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

Myisha Owens,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Jason Bindra, Sakshi Bindra, and Suburban Property Management of Chicago, LLC, d/b/a Real Property Management Suburban Chicago, LLC,	)	No. 20 L 4492
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Landlord and Tenant Act prohibits as against public policy contractual provisions exculpating a lessor from liability for personal injuries to a lessee resulting from the lessor's negligence. In this case, the defendant-lessor and plaintiff-lessee executed an agreement containing statutorily prohibited exculpatory provisions. As a result, the provisions are unenforceable against the plaintiff, and the defendants' motion to dismiss must be denied.

Facts

On April 1, 2016, Myisha Owens signed a residential lease agreement with DIN Fund II, LLC to become a tenant in an apartment complex located at 441 22nd Avenue in Bellwood. The lease agreement contains two paragraphs relevant to the current dispute. Paragraph 6 of the lease agreement provides:

> LIMITATION OF LIABILITY: Except as provided by state or local law or ordinance, Landlord shall not be liable for any damages (a) occasioned by failure to keep

> Premises in repair; (b) for any loss or damage of or to Tenant's property wherever located in or about the building or premises, or (c) acts or neglect of other tenants, occupants or others at the building. Tenant shall be the sole insurer for Tenant's own property. Unless prohibited by State or local law or ordinance, Tenant shall obtain Tenant's own insurance policy to cover damage to or loss of personal possessions, as well as losses resulting from the negligence of Tenant or its guests and invitees.

Paragraph 32 states:

> LIABILITY: Landlord shall not be liable for any damage or injury to Tenant, Tenant's family, guest, invitees, agents or employees or to any person entering the Premises or building of which the Premises are a part or to goods or equipment which the Premises are a part, and Tenant hereby agrees to indemnify, defend and hold the Landlord harmless of any and all claim or assertions of every kind and nature.

On December 16, 2016, DIN Fund II, LLC assigned the lease agreement to Jason and Sakshi Bindra as the new owners of the apartment complex.

On April 29, 2018, Owens exited the apartment complex through a rear door. The steps located immediately outside the rear entrance were made of large concrete slabs. Owens fell on the concrete slab steps, suffering serious personal injuries necessitating medical care and treatment.

On April 22, 2020, Owens filed a complaint against Jason and Sakshi Bindra, and Suburban Property Management of Chicago, LLC d/b/a Real Property Management Suburban Chicago, LLC (collectively "defendants") as the owners and property managers of the apartment complex where Owens is still a tenant. The complaint presents three counts. Counts 1 and 2 against Jason and Sakshi Bindra, respectively, allege they

carelessly and negligently failed to: (1) reduce the height of the concrete slab; (2) level the slab; (3) provide handrails; (4) provide a safe method of ingress and egress; (5) failed to warn tenants of the stairs' dangerous condition; and (6) maintain the premises in a reasonably safe condition. Count 3 against Suburban Property Management repeats the claims above and also claims it carelessly and negligently failed to communicate the dangerous condition about the stairs to the property owners.

On September 18, 2020, the defendants filed and submitted their motion to dismiss. On September 21, 2020, this court entered and continued the defendants' motion in part and denied it in part. The same day, this court ruled that Owens filed her complaint within the appropriate statute of limitations and that her claims met the damages threshold to remain in the Law Division. At this time, the import of paragraphs 6 and 32 are still contested. The remaining issue is whether Owens, by executing the residential lease agreement, agreed that Suburban Property Management was not liable to Owens for any injury she might sustain.

Analysis

The Code of Civil Procedure authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. 735 ILCS 5/2-619. *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). 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.

One of the enumerated grounds for a section 2-619 motion to dismiss is that the claim is barred by "affirmative matter" that 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 that negates the cause of action completely or refutes 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. The defendant, as the movant, "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). "When a motion to dismiss is based on facts not apparent from the face of the complaint, the movant 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); *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116 (1st Dist. 1993); *see also Hollingshead v. A.G. Edwards & Sons, Inc.*, 396 Ill. App. 3d 1095, 1101-02 (5th Dist. 2009) ("By presenting an affidavit supporting the basis for the motion, the defendant satisfies the initial burden of going forward . . . ."). If the defendant carries its burden, "the burden then shifts to the plaintiff, who must establish that the affirmative 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 at 116). The plaintiff may establish this by presenting "affidavits or other proof." 735 ILCS 5/2-619(c).

