2017 IL App (1st) 163422-U
Order filed: September 22, 2017

FIFTH DIVISION

No. 1-16-3422

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ALAN KIRKPATRICK, Plaintiff-Appellant, v. THE VILLAGE OF ROSEMONT, a Municipal Corporation; BOMARK CLEANING SERVICE CORPORATION, an Illinois Corporation; and EVENT VENUE SERVICES, INC., an Illinois Corporation, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 13 L 5224 Honorable Daniel T. Gillespie, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the section 2-615 dismissal of the complaint of plaintiff-appellant alleging willful and wanton conduct against defendant-appellee, the Village of Rosemont, finding plaintiff failed to state a cause of action. We affirmed the grant of summary judgment for defendants-appellees, Bomark Cleaning Service Corporation and Event Venue Services, Inc., on plaintiff's negligence complaint, finding plaintiff failed to present a factual basis arguably entitling him to judgment.

¶ 2 Plaintiff-appellant, Alan Kirkpatrick, fell and was injured while attending a concert at the Allstate Arena (Arena). Plaintiff brought suit against defendants-appellees, the Village of Rosemont (Village), Bomark Cleaning Services Corporation (Bomark), and Event Venue Services, Inc. (EVS), seeking damages for his injuries. The circuit court dismissed plaintiff's claim against the Village, with prejudice, and granted summary judgment in favor of both Bomark and EVS. Plaintiff appeals the dismissal and summary judgment orders. We affirm.

¶ 3 On May 30, 2012, plaintiff and his wife attended a concert at the Arena, which is located in and owned, operated, and maintained by the Village and used for recreational activities. Plaintiff's seat was located in the lower or ground section of the Arena near the stage on a removable metal riser. The Village had supplied the removable metal risers and installed them by attaching them to the Arena's permanent concrete stairs and seats. The stairs of the metal risers did not have handrails, but there were rubber treads on the steps. Patrick Nagle, the executive director of the Arena, was not aware of any prior complaints about how the risers were "utilized" in the Arena, or that the metal risers were "irregular in size," or caused "a problem for people to walk on." The Village had not been notified of any spills in the section where plaintiff was seated prior to his fall.

¶ 4 Anthony Adornetto, the lead supervisor for Bomark at the Arena, testified that Bomark contracted with the Village to provided janitorial, maintenance, and cleaning services at the Arena and was to perform those services before, during, and after the concert. Bomark had a cleaning crew of 12 people at the concert. During the concert, the cleaning crew was stationed in the concession area or the bathrooms and was not in the seating area so as not to disrupt the performance. If a spill occurred inside the seating area, an usher would inform Bomark, who

would then send someone in to clean it up. Bomark had not been notified of any spills in the section where plaintiff was seated prior to his fall.

¶ 5 James Hennessy, the EVS event manager for the Arena, testified that EVS had contracted with the Village to provide ushering and other related services—*e.g.*, checking tickets and helping patrons to their seats—during events at the Arena. During a performance, EVS will assign an operations manager, 9 to 10 supervisors, and about 55 ushers to the Arena. The supervisors roam the Arena to assist with any patron problems. The Village instructed EVS that any spills were to be reported to Bomark. An usher would report a spill to the nearest person with a radio who would "pass the word to Bomark." EVS had not been notified of any spills in the section where plaintiff was seated prior to his fall. EVS had no responsibilities or duties with the design or construction of the risers.

¶ 6 Plaintiff testified that, before the concert began, he walked down the permanent concrete stairs, and then the metal stairs, to reach his seat. The Arena was fully illuminated. Plaintiff was wearing "athletic shoes."

¶ 7 During a break in the performance, plaintiff left his seat to purchase drinks. To do so, plaintiff proceeded up the metal stairs, and then the concrete stairs, to the concession area. Plaintiff did not have any difficulty climbing up the metal stairs and did not notice any liquid spills.

¶ 8 When he returned to his seat, plaintiff was carrying a drink in each hand. The lights in the Arena were then dimmed. Plaintiff described the metal stairs as not being a "full width," nor a "full height" and that, "with the lights dimmed it's hard to see where you need to step." The height of the metal stairs was less than the height of the permanent concrete steps. As he descended the metal stairs, plaintiff slipped and he fell, head first, down the stairway. The fall

happened when he was 3 to 4 rows from his seat and he had "made it a fair way;" about 10 steps. When he landed, plaintiff noticed a puddle of liquid and ice, approximately 12 to 18 inches in diameter, on the right side of the step where he had slipped. He did not know how long the puddle had been there and he did not see it prior to his fall. Plaintiff believed the puddle was a beverage and "originated from people's drinks [because] [t]here's no other way that water or liquid would wind up on the floor in a facility like that." Plaintiff testified that "[i]t was really fast, but between liquid that was spilled on the stairs, and the fact that the stairs and the metal riser sections are only, maybe, a foot-and-a half, or two wide, at some point I slipped on wetness and/or the step not being full width."

