

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

Rachel Newhouse,)	
)	
Plaintiff,)	
)	
v.)	No. 19 L 10688
)	
Red Fox Restaurant I LLC, an Illinois corporation)	
d/b/a Kitsune Restaurant, Rick Strilky and)	
Iliana Regan, David W. Silver, Red Fox)	
Management, LLC, Novelli Construction, Inc.,)	
Mohr Architecture, Inc., and Mr. David's Flooring)	
International, LLC,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

An unambiguous contract is to be enforced in accordance with its plain meaning. In this case, a one-page proposal does not sufficiently detail the scope of the defendant's duty to the plaintiff to be judged unambiguous, yet when read in light of the defendant's deposition testimony, establishes a duty to the plaintiff. As such, the defendant's motion to dismiss must be denied.

Facts

In 2016, expeditor PCG Consulting contacted Mohr Architecture, Inc. about a project at Kitsune Restaurant, located at 4229 North Lincoln Avenue in Chicago. The proposal for the project is dated October 12, 2016 and is addressed to Iliana Regan of Kitsune. The header states the nature of Mohr's involvement in the project: "Prepare permit drawings for existing restaurant alterations including Chef Counter and new wall for bar service area." The scope of work is listed as follows:

- Architect—Scope of Work
- Title-sheet with required site plan & zoning data (building and property) square footage, building classification, construction type and F.A.R.
- Correspondence with owner
- Construction Documents: 1st floor counter and Chef Counter
- Occupancy Plans and exit calculations

- Americans with Disability Act (ADA) compliance and MOPD form filled out
- Correspondence with PCG, city and owner on all building issues
- Provide signed & sealed PDF drawings for DOB
- Respond to all comments made by DOB review with corrections

On May 10, 2019, Rachel Newhouse attended a cooking class at Kitsune. While there, Newhouse fell through an open hatch door in a restroom floor. A ship's ladder led from the open hatch door to a kitchen in the restaurant's basement.

Newhouse filed suit by bringing negligence and premises liability causes of action against Red Fox Restaurants I LLC (doing business as Kitsune) and its owner-operators Rick Strilky and Iliana Regan. On November 10, 2021, Red Fox, Strilky, and Regan brought a third-party complaint for contribution against Mohr and two other defendants, Novelli Construction, LLC and Mr. David's Flooring International, LLC. The third-party complaint alleges that Mohr was liable for one or more negligent acts centering on the design of the stairway on which Newhouse fell. On January 24, 2022, Newhouse filed a third amended complaint, adding Mohr as a defendant and bringing a negligence cause of action against Mohr. Newhouse claimed that Mohr "failed to properly document the work being performed on the premises," and negligently designed the hatch door and stairway.

The case proceeded to discovery. On September 2, 2021, the parties deposed Michael Mohr, the principal of his company, who clarified the extent of his work at Kitsune. Mohr testified that he created a floor plan drawing as part of the scope of his work. On the drawing, in a box labeled "scope of work," is included the phrase, "document existing restaurant conditions." The following exchange took place regarding the scope of work as shown on the floor plan drawing:

- Q: What is required by the drawing to document?
A: The counter and the walls.
Q: Are you required to document anything else?
A: Yeah. Any existing conditions.
Q: What are existing conditions that --
A: Well, let's see. I got the counters, the walls, and looks like, yeah. Some of the equipment that was in there, some of the kitchen equipment, the hood, the hood that was in there, the back bar, the existing washrooms, the existing kitchen. So those already existing. Room conditions.

* * *

- Q: You weren't aware that there was a wood door, or a hole in the floor, when you went to take the dimensions of the men's restroom?
- A: No. Because I'm up high with my laser, so literally, I – I probably didn't even walk in. I probably, right by the door, held it to the other side, and then held it to the other way. I just needed the two measurements in there and that was it. Of the walls.
- Q: Do you know if you would have walked into the bathroom, if you would have noticed the steel hatch door?
- A: I wasn't aware it was there.

On February 18, 2022, Mohr brought a motion to dismiss Newhouse's negligence claim of action against it, claiming Mohr owed no duty to Newhouse. The parties fully briefed the motion.