At issue are two clauses in the lease agreement. The defendants rely on paragraphs 6 and 32 in support of their motion to dismiss; alternatively, Owens relies on those same paragraphs for the opposite conclusion. The defendants present three arguments. First, they contend Owens contractually agreed Suburban Realty Management would not be liable for any personal damage or injury and further agreed to indemnify, defend, and hold Suburban Realty Management harmless from any and all claims. The defendants note that neither party has

indicated they are ending their relationship as evidenced by Owens' continued residency at the apartment complex.

Second, the defendants argue that, although Owens limits her argument to the Illinois Landlord and Tenant Act (LTA), she does not deny knowingly executing the lease agreement. She also fails to assert affirmative defenses such as lack of capacity, duress, fraud, misrepresentation, undue influence, or mistake of fact. Further, the defendants stress this is a premises liability case, not a negligence suit. According to the defendants, Owens fails to argue the premises were in disrepair or a different condition on April 29, 2018 than at any other time she navigated the steps without incident. In sum, the defendants argue that Owens' reliance on the LTA section 1 is misplaced as it concerns negligence actions, not premises actions.

Third, the defendants argue paragraphs 6 and 32 contain clear, explicit, and unequivocal language that Illinois courts have found to be valid and enforceable exculpatory clauses. *See Garrison v. Combined Fitness Centre*, 201 Ill. App. 3d 581, 584 (1st Dist. 1990). The defendants argue the indemnification clause in paragraph 32 is not expressly prohibited by statute, and the case on which Owens relies, *McMinn v. Cavanaugh*, plainly distinguishes between exculpatory and indemnity clauses. 177 Ill. App. 3d 353, 356-357 (1st Dist. 1988). Further, these two clauses are severable such that if one is void, the remainder is not.

In contrast, Owens argues the two provisions improperly seek to exculpate the defendants from liability. Owens relies on the LTA which, she argues, forbids both the exculpatory and indemnity clauses in lease agreements, rendering them void. 765 ILCS 705/1 *et seq.* In support of her argument, Owens relies on *McMinn*. In that case, the plaintiff fell on pavement at a service station and sued the lessor and lessee. 177 Ill. App. 3d at 355. The lessor sought indemnity from the lessee based on an indemnification clause in the lease. *Id.* The court considered whether the LTA section 1 prohibited indemnification and concluded that indemnification "has the same effect as a lease

exculpatory clause: the landlord does not pay." *Id.* at 357. The court held, "the Act, by clear and necessary implication, forbids indemnity agreements in leases as well as exculpatory agreements." *Id.* Second, Owens argues that "[a] void lease provision cannot be used to avoid liability nor to shift financial responsibility. . . ." *Economy Mech. Indus., Inc. v. T.J. Higgins Co.*, 294 Ill. App. 3d 150, 154 (1st Dist. 1997). In sum, Owens argues paragraphs 6 and 32 do not bar her claims.

In the face of these arguments, this court must determine whether paragraphs 6 and 32 are permissible provisions subject to the freedom of contract or void as against public policy. It hardly bears repeating that a lease is an agreement subject to the law of contracts, and any ambiguities in a residential lease are strictly construed against the lessor and in the tenant's favor. *Towne Realty, Inc. v. Shaffer,* 331 Ill. App. 3d 531, 536 (4th Dist. 2002). It is also true that laws and statutes in existence at the time a contract is executed are considered part of the contract. *Dubey v. Public Storage, Inc.*, 395 Ill. App. 3d 342, 351 (1st Dist. 2009) (citing *Jewelers Mut. Ins. Co. v. Firstar Bank Ill.,* 341 Ill. App. 3d 14, 18-19 (1st Dist. 2003)).

As a matter of law, the document executed by DIN Fund II, LLC (later assigned to Suburban Realty Management) and Owens constitutes a lease. A lease requires a definite agreement as to: (1) the extent and bounds of the property; (2) the term; and (3) the rental price and manner of payment. *Millennium Park Joint Venture, LLC v. Houlihan*, 393 Ill. App. 3d 13, 25 (2009). As a matter of fact, the parties do not contest the existence of a lease, only the enforceability of two of its provisions.

