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

Ellen Ritsos,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 4624
	)	
Madison Parker, Dana Parker, Steve McEwen, Coldwell Banker, and the estate of Richard W. Slovina,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

If a defendant meets its burden of proof on a section 2-619(a)(9) motion to dismiss, a plaintiff is required to establish that the defense asserted is unfounded as a matter of law or rests on an essential element of material fact that remains in dispute. In this case, the plaintiff has failed to respond to the defendants' motion to dismiss both in law and in fact. As a result, the defendants' motion to dismiss must be granted and the defendants dismissed with prejudice.

Facts

Richard Slovina owned a house located at 1102 Cypress Lane in Arlington Heights, Illinois. In 2015, Dana Parker, Slovina's daughter, began living at the property to assist her father. After Slovina became ill, Dana hired Steve McEwen, a Coldwell Banker employee, as a listing agent to sell the property.

In mid-May 2018, Madison Parker, Dana's daughter, began staying at the house temporarily to help her mother prepare the house for sale. Madison brought along her dog, a Pomeranian-Maltese mix. On May 25, 2018, Ellen Ritsos, a real estate agent, was showing the property to a potential buyer. Madison's dog, which was in the house at the time, attacked Ritsos without warning or provocation. Ritsos was injured from the attack.

On April 27, 2020, Ritsos filed a six-count complaint against the defendants. Count three is a cause of action directed against McEwen and Coldwell Banker for a violation of the Animal Control Act. 510 ILCS 5/1—35. The statute provides, in part, that:

> "Owner" means any person having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her.
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> * * *
>
> If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby.

510 ILCS 5/2.16 & 16. In count three, Ritsos alleges that the Parkers owned, kept, or harbored the dog that attacked Ritsos. She further alleges that McEwen authorized Ritsos to view the property with a potential purchaser and that McEwen knew the Parkers kept a dog at the address. Ritsos alleges that McEwen, as a Coldwell Banker employee, owed Ritsos a duty of reasonable care for her safety and that McEwen breached his duty by failing to warn Ritsos that a dog was at the property.

The case proceeded to written and oral discovery. At her deposition, Dana Parker testified that she permitted Madison's dog to be in the house. Dana also testified that she never informed McEwen or Coldwell Banker that a dog would be in the house. Dana did not instruct Madison to post any warnings that a dog was in the house. Finally, Dana testified that she did not give McEwen, Coldwell Banker, or Ritsos permission to show the house on May 25, 2018.

Based on the record, McEwen and Coldwell Banker filed a motion to dismiss. The parties briefed the motion and supplied various exhibits.

Analysis

McEwen and Coldwell Banker bring their motion to dismiss based on Code of Civil Procedure section 2-619(a)(9). 735 ILCS 5/2-619(a)(9). 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). Section 2-619(a)(9) specifically authorizes a cause of action's dismissal if "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.

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., 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.

McEwen and Coldwell Banker argue that the record warrants their dismissal because they did not own the dog, were not responsible for controlling it, and did not know the dog was in the house on May 25, 2018. Courts have on several occasions interpreted the Animal Control Act in ways that are relevant to the disposition of the defendants' motion. First, "ownership" under the statute requires "some measure of care, custody, or control." *Cieslewicz v. Forest Preserve Dist.*, 2012 IL App (1st) 100801, ¶ 13 (citing *Steinberg v. Petta*, 114 Ill.2d 496, 501 (1986)). Second, a person who "knowingly permits" a dog to be on the premises is not an "owner" under the statute because "[m]erely allowing an animal to be temporarily on one's premises does not make the landowner a keeper or harborer of the animal." *Goennenwein v. Rasof*, 296 Ill. App. 3d 650, 653 (2nd Dist. 1998). McEwen and Coldwell Banker conclude that under the statue and the common law interpretation they are not liable for Ritsos's injuries because they were not the dog's owners and had no knowledge that the dog was in the house at the time Ritsos went inside.

Ritsos argues in response that McEwen and Coldwell Banker meet the definition of "owners" because they knowingly permitted the dog to remain on the premises. Ritsos relatedly argues that McEwen and Coldwell Banker allowed Ritsos to enter the home, despite the dog's presence on the property. In support of her arguments, Ritsos points to the allegations in her complaint, but not to any case law or facts in the record.

Ritsos's failure to go beyond complaints' allegations in responding to the defendants' motion to dismiss is dispositive. On a section 2-619(a)(9) motion, the defendant "has the burden of proof on the motion, and the concomitant burden of going forward." 4 Richard A. Michael, Illinois Practice § 41:8, at 481 (2d ed. 2011). If the motion is based on facts not apparent from the complaint, the defendant must support its motion with affidavits or other evidence. *City of Springfield v. West Koke Mill Dev. Corp.*, 312 Ill. App. 3d 900, 908 (3d Dist. 2000). If the defendant carries its burden of going forward,

"the burden then shifts to the plaintiff, who must establish that the . . . defense asserted either is 'unfounded or requires the resolution of an essential element of material fact before it is proven.'" *Epstein v. Chicago Bd. of Ed.*, 178 Ill. 2d 370, 383 (1997) (quoting *Kedzie & 103rd Currency Exchange, Inc.*, 156 Ill. 2d 112, 116 (1993)). The plaintiff may fulfill its burden by presenting "affidavits or other proof." 735 ILCS 5/2-619(c). "'If, after considering the pleadings and affidavits, the trial judge finds that the plaintiff has failed to carry the shifted burden of going forward, the motion may be granted and the cause of action dismissed.'" *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 377 (2003) (quoting *Epstein*, 178 Ill. 2d at 383).

Ritsos has failed to meet her burden of going forward. She failed to cite to any case law or facts supporting her arguments that McEwen and Coldwell Banker were owners within the meaning of the statute. Further, she fails to cite to any deposition testimony or other facts contradicting Dana's testimony that she had not authorized Ritsos to show the house on May 25, 2018. Absent any law or evidence to the contrary, the factual record is undisputed that McEwen and Coldwell Banker did not own Madison's dog as a matter of law because they did not keep or harbor the pet. Further, McEwen and Coldwell Banker had no notice that the Parkers had a dog in the house when Ritsos showed it to a potential buyer.

Conclusion

For the reasons presented above, it is ordered that:

1. McEwen and Coldwell Banker's motion to dismiss count three is granted; and
2. McEwen and Coldwell Banker are dismissed from this case with prejudice.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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