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

Eric Myers and Christine Myers as co-special administrators of the estate of Amanda Christine Myers, deceased,	)	
Plaintiffs,	)	
v.	)	No. 20 L 13572
Cormick J. O'Connell, individually, and as agent, servant and/or employee of Reyes Holdings, L.L.C., Reyes Holdings, L.L.C., California Tire Shop, Inc. d/b/a Sierra Tire Shop & Auto Repair, and Sierra Management I, LLC d/b/a Sierra Tire Shop & Auto Repair,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs are required at the pleading stage to allege sufficient facts establishing each element necessary for a cause of action. Here, the plaintiffs adequately alleged each element necessary to establish that certain defendants had entered into a joint venture or partnership. Since the plaintiffs have stated a cause of action, the defendants' motion to dismiss must be denied, except for two counts brought under the *res ipsa loquitor* doctrine, which is not a recognized cause of action.

Facts

At some time before June 2, 2020, an agent or employee of California Tire Shop, Inc. ("California Tire") and Sierra Management I, LLC ("Sierra I") (together, "Sierra Defendants") installed, maintained, or repaired Cormick O'Connell's 2009

Nissan Versa. The scope of work included the car's front driver's side wheel. At that time, each of the Sierra Defendants were Illinois corporations doing business under the name "Sierra Tire Shop & Auto Repair," located at 2324 North California Avenue in Chicago.

On June 2, 2020, O'Connell was driving his car east on Interstate 290, at or near the intersection with Wolf Road in Chicago. At approximately the same time, Amanda Christine Myers was driving a 2017 Ford Escape west on Interstate 290. The front driver's side wheel on O'Connell's car suddenly became loose and disconnected from the axle. The wheel bounced over the center concrete traffic barrier and struck Myers' car. The impact resulted in Myers' death.

On December 21, 2020, Eric and Christine Myers, as co-special administrators of Christine's estate filed an 11-count wrongful death complaint against the defendants. In count 10, pleaded under the Wrongful Death Act, the Myers seek to hold the Sierra Defendants, as joint venturers, vicariously liable for each other's negligence in servicing O'Connell's car. The Myers claim the Sierra Defendants breached their duty of care by failing to: (1) inspect or install certain parts properly; (2) repair or replace certain broken parts sufficiently; (3) advise O'Connell that his vehicle was not safe; and (4) prevent damaging O'Connell's car. In count 11, also pleaded under the Wrongful Death Act, the Myers seek to hold the Sierra Defendants liable as members of a partnership based on the same allegations and claims as in count 10. Counts 10 and 11 incorporate the allegations contained in counts six through nine. In counts six and eight, the Myers allege the Sierra Defendants are directly negligent for the acts and omissions alleged in counts 10 and 11. In counts seven and nine, the Myers allege the Sierra Defendants are negligent under the *res ipsa loquitor* doctrine.

On March 9, 2021, the Sierra Defendants filed a motion to dismiss counts 10 and 11. The parties subsequently submitted their response and reply briefs.

Analysis

The Sierra Defendants seek to dismiss counts 10 and 11 pursuant to Code of Civil Procedure section 2-615. 735 ILCS 5/2-615. A section 2-615 motion to dismiss attacks the sufficiency of a complaint and raises the question of whether a complaint states a cause of action upon which relief can be granted. *Berry v. City of Chicago*, 2020 IL 124999, ¶ 25. All well-pleaded facts must be taken as true and any inferences are to be drawn in the non-movant's favor. *Id.* "[A] 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." *Chandler v. Illinois Cent. R.R. Co.*, 207 Ill. 2d 331, 348 (2003). A section 2-615 motion should not be granted unless no set of facts can be proven that would entitle the plaintiff to relief. *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006).

Count 10 — Joint Venture/Wrongful Death

A joint venture is "an association of two or more persons to carry out a single enterprise for profit." *In re Johnson*, 133 Ill. 2d 516, 526 (1989) (citing cases). A joint venture is properly alleged if there exists

> (1) a community of interest in the purpose of the joint association, (2) a right of each member to direct and govern the policy and conduct of the other members, and (3) a right to joint control and management of the property used in the enterprise.