It also plain as a matter of law that paragraphs 6 and 32 are exculpatory or indemnification provisions. Exculpatory clauses must contain "clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation . . . it encompasses and for which [one party] agrees to relieve the [other party] from a duty of care. *Offord v. Fitness Int'l, LLC,* 2015 IL App (1st) 150879, ¶ 20 (quoting *Platt v. Gateway Int'l Motorsports*

Corp., 351 Ill. App. 3d 326, 330 (5th Dist. 2004)). At the time the parties execute the agreement, it is unnecessary that they contemplate the precise cause of the injury that later transpires, *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581, 585 (1st Dist. 1990), but the benefitting party must put the other party on notice of the possible range of dangers for which the other party assumes the risk. *Offord*, 2015 IL App (1st) at ¶ 20. Most importantly, the scope of an exculpatory clause is defined by the foreseeability of the specific danger. *Id.* (citing *Larsen v. Vic Tanny Int'l*, 130 Ill. App. 3d 574, 577 (5th Dist. 1984)). Courts disfavor exculpatory provisions and construe them strictly against the benefitting party, particularly if that party drafted the provision. *McKinney v. Castleman*, 2012 IL App (4th) 110098, ¶ 14 (citing *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378, 395 (1986).

Much of this discussion is simply background. The reason is that, at the time Owens executed her rental agreement, the LTA was in effect. The statute plainly states in its opening provision that:

> Every covenant, agreement or understanding in or in connection with . . . any lease of real property, exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor . . . in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

765 ILCS 705/1(a) (eff. Aug. 16, 2005). The statute also makes plain in the converse that subsection 1(a) applies to residential leases: "Subsection (a) does not apply to a provision in a non-residential lease that exempts the lessor from liability for property damage." 765 ILCS 705/1(b). The legislature enacted the LTA to prevent landlords from escaping liability for their own negligence through the use of exculpatory lease provisions. *Whitledge v. Klein*, 348 Ill. App. 3d 1059, 1063-64 (4th Dist. 2004). The

Whitledge court explicitly found a clause requiring the tenant to indemnify the landlord violated the LTA for the same reasons the LTA prohibited exculpatory clauses. 348 Ill. App. 3d at 1062. As the court explained:

> An indemnity clause in a lease has the same purpose as an exculpatory clause: the landlord does not pay. The legislature, while prohibiting landlords from avoiding paying claims through exculpation, did not intend to allow landlords to avoid paying claims through indemnity. . . . [T]he Act, by clear and necessary implication, forbids indemnity agreements in leases as well as exculpatory agreements.

Id. (quoting *McMinn v. Kavanaugh,* 177 Ill. App. 3d 353, 357 (1st Dist. 1988)). The LTA, therefore, expresses Illinois public policy and invalidates exculpatory provisions such as paragraphs 6 and 32.

Suburban Realty Management's argument that Owens voluntarily agreed to the exculpatory language is wholly unpersuasive in light of the plain public policy expressed by the LTA. In fact, Suburban Realty Management provided Owens with a residential lease agreement that had been expressly prohibited by the LTA for 11 years prior to the parties executing the document. Such oversight is either intentional or gross ignorance of the law, neither of which this court takes lightly.

Suburban Realty Management's argument that Owens has brought a premises liability action, not a negligence action, is irrelevant. The LTA does not distinguish between different types of causes of action; rather, the language is broad and prohibits exculpatory provisions of any kind in a landlord-tenant residential lease. "Whether a particular lease provision is void depends not on the cause of action in which the lease provision is invoked, but rather, whether the language of the lease provision runs afoul of the statutory prohibition." *Economy Mech. Indus., Inc. v. T.J. Higgins Co.*, 294 Ill. App. 3d 150, 154 (1st Dist. 1997).

Finally, the cases relied on by Suburban Realty Management are off point. *Garrison*, for example, concerns the enforceability of a fitness club's membership agreement. *See* 201 Ill. App. 3d at 585. Such an agreement based on a commercial transaction is transparently not subject to the LTA.

Conclusion

For the reasons presented above, it is ordered that:

1. The defendants' motion to dismiss is denied; and
2. The defendants have until December 11, 2020 to answer the complaint.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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