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

Julianna Marek, Plaintiff, v. We'll Drive Home Backwards, LLC, BLVD Capital, and the Habitat Company of Illinois, LLC, Defendants.	)	No. 20 L 3081

MEMORANDUM OPINION AND ORDER

The relation-back doctrine prevents the loss of causes of action from technical errors. Here, the defendants knew the plaintiff's original complaint misidentified both the location of the plaintiff's injury and the property's owner. The plaintiff's correction of those errors after the statute of limitations had expired altered neither the plaintiff's claims nor the defendant's defenses. For those reasons, the defendant's motion to dismiss must be denied.

Facts

On March 29, 2018, Julianna Marek walked down the back stairs at 10020 South Sayre Avenue in the Village of Chicago Ridge. Marek slipped on an accumulation of rock salt on the stairs that had not been cleared. Marek fell and was injured.

On March 12, 2020, Cheryl Polarek, Marek's attorney, e-mailed Brenda Lee, a claims specialist for Philadelphia Insurance Companies (PIA). Lee averred that PIA provided a general liability policy for the property located at 10020 South Sayre Avenue. In the e-mail, Polarek referred to a March 11, 2020

conversation between Polarek and Lee and stated that Polarek had prepared a complaint for filing solely to preserve Marek's case from the impending statute of limitations. Polarek asked Lee to confirm their understanding that Polarek would withhold service pending a demand package in an attempt to settle Marek's claim.

On March 13, 2020, Marek filed her original complaint. The complaint identified the location of the incident as 7933 South 82nd Court in the Village of Justice, Marek's home address. The complaint named Rudogu, Inc. as the only defendant. The Cook County Recorder of Deeds' website indicates that Rudogu owns 7933 South 82nd Court. *See* https://ccrecorder.org/parcels/show/parcel/319916/ (accessed Sept. 4, 2020).

On March 26, 2020, Polarek e-mailed Lee and referred to a prior conversation on an unidentified date. Polarek indicated she planned to file an amended complaint, but would delay service of process. Polarek stated that Marek had completed treatment in February 2020 and her medical records had been ordered. Polarek expressed her motivation to resolve the case without "full-blown litigation." Polarek informed Lee that Polarek would send a demand letter after she received all the medical records.

On May 14, 2020, Polarek filed Marek's amended complaint. The amended complaint identified the location of Marek's injury as 10020 South Sayre Avenue in Chicago Ridge. The amended complaint also named the currently identified defendants.

On July 14, 2020, Polarek e-mailed Linda Kolosowski and Richard Valek, attorneys for the defendants. Polarek wrote that her office had mistakenly sent out the amended complaint for service of process. Polarek referred to her March 10, 2020 conversation with Lee in which Polarek indicated she would file suit only to preserve Marek's claim from the statute of limitations. Polarek wrote that Lee had agreed the parties would attempt to negotiate the claim after the medical records had been received.

On July 20, 2020, Valek responded to Polarek in an e-mail. Valek indicated that Lee wanted Valek to file a motion. That motion is the present one to dismiss filed on June 24, 2020. On August 17, 2020, Marek filed her response brief, and on August 28, 2020, the defendants filed their reply.

Analysis

The defendants bring their motion 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 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).

One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim, "was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5). The statute of limitation applicable to a personal injury action or a statutory penalty is two years from the date of the occurrence. 735 ILCS 5/13-202. The Code of Civil Procedure also provides, however, a so-called "relation-back" safe harbor to plaintiffs. As stated, in part:

> The cause of action . . . set up in any amended pleading shall not be barred by lapse of time . . . 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 existence of some fact . . . which is a

necessary condition precedent to the right of recovery
. . . .

735 ILCS 5/2-616(b).

The defendants argue that Marek's errors in initially naming the wrong location and defendant and correcting them after the running of the statue of limitations are material mistakes not relating back to the original complaint. Marek argues, in turn, that naming the wrong location and defendants were non-essential scrivener's errors. She argues further that the relation-back doctrine authorizes her amended filing.

