

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

Bernard Zigman, as father and next	)	
friend of Emma Zigman, a minor,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 20 L 11250
	)	
CH MH Sterling, LLC, a foreign corporation,	)	
Ultimate Security and Investigations of America	)	
Corporation, an Illinois corporation, Scott	)	
Fernatt and Thomas A. Rochon, individuals,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

A landlord’s voluntary undertaking may establish a duty owed to tenants, but only to the extent of the undertaking. In this case, the defendant-landlord contractually agreed to provide security for the protection of tenants’ property, but did not voluntarily undertake to provide security for their personal safety. For that reason, the defendant’s motion to dismiss must be granted.

**Facts**

CF MH Sterling, LLC (Sterling) owns Sterling Estates, a manufactured home community located at 9300 West 79th Street in Justice, Illinois. On January 25, 2012, Sterling entered into a written agreement with Ultimate Security and Investigations of America Corporation (Ultimate) for security services at Sterling Estates. The agreement called for Ultimate to furnish one security guard to provide “security coverage in accordance with the following: property coverage.” The agreement also called for the “protection of the properties located at 9300 W. 79th Street

....” The contract terms limited Ultimate’s service hours after mid-August of each year to Fridays and Saturdays only, from 6:00 p.m. to 2:00 a.m.

On February 24, 2017, Bernard Zigman executed an agreement with Sterling for the lease of a lot at Sterling Estates. The standard form lease agreement had a printing date of May 18, 2015, and explicitly provided that: “[r]esident must obey all provisions in the Community Rules regarding the use, parking or storage of vehicles. Motorcycles and mopeds are prohibited.” The agreement also provided that, “[b]y execution of this Lease, Resident acknowledges receipt of and agrees to comply with the Community Rules, as well as any amendments or additions thereto which may be lawfully adopted by Landlord.” On December 20, 2017, Sterling issued amended rules and regulations to state that “[l]icensed motorcycles and mopeds are allowed.”

On Sunday, October 27, 2019, Bernard and Emma Zigman, Thomas Rochon, and Scott Fernatt each lived at Sterling Estates. On that date, at approximately 3:30 p.m., Fernatt was riding Rochon’s motorcycle within Sterling Estates at the same time Emma, a minor, was riding her bicycle there. Rochon’s motorcycle that Fernatt was driving struck Emma on her bicycle, seriously injuring her.

On February 17, 2021, Bernard filed an amended complaint bringing one negligence cause of action against each of the four defendants. Count one is directed against Sterling and acknowledges the contractual relationship between it and Ultimate. Bernard alleges that Sterling voluntarily undertook to provide security for its tenants’ personal safety. He further alleges that Sterling owed a duty of reasonable care to keep Sterling Estates safe for use by its tenants and a duty to warn of dangerous conditions. He alleges that both he and Emma knew Sterling prohibited motorcycles at Sterling Estates and relied on that prohibition. Bernard claims Sterling breached its duties by failing to: (1) see that Sterling Estates was safe for children; (2)

enforce its prohibition against motorcycles operating at Sterling Estates; (3) warn Emma about the use of motorcycles; (4) provide adequate security for Emma; and (5) supervise its agents to ensure the tenants of Sterling Estates were free from harm.

Sterling filed a motion to dismiss count one.<sup>1</sup> Bernard filed a response suggesting, among other things, that Sterling lured tenants with false promises of security. As an example, he indicated that a car with “Security” emblazoned on its sides was frequently seen at Sterling Estates and gave a false sense of security. He argued that residents were, instead, sitting ducks on property owned by an unfeeling landlord that cared little for tenant safety and security. Sterling filed a reply addressing Bernard’s alleged misstatements of fact and legal arguments.

### Analysis

Sterling brings its motion to dismiss pursuant to Code of Civil Procedure section 2-619. 735 ILCS 5/2-619. 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). 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 Czarowski 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). 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.” *Czarowski*, 227 Ill. 2d at 369.

Sterling’s motion is a so-called (a)(9) motion. Under that subsection, a motion to dismiss may be granted based on “affirmative matter” that avoids the legal effect of or defeats the

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<sup>1</sup> Neither Rochon nor Fernatt filed a motion to dismiss the complaint. On March 31, 2021, Bernard agreed to the dismissal of Ultimate.

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. Here, Sterling points to the lease agreement and community rules as affirmative matter justifying its motion.

The parties fundamentally disagree as a factual matter whether Sterling permitted or prohibited motorcycles at Sterling Estates on October 27, 2019. This dispute arises from various written documents, meaning that the rules of contract interpretation apply. The foundational rule of contract construction is to give effect to the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). To determine intent, a court is to look first to the contract's language. *Id.* at 233. A contract is to be construed as a whole, considering each provision in light of all others, and avoiding any interpretation based on reading one provision in isolation. *Id.* If the contract's terms are plain and unambiguous, they are to be given their ordinary and popular meaning. *Central Illinois Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004).

