

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

Orangie Garth,)	
)	
Plaintiff,)	
)	
v.)	No. 18 L 1071
)	
Austin Tyler Mayo and Mary M. Leslie,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

The Code of Civil Procedure provides for the liberal amendment of pleadings under certain circumstances. The plaintiff's amended complaint does not raise a new cause of action against the defendant, and the defendant has actively participated in this case from its inception. For those reasons, the defendant's motion to dismiss must be denied.

Facts

On January 30, 2018, Orangie Garth filed a one-count complaint in the Circuit Court against Austin Mayo and Mary Leslie. The complaint alleged that, on February 6, 2016, Garth and Mayo were involved in a vehicle collision on the Dan Ryan Expressway in Chicago. Garth alleged that Mayo owed Garth a duty of reasonable care, a duty he breached by failing to maintain a proper lookout, maintain control of his vehicle, brake in sufficient time, maintain his vehicle, sound his horn to warn Garth, and drive at a safe speed. Garth claimed that Mayo's breaches proximately caused her injuries for which he is liable. The complaint did not allege any tortious conduct by Leslie.

On June 6, 2018, counsel for Leslie filed an appearance and an answer on her behalf, generally denying all of the complaint's

allegations. Discovery then proceeded between Garth and Leslie. In September 2018, Leslie answered written discovery, and in May 2019, she sat for a deposition.

In contrast, throughout much of 2018 and 2019, Garth attempted service on Mayo at various addresses, including some in Wisconsin and Michigan. On May 20, 2019, Garth sought leave to serve Mayo through the Illinois Secretary of State; on May 30, 2019, this court issued an order to that effect. No later than June 12, 2019, the Secretary of State perfected service of process on Mayo. On July 19, 2019, Mayo filed a motion to dismiss pursuant to Illinois Supreme Court Rule 103(b) because it had taken Garth one year and four months to achieve service of process. On October 2, 2019, this court granted Mayo's motion and dismissed him with prejudice as a defendant.

On February 4, 2020, Leslie filed a motion to dismiss the complaint pursuant to Code of Civil Procedure section 2-615. *See* 735 ILCS 5/2-615. The basis of the motion was that the complaint failed to allege any tortious conduct by Leslie. On February 18, 2020, this court denied Leslie's motion and granted Garth leave to file an amended complaint.

On February 25, 2020, Garth filed a one-count amended complaint, entitled "Agency," against Mayo and Mary Leslie. Many of the facts alleged are similar to those in the original complaint, but the amended complaint raises new allegations that, at the time of the accident, Mayo acted on behalf of or for the benefit of Leslie and was her agent. The amended complaint also fails to identify with specificity who breached the duties owed to Garth. Regardless, the amended complaint raises old and new claims as to both defendants, that they: owned, operated, maintained, controlled, and drove the vehicle so that it proximately caused Garth's injuries, and failed to keep the vehicle under control, maintain a proper lookout, decrease speed, and give an audible warning.

On March 9, 2020, Leslie filed two motions. The first was a motion to strike the amended complaint as to Mayo since he was previously dismissed with prejudice. On March 10, 2020, this court granted the motion to strike. The second motion was to dismiss the amended complaint pursuant to Code of Civil Procedure section 2-619. The parties have fully briefed this matter.

Analysis

Leslie brings her motion to dismiss pursuant to Code of Civil Procedure section 2-619. *See* 735 ILCS 5/2-619. Leslie correctly points out as a factual matter that the amended complaint alleges, for the first time, Leslie's liability based on an agency relationship with Mayo. Based on this fact, Leslie argues as a legal matter that Garth's amended complaint must be dismissed because she filed it more than two years after the two-year statute of limitations had expired.

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 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). 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.

At issue here is whether Garth is authorized to file an amended complaint against Leslie for her alleged agency relationship with Mayo. Amendments and the relation-back doctrine are governed exclusively by Code of Civil Procedure section 2-616. *See Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 18 (citing *Apollo Real Estate Invest. Fund IV, L.P. v. Gelber*, 398 Ill.

