across the six lanes of East Touhy Avenue to get to the eastbound Pace bus stop. Another Sky Chef employee had previously been stuck and killed attempting to cross East Touhy Avenue. Maldonado alleges that by providing a shuttle service during peak shift changes, Sky Chefs owed a duty to employees, including Rainey, to provide shuttle service during off-peak shift changes. Maldonado claims that Sky Chefs' failure to provide the shuttle service during off-peak shift changes proximately caused Rainey's death.

On November 30, 2020, Sky Chefs filed a motion to dismiss. Sky Chefs argues that it owed Rainey no duty to ensure an employee's safety outside of work and that its shuttle service at certain times did not constitute a voluntary undertaking to offer that service at other times. Sky Chefs argues further that, if Rainey was injured during the course of her employment, as Maldonado alleges, Rainey's exclusive remedy would arise under section five of the Workers' Compensation Act. 820 ILCS 320/5(a).

On December 21, 2020, Stenson and Jam Trucking filed a counterclaim for contribution against Sky Chefs. The counterclaim alleges that Sky Chefs instructed its employees to

use cell phone lights and wear reflective gear when crossing to the south side of East Touhy Avenue. The counterclaim further alleges that Rainey was utilizing those instructions when she attempted to cross the street on October 29, 2019. Further, Stenson and Jam Trucking allege that Sky Chefs knew the dangers its employees faced when crossing East Touhy Avenue because another employee had previously been struck and killed. Stenson and Jam Trucking claim Sky Chefs owed Rainey a duty to provide a shuttle service during off-peak shift changes and the failure to do so proximately caused Rainey's death.

On January 22, 2021, Sky Chefs filed a motion to dismiss Stenson and Jam Trucking's counterclaim for contribution. Sky Chefs' arguments echo those made in its motion to dismiss Maldonado's complaint. The parties briefed this motion as well, and this court informed them that both motions would be ruled on simultaneously.

Analysis

Sky Chef brings a combined motion to dismiss as authorized by the Code of Civil Procedure. 735 ILCS 5/2-619.1; *see also* 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'l 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.*

Sky Chef argues first that it owed Rainey no duty to provide a shuttle service during off-peak shift changes. Sky Chef correctly indicates that Maldonado has failed to identify a duty to provide such a service, and this court has been unable to find any common law decision suggesting the existence of such a duty. Sky Chef then suggests Maldonado is alleging inferentially that Sky Chef owed Rainey a duty under a voluntary undertaking theory. That inference appears correct based on Maldonado's response brief.

The question of whether a voluntary undertaking exists is a question of law for the court. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 995 (1st Dist. 2005). A defendant may be found to have voluntarily undertaken a duty of care for a plaintiff if, regardless of any consideration, the defendant rendered services for the plaintiff's protection and, thereby, increased the plaintiff's risk of harm or caused the plaintiff an injury because the plaintiff relied on the defendant. This principle is derived from section 323 and 324 of the Restatement (Second) of Torts, which the Illinois Supreme Court has adopted into the common law. *Wakulich v. Mraz*, 203 Ill. 2d 223, 243 (2001).

The voluntary undertaking theory applies equally to malfeasance and nonfeasance. *Claimsone v. Professional Prop. Mgmt., LLC*, 2011 IL App (2d) 101115, ¶ 22. "When a plaintiff alleges a claim of nonfeasance based on a voluntary undertaking, it is an essential element of that claim that the plaintiff relied on the defendant's promise." *Bourgonje*, 362 Ill. App. 3d at 997. It is also plain that the duty owed under the voluntary undertaking theory is limited to the extent of the undertaking. *Bell v. Hutsell*, 2011 IL 110724, ¶ 12; *Miller v. Hecox*, 2012 IL App (2d) 110546, ¶ 31. Courts are to construe a voluntary undertaking narrowly. *Elam v. O'Connor & Nakos, Ltd.*, 2019 IL App (1st) 181123, ¶ 41; *Bell*, ¶ 12.

Maldonado's voluntary undertaking claim fails for two interrelated reasons. First, Maldonado admits that Sky Chef did not supply an employee shuttle during off-peak shift changes; rather, Maldonado argues Sky Chef should have. That argument concedes that Sky Chef's voluntary undertaking was limited to providing a shuttle service only during peak shift changes, not at other times. To find that Sky Chef should have provided off-peak transportation would impermissibly expand the limited undertaking Sky Chef voluntarily undertook. Second, as Maldonado argues Sky Chef's nonfeasance, it is plain that Rainey could not rely on Sky Chef's promise to provide her with shuttle service at off-peak hours because Sky Chef never made such a

promise. In short, Sky Chef owed Rainey no duty under a voluntary undertaking theory.