¶ 9 Plaintiff later testified, though, that he was not sure how he had fallen:

> "Q. Now, did you step off the side of the step?
>
> A. I'm not completely sure. I think I did. I think I did.
>
> Q. Okay. So if I ask you if you did or didn't step off the side of the step precipitating your fall, can you tell me yes or no?
>
> A. As an absolute fact, it's a bit unclear to me."
>
> ***
>
> Q. Was there any kind of gritty surface or anything on the treads in the area where you fell?
>
> A. I don't remember that.
>
> Q. Do you know if you would have fallen without regard to any liquid on a tread?
>
> A. Oh, I think that's quite possible.
>
> Q. I understand that you are saying it's possible. Do you know if you would or you wouldn't have?

***

A. I really don't have an answer for that.

***

Q. Do you know if you stepped off the tread and then slipped, or do you know *** what the sequence was of your fall?

A. I can't really answer that.

***

Q. Do you have any knowledge how long whatever liquid was there had been there-

A. No.

Q. -before your fall? You don't know where it came from. You assume it was from a drink, but you don't know where it came from?

A. I didn't see it deposited there.

***

Q. Can you describe your actual fall in some detail?

***

A. [I]t may have been a combination of wetness and the design of the steps. I can't be certain about that."

¶ 10 At the time he fell, plaintiff did not observe an usher near his seat. Plaintiff believed that, the span of time from the point he left his seat until he fell, was about 10 to 15 minutes.

¶ 11 Thomas Raines testified that he and his cousin assisted plaintiff after he fell. Mr. Raines did not see plaintiff's fall and could not say how it happened. While he was assisting plaintiff, Mr. Raines observed a liquid on the ground and that plaintiff's shirt was wet. Mr. Raines' cousin

looked at the liquid and noted that it was "soap like." Although Mr. Raines thought that "[t]here could have been an usher that was mopping and didn't put a *** sign up because they were in a hurry," he did not know if that was the case. Mr. Raines had no idea "whether [the liquid] was ice, beer, [or] juice." He did not recall, nor did he know, whether the metal stairs were wet prior to plaintiff's fall. Mr. Raines did not know how long the liquid had been there. Mr. Raines agreed that the spill would be "difficult to see" if a person was not "really looking for this particular substance."

¶ 12 In his fourth-amended complaint, plaintiff named the Village in a willful and wanton count (count I), and Bomark (count II) and EVS (count III) in negligence counts. The Village moved to dismiss count I of the fourth-amended complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), arguing that plaintiff had not sufficiently pleaded an action based on wilful and wanton conduct. On July 29, 2014, the circuit court entered an order which granted the Village's motion with prejudice.[1]

¶ 13 On May 26, 2015, plaintiff filed a fifth-amended complaint which, again, brought a wilful and wanton claim against the Village, and was pled solely to preserve for appeal the dismissal order of July 29, 2014, and negligence counts against EVS and Bomark.

¶ 14 Bomark and EVS moved for summary judgment on counts II and III. The circuit court, on December 6, 2016, granted those motions. Plaintiff has appealed.

¶ 15 On appeal, plaintiff contends the circuit court erred in dismissing count I of the complaint against the Village, with prejudice, as he had sufficiently alleged willful and wanton conduct.

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[1] On August 27, 2014, plaintiff filed a notice of appeal from the July 29, 2014, order of the circuit court. We dismissed that appeal for lack of jurisdiction on February 20, 2015. See *Kirkpatrick v. Village of Rosemont*, 2015 IL App (1st) 142658-U.

Plaintiff further argues that the circuit court should have allowed him to amend count I. Finally, plaintiff argues that the circuit court erred in granting summary judgment in favor of Bomark and EVS on counts II and III. We will address each argument in turn.