Andrews v. Marriott Int'l, 2016 IL App (1st) 122731, ¶ 23 (quoting *Romanek v. Connelly*, 324 Ill. App. 3d 393, 405 (1st Dist. 2001)). The existence of a joint venture may be inferred from the circumstances demonstrating, in fact, that the parties entered into a joint venture. *Bosch v. NorthShore Univ. Health Sys.*, 2019 IL App (1st) 190070, ¶ 85 (citing *Kaporovskiy v. Grecian Delight Foods, Inc.*, 338 Ill. App. 3d 206, 212 (1st Dist. 2003)). Whether a

joint venture exists is a question for the trier of fact. *O'Brien v. Cacciatore*, 227 Ill. App. 3d 836, 843 (1st Dist. 1992).

The Sierra Defendants argue count 10 must be dismissed because the Myers failed to allege that the Sierra Defendants had a right to joint control and management of the property used in the enterprise. In support, the Sierra Defendants rely on *Barton v. Evanston Hospital*, 159 Ill. App. 3d 970, 974-75 (1st Dist. 1987), and *Yokel v. Hite*, 348 Ill. App. 3d 703 (5th Dist. 2004). Each case is distinguishable from this one.

The *Barton* court affirmed the trial court's dismissal of the plaintiff's claims because Illinois does not recognize a joint venture between a physician and a hospital. 159 Ill. App. 3d at 974. As the court explained, "[t]he decision on how to treat a patient is a medical question entirely within the discretion of the treating physician, not the hospital." *Id.* Simply put, *Barton* is both factually and legally distinguishable from the allegations and claims presented in this case. In *Yokel*, the trial court struck the plaintiffs' breach of fiduciary duty claims, in part, because the complaint spoke to a typical oil-and-gas lease rather than a partnership marked by joint control and management. 348 Ill. App. 3d 711. The Fifth District affirmed the trial court's order, finding the plaintiffs "failed to allege any facts from which the trial court could conclude that they, [defendant], or the adjacent landowners intended to carry on an enterprise in the nature of a partnership." *Id.* at 709.

In contrast, the Myers' complaint explicitly alleges, among other things, that the Sierra Defendants: (1) "functioned jointly in doing business as Sierra Tire Shop and Auto Repair, providing a variety of motor vehicle and maintenance repair services," (2) "entered into an agreement to partner, coordinate, further, advance and promote the business of each respective entity," (3) "permitted each business to contribute property, money, or services," (4) "shared in the profits and losses resulting from the joint venture," and (5) "each had a right to share in the control of and a right to direct and govern the policy and conduct of the

other joint venturers." Cmplt. count 11, ¶¶ 4-6, 8. In sum, unlike the *Yokel* plaintiffs, the Myers allege sufficient facts from which this court may infer the defendants intended to form a joint venture.

Finally, this court rejects the Sierra Defendants' arguments that the plaintiffs failed to identify the property at issue or allege its connection to the complaint's allegations. The complaint plainly alleges both that the Sierra Defendants: (1) conducted motor vehicle services out of their principal place of business, and (2) performed such services on O'Connell's 2009 Nissan Versa on June 1, 2020. (Re-alleged counts six through nine.)

Count Eleven — Partnership/Wrongful Death

Under the Uniform Partnership Act, "[a] partnership is an association of two or more persons to carry on as co-owners a business for profit." 805 ILCS 205/6(1). To establish a partnership, a plaintiff must prove that each party: (1) joined to carry on a trade or venture for a common benefit; (2) contributes property or services; and (3) has a community of interest in the profits. *Seidmon v. Harris*, 172 Ill. App. 3d 352, 357 (1st Dist. 1988). Factors considered in determining whether a partnership exists include: "the manner in which the parties have dealt with each other; the mode in which each has, with the knowledge of the other, dealt with persons in a partnership capacity; whether the alleged partnership has advertised using the firm name; and whether the alleged partners shared the profits." *Id.* (citing *Rizzo v. Rizzo*, 3 Ill. 2d 291, 299-300 (1954); *Olson v. Olson*, 66 Ill. App. 2d 227, 233 (2d Dist. 1965)).

The Sierra Defendants argue count eleven must be dismissed for two reasons. First, they argue the Myers have failed to allege the first and second elements of a partnership. Second, the Myers failed to allege each factor evaluated by the trier of fact in deciding whether a partnership exists.