The purpose of the relation-back doctrine is to provide fairness to litigants and "preserve causes of action against loss by reason of technical default unrelated to the merits." *Porter v. Decatur Mem'l Hosp.*, 227 Ill. 2d 343, 355 (2008). The legislature, by enacting this provision, "'struck a balance between a preference for resolving disputes on their merits and preventing surprise or prejudice to a party resulting from a lack of notice of the conduct or condition upon which liability is asserted against him.'" *Cammon v. West Suburban Hosp. Med. Cntr.*, 301 Ill. App. 3d 939, 946 (1st Dist. 1998) (quoting *Yette v. Casey's Gen. Stores, Inc.*, 263 Ill. App. 3d 422, 425 (4th Dist. 1994)). "Courts should therefore liberally construe the requirements of section 2-616(b) to allow resolution of litigation on the merits and to avoid elevating questions of form over substance." *Porter*, 227 Ill. 2d at 355 (citing *Bryson v. News Am. Publ'ns, Inc.*, 174 Ill. 2d 77, 106-07 (1996), and *Boatmen's Nat'l Bank of Belleville v. Direct Lines, Inc.*, 167 Ill. 2d 88, 102 (1995)).

At the same time, an amendment will be considered distinct from the original, and the relation-back doctrine will not apply if: "(1) the original and amended set of facts are separated by a significant lapse of time, or (2) the two sets of facts are different in character, as for example when one alleges a slander and the other alleges a physical assault, or (3) the two sets of facts lead to arguably different injuries." *Porter*, 227 Ill. 2d at 359 (citing *In re*

Olympia Brewing Co. Sec. Lit., 612 F. Supp. 1370, 1372 (N.D. Ill. 1985)). Amendments will relate back, however, if there exists a "'sufficiently close relationship' between the original and new claims, both in temporal proximity and in the general character of the sets of factual allegations and where the facts are all part of the events leading up to the originally alleged injury." *Id.* (citing *Olympia Brewing*, 612 F. Supp. at 1372-73).

Under section 2-616(b) and the first prong of *Porter*'s relationship test, it is plain that Marek timely filed her original complaint and the original and amended sets of facts are not separated by any lapse of time. Also under *Porter*, it is plain that the two sets of facts lead to identical injuries. The defendants' argument, therefore, focuses on the second statutory requirement – the causes of action asserted in the original and amended complaint did not grow out of the same transaction or occurrence – and the second *Porter* factor – the two sets of facts are not identical.

In support of their argument, the defendants rely on *Zeh v. Wheeler*, 111 Ill. 2d 266 (1986), and *Digby v. Chicago Park District*, 240 Ill. App. 3d 88 (1st Dist. 1992). Those cases stand generally for the proposition that the misidentification of the location or the proper defendants are material, not technical, errors that defeat application of the relation-back doctrine. In essence, the defendants would interpose *Zeh* to say:

> The flaw with [Marek's] argument is that it does not recognize that the failure to maintain in a reasonably safe condition a common stairway at [7933 South 82nd Court in the Village of Justice], involves totally different conduct by different persons at a different time and at a different place than the failure to maintain in a reasonably safe condition a common stairway at [10020 South Sayre Avenue in the Village of Chicago Ridge].

Zeh, 111 Ill. 2d at 275. To that end, the *Zeh* court favorably quoted the trial judge who had written:

> Here the ownership and responsibility of the property, the relationship and the role of the person on the property, the condition of the property from the accumulation or non-accumulation of natural or unnatural processes, how and when they got there are, in fact, wedded and interwoven with the cause of action in a very real sense. . . .

Id. at 275-76.