¶ 16 A motion to dismiss brought under section 2-615 of the Code tests the legal sufficiency of a complaint by asserting defects on the face of the pleading. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 364 (2004). When considering the sufficiency of a complaint, we will "accept as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts." *Id.* At the same time, "we construe the allegations in the complaint in the light most favorable to the plaintiff." *Id.* A cause of action should not be dismissed under section 2-615 unless it is clearly apparent that no set of facts can be proved entitling plaintiff to recover. *Signapori v. Jagaria*, 2017 IL App (1st) 160937, ¶ 16. Our review of a dismissal order under section 2-615 is *de novo*. *Id.*

¶ 17 "When the plaintiff is alleging that the defendant engaged in willful and wanton conduct, such conduct must be shown through well-pled facts, and not by merely labeling the conduct willful and wanton. [Citations.] Conclusional statements of fact or law will not suffice to state a cause of action regardless of whether they succeed in generally informing the defendant of the nature of the claim against him or her." *Winfrey v. Chicago Park District*, 274 Ill. App. 3d 939, 943 (1995).

¶ 18 Section 3-106 of the Local Governmental and Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-106 (West 2012)), immunizes local public entities and employees for injuries arising from the "existence of a condition of any public property intended or permitted to be used for recreational purposes" except where liability is based on "[wilful] and wanton conduct proximately causing such injury." *Id.* There is no dispute that the Arena is public

property intended or permitted to be used for recreational purposes within the meaning of section 3-106.

¶ 19 Section 1-210 of the Act defines willful and wanton conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210 (West 2012). The Act's statutory definition of willful and wanton applies here because we must evaluate a public entity's conduct. See *e.g.*, *Lorenc v. Forest Preserve District of Will County*, 2016 IL App (3d) 150424, ¶ 20.

¶ 20 "This definition of willful and wanton conduct contemplates more than mere inadvertence, incompetence, or unskillfulness. Thus, courts employing the Act's definition have found willful and wanton conduct to exist where a public entity knew of a dangerous condition yet took no action to correct the condition, where a public entity was aware of prior injuries caused by a dangerous condition but took no action to correct it, and where a public entity intentionally removed a safety feature from recreational property despite the known danger of doing so." (Internal citations omitted.) *Leja v. Community Unit School District 300*, 2012 IL App (2d) 120156, ¶ 11. Knowledge of the dangerous condition may be either actual or constructive. *Fennerty v. City of Chicago*, 2015 IL App (1st) 140679, ¶ 21. Constructive knowledge exists when the dangerous condition existed for a sufficient time or was so conspicuous that defendant should have discovered the condition through the exercise of reasonable care. *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 228-29 (1994).

¶ 21 Plaintiff alleged in his fourth-amended complaint that the Village engaged in willful and wanton conduct by erecting and maintaining the metal stairs that (1) were uneven with the existing stadium seating and aisles, creating an unreasonable risk and danger to invitees such as

plaintiff; and (2) allowing an "unnatural accumulation of liquid beverage and/or icy substance to exist on the stairway," creating a foreseeable risk of danger for invitees such as plaintiff. However, plaintiff never pleaded any facts in his fourth-amended complaint as to *how* uneven the metal stairs were to the existing stairs or how long they were in a dangerously uneven condition, *i.e.*, he failed to plead any facts showing that the metal stairs upon which he fell were so obviously uneven and dangerous for a sufficient period of time as to put the Village on actual or constructive notice thereof. Nor did plaintiff plead any facts showing that: the Village was otherwise informed by any of the concert-goers, ushers or other persons in the Arena that the metal stairs were so uneven and irregular as to constitute a dangerous condition to walk on; that the Village was informed of the unnatural accumulation of liquid beverage or icy substance on the metal stairs; that the Village knew of any other injuries related either to the uneven and irregular condition of the metal stairs or to the unnatural accumulation of liquid beverage or icy substance; or that the Village intentionally removed a safety feature or device from those stairs. Accordingly, count I of plaintiff's fourth-amended complaint failed to adequately allege that the Village acted wilfully and wantonly so as to preclude its section 3-106 immunity. *Id.*

¶ 22 Further, our supreme court has held that a public entity is not guilty of willful and wanton conduct where it has "exercised some precautions to protect [persons] from injury, even if those precautions were insufficient." *Barr v. Cunningham*, 2017 IL 120751, ¶ 18. Plaintiff here pleaded that the Village took precautions to protect persons from falling down the metal stairs, specifically, the Village contracted with Bomark to provide janitorial, maintenance and cleaning services at the Arena (which would include inspecting and cleaning the metal stairs) and contracted with EVS to, among other things, provide "technical coordination" of the metal stairs, which also included inspecting them and ensuring that any unnatural accumulations of liquid

beverage and icy substances are removed. By alleging that the Village took some precautions to protect patrons from falling down the metal stairs, plaintiff has effectively pleaded that the Village did not engage in willful and wanton conduct towards him and has thereby pleaded himself out of court. See *e.g. Tamayo v. Blagojevich*, 526 F. 3d 1074, 1086 (7th Cir. 2008) ("a party may plead itself out of court by pleading facts that establish an impenetrable defense to its claims").

