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

Ignacia Santana,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 21 L 1272
	)	
Village of Maywood,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Municipalities are immunized from liability against claims brought by persons who were not intended users of municipal property. Here, the plaintiff was not an intended user of the street where she tripped and fell in a pothole because she had crossed the street at midblock outside of a marked crosswalk and was not walking around her legally parked vehicle. The defendant's motion must, therefore, be granted and the case dismissed with prejudice.

Facts

On February 6, 2020, Ignacia Santana parked her car lawfully at or near 1118 North 8th Avenue—the west side of the street—in Maywood. Santana exited her car and then walked across the street at a diagonal to get to the driveway of her daughter's house at 1115 North 8th Avenue—the east side of the street. Before Santana reached the driveway, she tripped on a pothole in the street, fell, and suffered injuries.

On February 28, 2022, Santana filed her third amended complaint against the Village of Maywood. Santana brought a single count of negligence against Maywood, alleging that the municipality owed her a duty of care for her safety while on its property. Santana's complaint alleges that the pothole on the east side of the street was only five feet from her car. Santana claims that Maywood breached its duty by, among other things, failing to: (1) repair the pothole; (2) maintain the roadway in a reasonably safe condition; (3) recognize the dangerous condition the pothole presented; and (4) failed to warn of the pothole.

On March 28, 2022, Maywood filed a motion to dismiss. The parties briefed the motion, and both included exhibits in support of their positions.

Santana attached photographs of herself crossing the street. There are no street or pavement markings in the area in which Santana is photographed. The photos also show the pothole at the end of the driveway on the other side of the street from where Santana parked her car. Maywood, on its behalf, attached an aerial photograph showing that 1118 and 1115 North 8th Avenue are diagonally across the street from each other.

Analysis

Maywood brings a combined motion to dismiss Santana's complaint. *See* 735 ILCS 5/2-619.1. A section 2-619.1 motion authorizes the filing of one pleading incorporating motions to dismiss under sections 2-615 and 2-619. *Id.* A section 2-615 motion tests a complaint's legal sufficiency, while a section 2-619 motion admits a complaint's legal sufficiency, but asserts affirmative matter to defeat the claim. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21; *Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Affirmative matter is a defense that negates a cause of action in total or refutes conclusions of law or material fact that are unsupported by allegations of specific fact contained in or inferred from the complaint. *Bloomingdale State Bk. v. Woodland Sales Co.*, 186 Ill. App. 3d 227, 233 (2d Dist. 1989). A court considering either motion must accept as true all well-pleaded facts and reasonable inferences arising from them, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 23-24 (2004), but not conclusions unsupported by facts. *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009); *see also Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 17.

Maywood argues that section 3-102(a) of the Governmental and Governmental Employees Tort Immunity Act immunizes the village from liability based on Santana's claims. 745 ILCS 10/3-102(a). According to Maywood, the immunity applies in this instance because Santana was not an intended user of North 8th Avenue when she tripped, fell, and was injured in the street. Section 3-102 explicitly provides, in part, that:

> a local public entity has the duty to exercise ordinary care to maintain its property in a reasonably safe condition for the use in the exercise of ordinary care of people whom the entity intended and permitted to use the property in a manner in which and at such times as it was reasonably foreseeable that it would be used . . . .

745 ILCS 10/3-102(a).

By definition, an intended user of municipal property is also a permitted user, but a permitted user is not necessarily an intended user.

See Gutstein v. City of Evanston, 402 Ill. App. 3d 610, 616-17 (1st Dist. 2010) (quoting *Boub v. Township of Wayne*, 183 Ill. 2d 520, 524 (1998)); *see also Wojdyla v. City of Park Ridge*, 148 Ill. 2d 417, 426 (1992). Whether a municipality intended a pedestrian's use of a particular piece of municipal property is determined by the nature of the property. *See Vaughn v. City of West Frankfort*, 166 Ill. 2d 155, 162-63 (1995); *Boub*, 183 Ill. 2d at 525. In other words, the local entity's intent is controlling, not the plaintiff's. *Wojdyla*, 148 Ill. 2d at 425-26; *Scarse v. City of Chicago*, 272 Ill. App. 3d 903, 905-06 (1st Dist. 1995). The mere fact that the municipality could foresee the misuse of its property or know it has been misused in the past does not make the plaintiff's use of the property intended. *Wojdyla*, 148 Ill. 2d at 428; *Swett v. Village of Algonquin*, 169 Ill. App. 3d 78, 93 (2d Dist. 1988).