With that conclusion, it is unnecessary to address Sky Chef's section 2-619 argument that Rainey's exclusive remedy lies in the Workers' Compensation Act.

This court's conclusion as to Sky Chef's lack of duty applies equally to Jam Trucking and Stenson's counterclaim for contribution. Those defendants present a slightly different duty theory than did Maldonado. The counterclaim posits that Sky Chef owed Rainey a duty to ensure her safety off of Sky Chef's property regardless of whether Sky Chef provided transportation services at other times during the day.

Illinois law does not recognize such a duty; indeed, the opposite it true. It has long been the rule in Illinois that an employee traveling to or from work is generally not within the scope of employment. *Pyne v. Witmer*, 129 Ill. 2d 351, 356 (1989); *Hall v. De Falco*, 178 Ill. App. 3d 408, 413 (1st Dist. 1988); *Hindle v. Dillbeck*, 68 Ill. 2d 309, 318 (1977); *Sjostrom v. Sproule*, 49 Ill. App. 2d 451, 460 (1st Dist. 1964), *aff'd*, 33 Ill. 2d 40 (1965). The noted exception of employer-authorized travel is inapplicable here. The logic supporting this rule is that an employee's travel to and from work arises from where the employee lives, "a matter in which his employer ordinarily has no interest." *Sjostrom*, 33 Ill. 2d at 43. There is nothing to persuade this court to deviate from this longstanding legal principle.

Jam Trucking and Stenson also argue that Sky Chef's instructions to its employees about how to cross East Touhy Avenue safely supports a duty of care. 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). Here the four factors do not support raising a duty of care.

As to the first two elements, it is arguable that Sky Chef could have reasonably foreseen Rainey's accident and the likelihood of her tragic death given that another employee had previously died while attempting to cross East Touhy Avenue. Yet, "foreseeability alone provides an inadequate foundation upon which to base the existence of a legal duty." *Ward v. K Mart Corp.*, 136 Ill. 2d 132, 140 (1990) (citing *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 525 (1987)). These two elements have been previously addressed in a case involving similar circumstances and found wanting.

In *Behrens v. Harrah's Illinois Corporation*, the court considered the argument that the defendant's imposition of excessive overtime hours proximately caused the plaintiff's single-car accident. 366 Ill. App. 3d 1154 (3d Dist. 2006). Behrens had worked three, 13-hour days in a row before she fell asleep at the wheel on her way home from work and drove her car into a ditch. *Id.* at 1155. As the court wrote, "[a]n employer should be able to presume that the person in the best position to avoid driving while excessively fatigued, the employee, will either ask for a ride from someone or pull off the roadway and rest if necessary." *Id.* at 1157.

As to the latter two duty elements, the court posed a series of hypotheticals to emphasize Behrens' overreaching argument. "The burden plaintiffs request us to place on an employer would be enormous. . . . Undoubtedly, individual employees are in the best position to determine whether they are sufficiently rested to drive home safely. An employer is in a much inferior position when it comes to making this determination." *Id.* at 1157-58. "[E]ven if an employer did determine that an employee was too tired to drive home after the employee's shift, we are aware of no authority that would allow an employer to stop the employee from leaving the work place and driving home. Once the employee's

workday has ended, the employer's ability to control physical conditions surrounding the employee is nonexistent." *Id.* at 1158. "We believe that placing this burden on employers would be poor social policy that is likely to have an onerous impact, not only on employers, but also on the workforce." *Id.*

Behrens is persuasive here given the facts in this case. Sky Chef's past issuance of instructions to employees about how to cross East Touhy Avenue did nothing to make Rainey's accident more foreseeable or her death more likely. Further, a decision to burden Sky Chef with the duty to ensure the safety of off-duty and off-site employees would run counter to well-reasoned cases noted above. In short, the instructions Sky Chef provided do its employees did not establish a duty of care Sky Chef owed to Rainey.

Conclusion

For the reasons presented above, it is ordered that:

1. Sky Chef's motion to dismiss count three is granted;
2. Sky Chef is dismissed as a defendant with prejudice;
3. Sky Chef's motion to dismiss Jam Trucking and Stenson's counterclaims for contribution is granted;
4. Sky Chef is dismissed as a third-party defendant with prejudice; and
5. Pursuant to Illinois Supreme Court Rule 304(a), there is no just reason for delaying the enforcement or appeal of this court's ruling.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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