¶ 23 Next, plaintiff contends the circuit court erred by dismissing his willful and wanton claim against the Village with prejudice and denying him leave to file further pleadings against the Village. The record on appeal contains no indication plaintiff sought leave in the circuit court to file further pleadings against the Village following the dismissal order, not does it contain any proposed pleadings. Accordingly, the issue is forfeited. See *Teter v. Clemens*, 112 Ill. 2d 252, 261 (1986).

¶ 24 Next, we address the grant of summary judgment in favor of Bomark on count II of plaintiff's fifth-amended complaint alleging negligence. Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, viewed in the light most favorable to the nonmoving party, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Village of Arlington Heights v. Pappas*, 2016 IL App (1st) 151802, ¶ 20. Our review is *de novo*. *Id.*

¶ 25 The elements of a negligence cause of action are a duty owed by defendant to plaintiff, defendant's breach of that duty, and an injury to plaintiff proximately caused by that breach. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 294 (2000).

¶ 26 Initially, we note that plaintiff argues on appeal that Bomark owed him a duty of care under a premises liability theory. However, careful review of plaintiff's fifth-amended

complaint reveals that he only alleged that Bomark was negligent because of its failure to adequately perform cleaning, janitorial, and maintenance services required by contract, specifically, Bomark negligently failed to clean up and warn about the allegedly unnatural accumulation of liquid beverage and/or icy substance on the metal steps. Where defendant is charged with negligence because of its failure to perform acts allegedly required by contract, the question of whether defendant had a duty to perform the acts is determined by the terms of the contract itself. *Kotarba v. Jamrozik*, 283 Ill. App. 3d 595, 597 (1996).

¶ 27 The Bomark contract is not contained in the record on appeal. However, Bomark's contractual responsibilities were testified to by Mr. Adornetto, Mr. Hennessy, and Mr. Nagle, and their testimony makes clear that Bomark owed no duty to plaintiff under the contract at the time of his fall.

¶ 28 Anthony Adornetto testified that the 12 Bomark cleaning crew members were initially stationed near the entrances to the building and, thereafter, were assigned to stations on the north, south, east, and west sides of the building. Once the concert began, the EVS ushers closed the curtains to keep the light out, and then the 12 Bomark employees worked the lobby and bathrooms, checking for spills; they were not to enter the seating area unless called in by an usher to clean up a spill. Mr. Adornetto had no "knowledge or recollection that anybody from Bomark knew anything about any substance on the stairs or a riser prior to [plaintiff] allegedly falling."

¶ 29 James Hennessy testified that, if one of the ushers saw a spill or "maintenance issue," he was to contact a supervisor who would, in turn, notify Bomark. Bomark would then send someone in to clean up. Mr. Hennessy had no knowledge of Bomark being notified of the alleged spill involved in plaintiff's fall.

¶ 30 Patrick Nagle similarly testified to Bomark's responsibility to clean up any spills of which it is notified. Mr. Nagle had no specific knowledge of anyone notifying Bomark about the alleged spill involved in plaintiff's fall.

¶ 31 The deposition testimony of Mr. Adornetto, Mr. Hennessy, and Mr. Nagle make clear that Bomark owed no contractual duty to plaintiff to generally roam the seating area during the concert, looking for spills to clean; rather, Bomark's contractual duty was to remain outside the seating area, and to come in and clean up spills only when specifically called on to do so. Bomark was never notified of the alleged spill at issue here, and therefore Bomark owed plaintiff no duty to clean it up.

¶ 32 Further, liability cannot be predicated on surmise or conjecture as to the cause of an injury; proximate cause can only be established when there is a reasonable certainty that defendant's acts caused the injury. *Kimbrough v. Jewel Companies, Inc*., 92 Ill. App. 3d 813, 817 (1981). Here, plaintiff surmises he slipped and fell on the unidentifiable liquid and/or fell off the side of the metal stairs, injuring himself; however, he did not see the liquid until after the fall, he did not know how long it had been there, and he was "unclear" and not "completely sure" that he fell off the side of the stairs. Mr. Raines was, similarly, unclear as to how or why plaintiff had fallen. No one else testified to witnessing the fall, or its aftermath. Plaintiff has, thus, failed to establish, with any reasonable certainty, the proximate cause of his fall and injury.