As a general principle, "since pedestrians are not intended users of streets, a municipality does not owe a duty of reasonable care to pedestrians who attempt to cross a street outside the crosswalks." *Vaughn*, 166 Ill. 2d at 158. As the Supreme Court explained in another opinion:

> [R]oads are paved, marked and regulated by traffic signs and signals for the benefit of automobiles. Parking lanes are set out according to painted blocks on the pavement, signs or meters on the sidewalk or parkway, or painted markings on the curb. Pedestrian walkways are designated by painted crosswalks by design, and by intersections by custom. These are the indications of intended use. That pedestrians may be permitted to cross the street mid-block does not mean they should have unfettered access to cross the street at whatever time and under whatever circumstances they should so choose. Marked or unmarked crosswalks are intended for the protection of pedestrians crossing streets, and municipalities are charged with liability for those areas. Those areas do not, however, include a highway in mid-block.

Wojdyla, 148 Ill. 2d 417, 426.

There are two exceptions to the general rule that pedestrians are not intended users of public streets. The first exception applies if a pedestrian is entering or exiting a legally parked vehicle. *Curatola v. Village of Niles*, 154 Ill. 2d 201, 213-14 (1993); *Sisk v. Williamson Cty.*, 167 Ill. 2d 343, 347, 351 (1995); *Vaughn*, 166 Ill. 2d at 160-61, 163. As the court explained in *Vaughn*, "except for those cases in which street defects were in the area immediately around a parked vehicle, Illinois courts have refused to impose a duty on municipalities for injuries to pedestrians which were caused by those defects." 166 Ill. 2d at 163. The phrase "immediately around" is strictly

limited; thus, "[a]ny duty to maintain the street area immediately around lawfully parked vehicles for those existing and entering them will be bounded by the parameters of parking lanes." *Curatola*, 154 Ill. 2d at 214.

The second exception applies if a pedestrian is in a marked or unmarked crosswalk. The Illinois Vehicle Code defines "crosswalk" as:

> (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in the absence of curbs, from the edges of the traversable roadway, and in the absence of a sidewalk on one side of the highway, that part of the highway included within the extension of the lateral line of the existing sidewalk to the side of the highway without the sidewalk, with such extension forming a right angle to the centerline of the highway;
>
> (b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface placed in accordance with the provisions in the Manual adopted by the Department of Transportation as authorized in Section 11-301.

625 ILCS 5/1-113. "[A] piece of property may constitute a 'crosswalk' if it meets the requirements of either, not both, section (a) or section (b)." *Kavales v. City of Berwyn*, 305 Ill. App. 3d 536, 542 (1st Dist. 1999). By its plain language, the definition supplied by subsection (a) applies only to a crosswalk located at an intersection. *See id.* In contrast, subsection (b) defines a crosswalk at any location as long as it is marked. *See id.*

Neither exception to the general rule applies here. Santana does not argue that she was crossing North 8th Avenue in an unmarked crosswalk when she fell, and the photographs in the record do not show a marked crosswalk at that location. The photographs also establish that Santana could not have been immediately around her car, which was legally parked on the west side of the street, when she tripped on the pothole on the east side of the street. The evidence is plain that Santana did not cross North 8th Avenue at an intersection or in a marked crosswalk at midblock and was not walking immediately around her legally parked car when she tripped and fell.

In her last argument, Santana claims that Maywood knew of the pothole and its danger based on telephone calls made to the village by Santana's daughter. Those phone calls may have, in fact, put Maywood on

notice, but foreseeability goes to duty, not immunity. Even if Maywood was arguing duty, not immunity, "[f]oreseeability alone . . . is not the standard for determining whether a duty of care exists . . ." *Wojdyla*, 148 Ill. 2d at 428; *Vaughn*, 166 Ill. 2d at 161 (pedestrian not intended user of street when crossing midblock outside of crosswalk). *See also Tieman v. City of Princeton*, 251 Ill. App. 3d 766, 768 (3d Dist. 1993); *Ramirez v. City of Chicago*, 212 Ill. App. 3d 751, 755-56 (1st Dist. 1991). More important, custom or practice does not establish a municipality's intended use of its property. *See Boub*, 183 Ill. 2d at 531; *Deren v. City of Carbondale*, 13 Ill. App. 3d 473, 478 (5th Dist. 1973).

In sum, Santana was not an intended user of North 8th Avenue when she walked more than five feet away from her car, as alleged in her complaint, and tripped on a pothole located diagonally across the street from where she had legally parked her car. Given those uncontested facts, the Tort Immunity Act immunizes Maywood from liability based on Santana's claims.

<u>Conclusion</u>

For the reasons stated above, it is ordered that:

1. Maywood's section 2-619 motion to dismiss is granted; and
2. This case is dismissed with prejudice.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

AUG 29 2022

Circuit Court 2075