As to the first element—that the parties joined to carry on a trade for their common benefit—the Sierra Defendants challenge as insufficient the Myers' allegation that the Sierra Defendants "entered into an agreement to partner, coordinate, further, advance and promote the business of each respective entity." Cmplt. count 11, ¶ 4. This court disagrees. The complaint alleges the Sierra Defendants: (1) shared the same principal place of business and business name, "Sierra Tire Shop & Auto Repair" (counts six and eight at ¶¶ 1, 3); (2) had "a common purpose and common business interest in that purpose" (count 11 at ¶ 7); and (3) "functioned jointly in doing business as Sierra Tire Shop and Auto Repair, providing a variety of motor vehicle maintenance and repair services" (count 11 at ¶ 3). These allegations, taken in their entirety, are sufficient to fulfill the first element.

As to the second element—that each party contributes property or services—the Sierra Defendants argue it is immaterial whether each defendant was alleged to have been permitted to contribute property, money, or services absent an accompanying allegation that each defendant did so. (Count 11, ¶ 5.) This argument overlooks the Myers' other allegations that "[the Sierra Defendants] and their partnership, performed installation, maintenance and/or repair *services* to [O'Connell's] 2009 Nissan Versa" and "functioned jointly in doing business . . . providing a variety of motor vehicle maintenance and repair services." (Count 11, ¶¶ 8 & 3, respectively).

As to the third element—that each defendant has a community of interest in the profits—the Sierra Defendants do not dispute that the Myers' complaint adequately alleges such an interest. In sum, the Myers have alleged the three required elements of a partnership.

The Sierra Defendants also take issue with the Myers' alleged failure to plead all four factors to be considered by a trier of fact to determine the existence of a partnership. That argument must fail because "[w]hether a partnership exists is a question to be determined by the fact finder from all the facts and

circumstances presented." *Goldstein v. Goldstein*, 293 Ill. App. 3d 700, 710 (1st Dist. 1997) (quoting *Argianas v. Chestler*, 259 Ill. App. 3d 926, 942 (1st Dist. 1994)). Here, the facts and circumstances of the defendants' alleged partnership have yet to be uncovered through discovery. Dismissal for failure to allege each of the factors evaluated by the trier of fact when determining whether a partnership exists is thus improper, particularly if, as in this case, the Sierra Defendants do not dispute the Myers alleged the sharing-of-profits factor. *See Rizzo*, 3 Ill. 2d at 300 (noting "the essential test" . . . "is the sharing of profits").

Counts Seven and Nine – *Res Ipsa Loquitur*

In counts seven and nine, the Myers present two causes of action for *res ipsa loquitur*. This is a common pleading error. *Res ipsa loquitur* is not an independent cause of action, but simply "a 'rule of evidence relating to the sufficiency of plaintiff's proof'" to establish a defendant's negligence. *Krivokuca v. City of Chicago*, 2017 IL App (1st) 152397, ¶ 43 (citing *Collins v. Superior Air-Ground Ambulance Serv., Inc.*, 338 Ill. App. 3d 812, 816 (1st Dist. 2003)). As explained:

> The *res ipsa loquitur* doctrine is a species of circumstantial evidence permitting the trier of fact to draw an inference of negligence if plaintiff demonstrates that he or she was injured (1) in an occurrence that ordinarily does not happen in the absence of negligence, (2) by an agency or instrumentality within the defendant's exclusive control. . . .

Id. (internal quotations and citations omitted). Thus, the doctrine's purpose "is to allow proof of negligence by circumstantial evidence when the direct evidence concerning cause of injury is primarily within the knowledge and control of the defendant." *Id.*

It is plain that the Myers' causes of action based on *res ipsa loquitur* are improper as well as unnecessary. In short, the Myers

will be able to prove their causes of action through whatever direct or circumstantial evidence is available and admissible.

Conclusion

For the reasons presented above, it is ordered that:

1. The Sierra Defendants' motion to dismiss counts 10 and 11 is denied;
2. The Sierra Defendants' motion to dismiss counts seven and nine is granted;
3. On this court's own motion, counts seven and nine are dismissed with prejudice; and
4. The Sierra Defendants have until July 23, 2021 to answer the complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 25 2021

Circuit Court 2075