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

Javad Molaei,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 22 L 850
	)	
City of Chicago,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

A plaintiff is not required to allege in a complaint ultimate facts in the defendant's possession. Here, the complaint claims that a local governmental entity failed to inspect its property, but does not allege that the local entity had an inspection system. Since that significant fact is not yet in the record, the motion to dismiss must be denied, in part, and granted, in part.

Facts

On February 2, 2021, Javad Molaei was walking north on the pedestrian walkway of the North LaSalle Street bridge crossing the Chicago River. Molaei tripped on a piece of metal that protruded up from the walkway, fell, and was injured. Molaei subsequently filed a two-count complaint against the City. Count one asserts a negligence claim for several alleged breaches, including the failure "to maintain and operate an inspection system with due care and that was reasonably adequate to discover the tripping hazard." Count two asserts a premises liability claim.

It is uncontested that the City owns and operates the North LaSalle Street bridge, including the pedestrian walkway. On June 3, 2022, the City filed a motion to dismiss the complaint, arguing that counts one and two are duplicative, and that parts of Molaei's negligence claim are insufficiently pleaded. The parties fully briefed the motion.

Analysis

The City brings its motion pursuant to Code of Civil Procedure section 2-615. 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 City's motion presents the question of whether the complaint's allegations, "when construed in the light most favorable to the plaintiff, are sufficient to set forth a cause of action upon which relief may be granted." *Carter v. New Trier E. High Sch.*, 272 Ill. App. 3d 551, 555 (1st Dist.1995) (citing *Duncan v. Rzonca*, 133 Ill. App. 3d 184, 190-91 (2d Dist. 1985)). To avoid dismissal, "the complaint must sufficiently set forth every essential fact to be proved." *Id.* If the complaint "fails to allege such facts, the deficiency may not be cured by liberal construction." *Id.*

A court reviewing the sufficiency of a complaint must "accept as true all well-pleaded facts . . . and all reasonable inferences that may be drawn from those facts." *K. Miller*, 238 Ill. 2d at 291 (citing *Pooh-Bah*, 232 Ill. 2d at 473). The court disregards legal and factual conclusions unsupported by specific allegations of fact, and exhibits attached to the complaint will control over any conflicting allegations. *Carter*, 272 Ill. App. 3d at 555; *Compton v. Country Mut. Ins. Co.*, 382 Ill. App. 3d 323, 326 (1st Dist. 2008) (quoting *Abbott v. Amoco Oil Co.*, 249 Ill. App. 3d 774, 778-79 (2d Dist. 1993)). While the complaint must contain allegations of fact sufficient to establish a cause of action, "the plaintiff is not required to set out evidence; only the ultimate facts to be proved should be alleged, not the evidentiary facts tending to prove such ultimate facts." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004) (quoting *Chandler v. Ill. Cent. R.R.*, 207 Ill. 2d 331, 348 (2003)). The critical inquiry 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 on which relief may be granted. *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 19; *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34.

The City argues that Molaei's negligence claim should be dismissed because it is duplicative of his premises liability claim. Claims are duplicative if they share the same operative facts and injury. *Pippen v. Pedersen*, 2013 IL App (1st) 111371, ¶ 28. Here, Molaei does not dispute that the injury alleged in his negligence claim is the same as that alleged in his premises liability claim; however, the operative facts of each claim vary slightly. *See Perez v. Subsits*, 2020 IL App (1st) 192193-U, ¶ 34 (finding that premises liability and negligence claims arising out of the same event should be pleaded in separate counts). Ordinary negligence requires proof of: (1) the existence of a duty, (2) a breach of that duty, and (3) an injury proximately caused by the breach. *Guvenoz v. Target Corp.*, 2015 IL App (1st) 133940, ¶ 89. On the other hand, a premises liability claim requires proof of the three elements of ordinary negligence along with proof that: (1) there was a condition on the property that presented an unreasonable risk of harm; (2) the defendant knew or reasonably should have known of the condition and the risk; and (3) the defendant could reasonably have expected people on the property would not realize, would not discover, or would fail to protect themselves from the danger. *Hope v. Hope*, 398 Ill. App. 3d 216, 219 (4th Dist. 2010).