The *Zeh* court reasoned that: "the occurrence upon which the cause of action is based must be properly pleaded to give a defendant a reasonable amount of information concerning where the incident took place. The failure here to properly plead the location of the injury is not a technical defect which can be cured after the running of the statute of limitations." *Id* at. 278. The court rejected Zeh's argument that the defendants had notice because the substance of both complaints was identical except for the street name, the defendants managed both buildings, and the buildings were only two blocks apart. *Id.* at 279. The court rejected that argument because, "[it] would require an owner or manager of multiple parcels of realty to investigate each and every property when confronted with a cause of action arising out of the alleged negligent maintenance of one of its premises." *Id.*

Digby reached a similar result in a case concerning an electrocution inside a utility access point. 240 Ill. App. 3d at 89. The complaint misidentified the location two blocks from where it occurred. *Id.* at 90. The court held that, as a result, the amended complaint filed after the expiration of the statute of limitations did not relate back to the original. *Id.* at 92.

Despite their holdings, *Zeh* and *Digby* each point to the distinguishing purpose of the statute of limitations. As the *Zeh* court acknowledged, "the purpose of a statute of limitations . . . is 'to afford a defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated

while the facts are accessible.'" *Id.* at 282-83 (quoting *Geneva Construction Co. v. Martin Transfer & Storage Co.*, 4 Ill. 2d 273, 289-90 (1954)). For its part, the *Digby* court expressly distinguished its set of facts from those in *Wolf v. Meister-Neiberg, Inc.*, 143 Ill. 2d 44 (1991). In *Wolf*:

> the defendants were aware of the precise location of the accident site before the statute of limitations ran. Those defendants were given notice through (1) the deposition testimony of plaintiff; (2) the deposition testimony of a foreman involved in the accident site; (3) the deposition testimony of another worker at the accident site; and (4) documents regarding the construction project which referred to the correct location and which were produced pursuant to production requests.

240 Ill. App. 3d at 93.

As acknowledged in *Zeh* and *Digby*, a distinguishing factor is notice. Although the original complaint here misidentified the location of the injury and the property owners – factors that would otherwise be material – the defendants knew the actual location and owners of the property prior to Marek filing her original complaint. Polarek's e-mails to Lee establish that fact. And although the record does not indicate Lee's responses, it would have been incumbent on her to have clarified any misunderstanding as to location or ownership. In short, the defendants' knowledge before Marek filed her original complaint defeats their argument that they are surprised or prejudiced. The amended complaint does, therefore, relate back to the original and the defendants' motion to dismiss must be denied.

As a final note, the record suggests that PIA asked its counsel to file a motion to dismiss because Marek served process before settlement discussions. If that is true, unexpected service is not a good-faith basis for filing a motion to dismiss. That is particularly true here in light of the long

history of cases holding the relation-back doctrine inapplicable if the defendant had prior notice of the essential facts. *See, e.g., Boatmen's Nat'l Bk. v. Direct Lines, Inc.,* 167 Ill. 2d 88, 102 (1995) ("a defendant will not be prejudiced by an amendment so long as 'his attention was directed, within the time prescribed or limited, to the facts that form the basis of the claim asserted against him'"); *Bangaly v. Baggiani,* 2014 IL App (1st) 123760, ¶ 217 ("defendants . . . apprised of the existence of a class of beneficiaries who could recover under the Wrongful Death Act); *Pearl v. Waibel,* 293 Ill. App. 3d 349, 356 (4th Dist. 1997) ("[s]o long as defendants attention has been directed to the facts forming the basis of the claim against him within the prescribed time, he will not be prejudiced"); *United Parcel Serv. v. Church's Fried Chicken, Inc.,* 174 Ill. App. 3d 378, 381 (1st Dist. 1988) ("[c]omplainant must be able to show that the amendment hindered his ability to present his case on the merits")). It appears that neither this court nor the parties should have been burdened with this motion under the circumstances.

<u>Conclusion</u>

For the reasons presented above, it is ordered that:

1. Live Nation's motion to dismiss is denied;
2. Live Nation has until September 25, 2020 to answer the amended complaint; and
3. The parties are to submit an agreed category 1 case management order no later than September 25, 2020.

Judge John H. Ehrlich

SEP 11 2020

Circuit Court 2075

John H. Ehrlich, Circuit Court Judge