Bernard relies on paragraph 18 of his February 24, 2017 lease explicitly providing that "[m]otorcycles and mopeds are prohibited." Bernard overlooks, however, paragraph 17 of the lease, acknowledging receipt of and his agreement to comply with "the Community Rules, as well as any amendment or additions thereto which may be lawfully adopted by Landlord." It is notable that Bernard's lease was a standard form document dated May 18, 2015. That date is important because Bernard also fails to point out that on December 20, 2017, Sterling issued amended rules and regulations explicitly providing that "[l]icensed motorcycles and mopeds are allowed." Since Bernard in his lease acknowledged and agreed to comply with any amended community rules, he understood that, as of December 20, 2017, Sterling Estates permitted motorcycles. In sum, Bernard's argument that Sterling Estate prohibited motorcycles as of October 27, 2019 is without merit.

A second dispute between the parties concerns the legal issue of whether Sterling voluntarily undertook to provide security for tenant safety at Sterling Estates. As an initial matter, it is important to distinguish this argument from one based on the Sterling-Ultimate agreement. That agreement's plain language required Ultimate to provide security for property coverage, but made no mention of providing security for the personal safety of Sterling Estate tenants. Rather, the legal issue Bernard raises is whether Sterling voluntarily undertook an extra-contractual duty to provide security for tenant safety.

As a general matter, there exists no duty to anticipate and guard against third-party negligence. *See Ziembra v. Mierzwa*, 142 Ill. 42, 52-53 (1991). The reason for this general rule is that the existence of such a duty would "place an intolerable burden on society." *Id.* at 52 (quoting *Dunn v. Baltimore & Ohio R.R.*, 127 Ill. 2d 350, 366 (1989)). Yet a party may be found to have voluntarily undertaken a duty of care for a plaintiff if, regardless of any consideration, the defendant rendered services for the plaintiff's protection and, thereby, increased the plaintiff's risk of harm or caused the plaintiff an injury because the plaintiff relied on the defendant. This principle is derived from the Restatement (Second) of Torts, which the Illinois Supreme Court has adopted. *See Wakulich v. Mraz*, 203 Ill. 2d 223, 243 (2001) (adopting Restatement (Second) of Torts §§ 323 & 324 (1965)). The voluntary undertaking theory applies equally to malfeasance and nonfeasance. *Claimson v. Professional Prop. Mgmt., LLC*, 2011 IL App (2d) 101115, ¶ 22. The question of whether a voluntary undertaking exists is a question of law for the court. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 995 (1st Dist. 2005).

The duty owed under the voluntary undertaking theory is limited to the extent of the undertaking, *Bell v. Hutsell*, 2011 IL 110724, ¶ 12; *Miller v. Hecox*, 2012 IL App (2d) 110546, ¶ 31, and a court is to construe a voluntary undertaking narrowly. *Bell*, ¶ 12. If the defendant has voluntarily undertaken a duty to the plaintiff, any breach is to be judged according to the standard of

ordinary care. *Weisblatt v. Chicago Bar Ass'n*, 292 Ill. App. 3d 48, 53 (1st Dist. 1997).

Bernard's voluntary undertaking argument proceeds based on the proposition that a landlord may be liable for a third person's criminal acts if the landlord voluntarily undertook to provide security but did so negligently. *See Rowe v. State Bank of Lombard*, 125 Ill. 2d 203, 217 (1988). There are three obvious problems with Bernard's argument. First, striking a person while driving a motorcycle is not criminal activity. The record patently does not indicate the State's Attorney charged Fernatt with any crime.

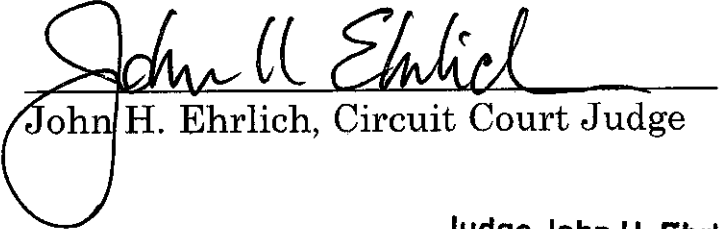
Second, Sterling did not voluntarily undertake to provide security for the personal safety of its tenants. The record makes plain that Sterling contracted with Ultimate to provide security for property only, not persons. Bernard's suggestion that Sterling lured tenants to Sterling Estates with false promises of security falsely presumes that Sterling made promises in the first place. His claims that residents were sitting ducks on property owned by an unfeeling landlord that cared little for tenant safety and security rings hollow. Bernard only needed to read his lease to discover the limits of Sterling's promises. Further, that Ultimate had a car with "Security" emblazoned on its sides does not create in any way a voluntary undertaking for tenants' personal safety.

Third, Bernard transparently acknowledges that Sterling did not voluntarily undertake a duty of care for the safety of its residents. In his response brief, Bernard writes that in the weeks leading up to Emma's injury, he and other residents complained to Sterling Estates about motorcycles speeding on the property. He further states that Sterling Estates did nothing about the complaints. That proves the point. Had Sterling Estates acted to stop motorcycle speeding, Bernard would have a good argument supporting a voluntary undertaking theory, but he proves the opposite.

Conclusion

For the reasons presented above, it is ordered that:

1. Sterling's motion is granted;
2. Sterling is dismissed from the case with prejudice; and
3. The case continues as to defendants Scott Fernatt and Thomas Rochon.

  
John H. Ehrlich, Circuit Court Judge

**Judge John H. Ehrlich**

**JUN 14 2021**

**Circuit Court 2075**