Molaei's complaint plainly conforms to these differing legal liability theories. Molaei's negligence count is predicated on the City's conduct; namely, its alleged causing of the metal protrusion and its failing to implement safeguards or warn pedestrians. The premises liability count is predicated on the existence of the hazardous condition. Illinois permits this sort of alternative pleading. Generally, a plaintiff is "entitled to elect the legal theory upon which to proceed." *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶ 45. If a plaintiff is injured on a landowner's property, "a plaintiff may elect to pursue a negligence claim, a premises liability claim, or both." *Id.* ¶ 54. This is because "'plaintiffs are masters of their complaint and are entitled to proceed under whichever theory they decide, so long as the evidence supports such a theory.'" *Id.* (quoting *Reed v. Wal-Mart Stores*, 298 Ill. App. 3d 712, 717 (4th Dist. 1998)).

The City also argues that Molaei's claim for failure to inspect the bridge should be dismissed because municipalities have owe no duty to inspect the public way. As an initial matter, the City's motion is brought pursuant to the wrong authorizing provision. Rather than attacking the facial sufficiency of Molaei's complaint as section 2-615 requires, *see Fox v. Seiden*, 382 Ill. App. 3d 288, 294 (1st Dist. 2008), the City offers affirmative matter in the form of the Local Governmental and Governmental Employees Tort Immunity Act (TIA) to argue that it had no duty. Section 2-619(a)(9) is the proper authorizing provision for such an argument. 735 ILCS 5/2-619; *see also Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003) ("Immunity under [TIA] is an affirmative matter properly raised in a section 2-619(a)(9) motion to dismiss") (citation omitted). While this error would provide sufficient justification to deny the City's motion, Illinois courts are permitted to consider a mislabeled motion to dismiss as if it had been brought under the correct authorizing provision, as long as the plaintiff is not prejudiced by the 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 will consider the City's motion as if it were brought pursuant to section 2-619.

A section 2-619(a)(9) motion admits the legal sufficiency of a complaint, but asserts affirmative matter to defeat the claim. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21; *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. The motion must be directed against an entire claim or demand. *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'g*, 2012 IL 113148, ¶ 31.

The City's argument that it owed Molaei no duty to inspect the walkway is premised on TIA section 3-102. That section provides that a local public entity "shall not be liable for injury unless it is proven that it has actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition." 745 ILCS 10/3-102(a). The statute goes on to add that a public entity does not have constructive notice of an unsafe condition if it establishes that a reasonably adequate inspection system would not have discovered the condition, or if "[t]he public entity maintained and operated such an inspection system with due care and did not discover the condition." 745 ILCS 10/3-102(b).

Paragraph 8(e) of Molaei's count one alleges that the City failed to maintain and operate its inspection system with due care. The City argues that the assumption underlying this allegation—that the City had an inspection system—is insufficiently pleaded because it is not supported by facts alleged in the complaint. While the City correctly notes that Illinois is a fact-pleading jurisdiction, Molaei is not required to set out evidence at the pleading stage. *See Board of Ed. v. Kankakee Fed'n of Teachers Local No. 886*, 46 Ill. 2d 439, 446-47 (1970). "To the contrary, only the ultimate facts to be proved should be alleged and not the evidentiary facts tending to prove such ultimate facts." *Id.* Distinguishing ultimate facts from evidentiary facts requires "careful consideration of the practical task of administering a particular litigation." *People ex rel. Scott v. Carriage Way West, Inc.*, 88 Ill. App. 3d 297, 302, (1st Dist. 1980) (citation omitted), *rev'd on other grounds*, 88 Ill. 2d 300 (1981). Here, the evidentiary facts that would tend to prove the ultimate fact that Chicago has an inspection system for its public walkways are likely within the City's possession. As such, it would be impractical to require Molaei to plead those facts at this pre-discovery stage of the litigation.

Paragraph 8(f) of Molaei's count one claims that the City otherwise failed to exercise ordinary care for Molaei's safety. Such a claim is an example of insufficient and unacceptable pleading. Should discovery reveal other viable claims against the City, Molaei may file a motion seeking leave to file an amended complaint to add those claims; in the meantime, paragraph 8(f) of count one must be dismissed.

Conclusion

For the reasons presented above, it is ordered that:

1. The City's motion to dismiss is granted, in part, and denied, in part;
2. The motion to dismiss is granted as to paragraph 8(f) in count one;

3. The remainder of the City's motion to dismiss is denied; and
4. The City has until January 6, 2023, to answer the complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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