¶ 33 This case is similar to *Kimbrough*, in which the plaintiff there fell on a ramp upon leaving a Jewel grocery store. *Id*. at 814. After she fell, the plaintiff saw grease spots on the ramp, but she could not say whether her foot touched the grease before she fell. *Id*. at 816. The plaintiff filed a negligence action and the trial court granted summary judgment in favor of Jewel. *Id*. at 814. The appellate court affirmed, holding:

> "[I]t is not enough for a plaintiff to show that he or she fell on the defendant's flooring. The plaintiff must go further and prove that some condition caused the fall and that this condition was caused by the defendant. Since the plaintiff has admitted that she does not know what caused the fall, and she has at no time mentioned other known witnesses who could present evidence as to this question," plaintiff failed to establish the proximate cause of her fall and summary judgment was properly granted. *Id*. at 818.

¶ 34 Similarly, here, plaintiff fell at the Arena and initially testified that he fell on the spill and/or off the side of the stairs, but later admitted he did not know how or why he fell. No one else witnessed the fall so as to be able to present evidence as to this question. Accordingly, plaintiff failed to establish the proximate cause of his fall and injury.

¶ 35 Although plaintiff is not required to prove his case at the summary judgment stage, he must present a factual basis that would arguably entitle him to judgment. *Weisberger v. Weisberger*, 2011 IL App (1st) 101557, ¶ 42. In the absence of a duty owed to him by Bomark, and in the absence of a showing of the proximate cause of his fall and injury, plaintiff has failed to present a factual basis that would arguably entitle him to judgment. Accordingly, we affirm the grant of summary judgment in favor of Bomark.

¶ 36 Next, we address the grant of summary judgment in favor of EVS on count III of plaintiff's fifth-amended complaint alleging negligence. Plaintiff alleged EVS contracted to perform event management, crowd control, site services and staffing, technical coordination of additional metal risers, and production services for events at the Arena. EVS "[n]egligently performed their event management, crowd control, site services and staffing, and technical coordination of the modified seating and temporary metal stairs installed for invitees at the Allstate Arena, when they knew or should have known in the exercise of ordinary care that

failure to perform their duties and obligations would create a forseeable risk of fall and danger for invitees such as plaintiff." Plaintiff also alleged EVS negligently failed to properly inspect the metal stairs and remove and warn about the unnatural accumulations of liquid beverage and/or icy substance on the stairs.

¶ 37 Plaintiff argues on appeal that EVS owed him a duty of care under a premises liability theory. Similar to his negligence claim against Bomark, plaintiff only alleged that EVS was negligent for failing to adequately perform its contractual duties; thus, the question of EVS's duty toward plaintiff is determined by the terms of the contract. *Kotarba*, 283 Ill. App. 3d at 597. The EVS contract, which is contained in the record on appeal, states that EVS would provide ticket taking, usher services, door control services, checkroom operation, and "other front of house guest services as requested by the [e]xecutive [d]irector or his designee." Mr. Hennessy testified that, pursuant to the contract, EVS provides about 55 ushers, and 9 or 10 supervisors. Mr. Nagle testified that an usher would have been placed within three feet of where plaintiff was seated. There was no testimony that EVS's placement of the usher within three feet of where plaintiff was sitting was, in any way, improper or in violation of the contract, nor was there any testimony that this particular usher was not in place at the time of plaintiff's fall.[2] According to Mr. Hennessy, the usher's duties included helping patrons to their seats and notifying Bomark of any observed spills, but the usher was not required to roam the stadium looking for a spill, and the alleged spill, at issue here, was not brought to the usher's attention.

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[2] Plaintiff testified he did not see an usher "near" or "below" his seat or aisle, and he was "not sure" if there was an usher "up at the top by the mezzanine level." Plaintiff was never specifically asked about an usher three feet away from him, and he never testified that such an usher was not present.

Accordingly, the usher had no duty under the contract to warn plaintiff about a spill of which the usher was unaware.

¶ 38 Also, as discussed earlier in this order, plaintiff did not present evidence showing the proximate cause of his fall and injury. In the absence of a showing of EVS's breach of duty owed to plaintiff proximately causing his fall and injury, plaintiff has failed to present a factual basis that would arguably entitle him to judgment against EVS on his negligence cause of action. Therefore, we affirm the grant of summary judgment in favor of EVS.

¶ 39 For the foregoing reasons, we affirm the circuit court.

¶ 40 Affirmed.