Analysis

Mohr brings its motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure. 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). The motion must be directed against an entire claim or demand. *See id.* 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). If the basis for the motion does not appear on the face of the complaint, the motion must be supported by an affidavit. 735 ILCS 5/2-619(a). 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., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. 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.

Mohr's motion to dismiss argues that Mohr owed no duty to Newhouse. The question of whether a duty exists is one of law for the court to decide. *See Burns v. City of Centralia*, 2014 IL 116998, ¶ 13. To determine if a duty exists, a court is to analyze whether a relationship existed between the plaintiff and the defendant for which the law would impose a duty on the defendant for the plaintiff's benefit. *See Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. of Directors*, 2012 IL 112479, ¶ 22, quoting *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436 (2006). The "relationship" is "a shorthand

description for the analysis of four factors: (1) the reasonable foreseeability of the injury, (2) the likelihood of the injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing the burden on the defendant.” *Id.*, citing *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 18. A court’s analysis of the duty element focuses on the policy considerations inherent in the four factors and the weight accorded to each based on the case’s particular circumstances. *Id.*

Both parties point to case law suggesting that the duty of a design professional is based on the contract for services. *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011); *2314 Lincoln Park W. Condo. Ass’n v. Mann, Gin, Ebel & Frazier, Ltd.*, 136 Ill. 2d 302, 317 (1990). This raises a question of contract interpretation. If the words in the contract are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. *Central Ill. Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004). If, however, the language of the contract is susceptible to more than one meaning, it is considered ambiguous. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007). If the contract language is ambiguous, a court may consider extrinsic evidence to determine the parties’ intent. *Id.*

Mohr’s motion to dismiss rightly emphasizes that Mohr was not involved in planning, designing, or constructing the hatch door in the men’s restroom or the stairway leading from the hatch door to the basement. Newhouse does not dispute this fact in her response but, instead, focuses on Mohr’s failure to document the hatch door in the men’s restroom. This narrows the question before this court. The key issue is, therefore, whether Mohr had a duty to include the hatch door in his floor plan drawing.

Much of Mohr’s argument depends on case law in which courts have found no duty if an injury occurs during construction. Mohr relies on cases establishing that the defendant must have control over the construction to be found to have a duty. These arguments are misplaced in the present case. Newhouse is alleging a breach of duty based on Mohr’s failure to include the hatch door in his drawings, not based on Mohr’s actions in relation to construction or workplace safety. Mohr undoubtedly had full control over the drawings he prepared.

This court’s task, then, is to determine whether the contract includes a duty for Mohr to include the hatch door in his floor plan drawing. In this case, the contract consists of a one-page proposal generally outlining the scope of work. The scope of the individually listed items to be completed is not detailed in the proposal. For example, the item concerning “signed and sealed PDF drawings for DOB” does not detail the drawings’ required contents or format. In the light of the sparse nature of the proposal, looking

to the deposition testimony of Michael Mohr, his affidavit, and the floor plan drawing is instructive in interpreting the scope of duty imposed by the proposal.

In his deposition, Mohr testified that his scope of work included documenting existing conditions in the restaurant. He further testified that he took measurements in the bathroom. As Newhouse rightly points out in her response to Mohr's motion to dismiss, Mohr included other items in the men's restroom in his drawing, such as the toilet and sink.

To counter Newhouse's argument, Mohr argues he was unaware of the hatch door, and this proves it was not included in the scope of his work. While the proposal does not include the words "hatch door," Mohr testified that his scope of work included documenting existing conditions, and the phrase "existing conditions" is included in the scope of work section on the floor plan drawing. Mohr documented other existing conditions in the bathroom, and he testified that he probably did not even walk into the bathroom. This testimony only helps bolster Newhouse's argument because it shows how low the burden was of including the hatch door. Mohr's proposal taken in view of this testimony and the floor plan drawing establishes Mohr's duty to Newhouse.

This conclusion is further supported by the other duty elements. It is certainly reasonably foreseeable and likely that a person would be injured after falling through a floor hatch door and into a basement. Further, the consequences of placing the burden on Mohr to include the hatch door in his floor plan drawing are insignificant given that he was the architect responsible for providing the drawing.

Conclusion

For the reasons presented above, it is ordered that:

The defendant's motion to dismiss is denied.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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