App. 3d 773, 782 (1st Dist. 2009)). Any analysis must, therefore, begin with the Code of Civil Procedure that provides, in part:

- (a) At any time before final judgment amendments may be allowed on just and reasonable terms . . . changing the cause of action . . . or adding new causes of action . . . which may enable the plaintiff to sustain the claim for which it was intended to be brought
- (b) The cause of action . . . shall not be barred by lapse of time under any statute . . . if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted . . . grew out of the same transaction or occurrence set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact or some other matter which is a necessary condition precedent to the right of recovery . . . and for that purpose only, an amendment to any pleading shall be held to relate back to the date of the filing of the original pleading so amended.

735 ILCS 5/2-616(a) & (b).

Illinois follows a liberal policy of allowing amendments, “so as to enable parties to fully present their alleged cause or causes of action.” *Grove v. Carle Found. Hosp.*, 364 Ill. App. 3d 412, 417, (4th Dist. 2006). A party does not, however, have an absolute right to amend a complaint. *Id.* To determine whether an amendment is permissible, a court is to consider four factors: “(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.” *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992).

As to the first factor, Leslie argues that the amended complaint based on agency does not cure a defective pleading but adds, too late, a new cause of action. There is, however, a sharp distinction, between “a complaint that alleges no cause of action, which may be challenged at any time, and one which defectively or imperfectly alleges a cause of action.” *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62 (1994) (citing cases). It is highly significant that Leslie answered the original complaint, a complaint that did not contain an agency cause of action against her. Indeed, all of the allegations in the original complaint went to Mayo’s alleged negligent driving. That begs the question: What was Leslie answering? She must have understood from the very beginning her potential liability in an agency relationship with Mayo, otherwise she would have filed a motion to dismiss (which she should have given the original complaint’s insufficient pleading). Based on Leslie’s own pleadings, it is unreasonable to conclude that Garth’s amended complaint adds a new cause of action, but simply cures a defect that Leslie should have raised in the first place. *See Jones v. O’Brien Tire & Battery Serv. Ctr., Inc.*, 374 Ill. App. 3d 918, 927, 871 N.E.2d 98, 312 Ill. Dec. 698 (2007) (distinguishing between adding a cause of action and curing a defective pleading).

The second factor – prejudice to Leslie – follows directly from the first, and is considered the most important. *See Hartzog v. Martinez*, 372 Ill. App. 3d 515, 525 (1st Dist. 2007). “Prejudice may be shown where delay before seeking an amendment leaves a party unprepared to respond to a new theory at trial.” *Miller v. Pinnacle Door Co.*, 301 Ill. App. 3d 257, 261 (4th Dist. 1998). Here, Leslie cannot argue that she is prejudiced and unprepared to respond to an agency theory at trial. Leslie answered the original complaint, responded to written discovery, and sat for a deposition. Since it is uncontested that Leslie did not drive the car that struck Garth, Leslie could have only been named as a defendant in an agency capacity. For her to claim prejudice at this point belies the last two years of her participating in this litigation.

As to the third factor, the amended complaint is timely filed. Although the statute of limitations has expired for new claims, this is not a new claim, for all of the reasons stated above. Leslie has always been in this lawsuit based on an agency theory, whether pleaded, or not. The amended complaint is, therefore, timely filed.

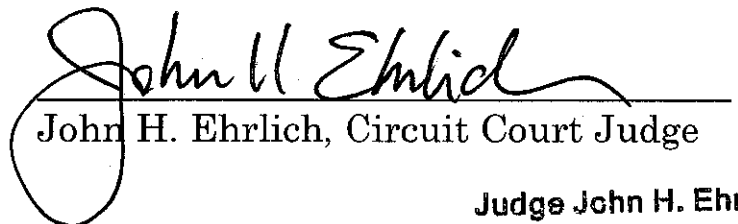
As to the fourth factor, the amended complaint could have, and should have, been filed at a much earlier point in the litigation. The logical time would have been immediately after Mayo's dismissal with prejudice. The delay is, however, of no moment because, once again, Garth's theory against Leslie has not changed from the inception of the lawsuit.

There is little question that the original and amended complaints are insufficiently pleaded, but apparently that has never bothered Leslie up until now. Leslie seeks to minimize her participation in the lawsuit in order to claim that the amended complaint is a surprise. That argument cannot be accepted as a matter of fact and law.

Conclusion

For the reasons stated above, it is ordered that:

1. Leslie's motion to dismiss the amended complaint is denied; and
2. A case management conference will be held on June 15, 2020 at 9:00 a.m.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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Circuit Court 2075