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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

NANCY GELMAN,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellant,)	
)	
v.)	No. 11-L-511
)	
FOREST PRESERVE DISTRICT OF)	
KANE COUNTY,)	Honorable
)	F. Keith Brown,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Burke concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in dismissing plaintiff’s complaint on the basis that defendant was immune under the Tort Immunity Act: although defendant asserted that plaintiff was injured on a “trail,” defendant could not obtain a dismissal merely by negating plaintiff’s allegations, which, taken as true, established that the area was not a “trail.”
- ¶ 2 Plaintiff, Nancy Gelman, slipped and fell while she was walking on the Fox River Trail. She sued defendant, Forest Preserve District of Kane County, claiming that it had a duty to maintain the area where she fell. Defendant moved to dismiss (see 735 ILCS 5/2-619(a)(9) (West 2010)), arguing that it was immune from liability pursuant to section 3-107(b) of the Local Governmental and

Governmental Employees Tort Immunity Act (Act) (745 ILCS 10/3-107(b) (West 2010)). Section 3-107(b) of the Act provides that local government entities are not liable for injuries caused by the condition of “[a]ny hiking, riding, fishing or hunting trail.” *Id.* The trial court granted the motion to dismiss, and this timely appeal followed. We reverse the dismissal and remand the cause for further proceedings.

¶ 3 The facts relevant to resolving this appeal are as follows.¹ In her original complaint, plaintiff alleged that on and prior to September 29, 2010, defendant owned, operated, maintained, and controlled a walking path known as the Fox River Trail. This included the property adjacent to the path that was east of the Fox River and south of the casino in Elgin, Illinois. On and before September 29, 2010, the property abutting the path consisted of loose earth and stone that sloped steeply down toward the river. The condition of the area adjacent to the path posed a falling risk to people using it. Plaintiff alleged that defendant knew or should have known about this condition of the path and that defendant had a duty to maintain the path and the area abutting the path. Plaintiff then asserted that defendant breached this duty when it allowed the area adjacent to the path to remain washed out, failed to repair the area adjacent to the path, and did not warn pedestrians about the condition of the path. Because defendant failed to maintain the path in a safe condition, plaintiff fell on the area adjacent to the path on September 29, 2010, and seriously injured herself.

¶ 4 Defendant moved to dismiss the complaint (735 ILCS 5/2-619(a)(9) (West 2010)), arguing that it was immune from liability pursuant to section 3-107(b) of the Act. This section of the Act provides that “neither a local public entity nor a public employee is liable for an injury caused by a

¹The facts are taken from only the common-law record, as no report of proceedings or substitute for a report of proceedings was submitted to this court.

condition of *** (b) Any hiking, riding, fishing or hunting trail.” 745 ILCS 10/3-107(b) (West 2010). Citing *Mull v. Kane County Forest Preserve District*, 337 Ill. App. 3d 589 (2003), defendant claimed that it was immune from liability for a fall that occurred on the Great Western Trail, and, thus, it should be immune from liability for plaintiff’s fall here. No affidavit in support of defendant’s position was attached to defendant’s motion. See 735 ILCS 5/2-619(a) (West 2010) (“If the grounds do not appear on the face of the pleading attacked[,], the motion shall be supported by affidavit.”).

¶ 5 Plaintiff moved to file an amended complaint, and the trial court granted that motion. In the amended complaint, plaintiff added:

“That the path[, *i.e.*, the Fox River Trail,] runs through residential and commercial areas of Elgin and passes by the Grand Victoria Casino and Times Square in downtown Elgin. It also passes restaurants, cafes, bike shops, and souvenir shops. At various points, it adjoins streets. It is not a marked path through forest and is not surrounded by forest, wild grasses, or shrubs.”

¶ 6 In response, defendant stood on the motion to dismiss that it had filed previously, and plaintiff filed a response to that motion to dismiss. In her response, plaintiff asserted that, unlike in *Mull* and similar cases, plaintiff did not allege that the Fox River Trail and the area adjacent to it was a marked path that runs through a forest or mountainous region or that the Fox River Trail is surrounded by wild grasses and shrubs. Rather, plaintiff noted that she alleged that the Fox River Trail traverses residential and commercial areas.

¶ 7 The trial court granted defendant’s motion to dismiss, finding that “the Fox River Trail is a trail[,] and the defendant is immune under [section 3-107(b) of] the *** Act.” This timely appeal followed.

¶ 8 At issue in this appeal is whether defendant’s motion to dismiss was properly granted. Defendant moved to dismiss plaintiff’s complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2010)). Under section 2-619(a)(9) of the Code, a claim may be dismissed if “the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim.” *Id.* “Immunity under the *** Act is an affirmative matter properly considered in a section 2-619 motion to dismiss.” *Abruzzo v. City of Park Ridge*, 231 Ill. 2d 324, 331 (2008). When ruling on a motion to dismiss, the court must construe the pleadings and any supporting documents in a light most favorable to the nonmoving party. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55. The court must accept as true all well-pleaded facts presented in the complaint and any inferences that may be drawn from those facts. *Id.* On appeal from the dismissal of a complaint, we consider whether there is a genuine issue of material fact that should have precluded dismissal of the complaint, or, in the absence of an issue of fact, whether dismissal of the complaint was proper as a matter of law. *Id.* We review such issues *de novo*. *Id.*

¶ 9 Here, accepting the well-pleaded facts in plaintiff’s complaint as true, we must conclude that the area where plaintiff fell on the Fox River Trail that is east of the Fox River and south of the casino in Elgin, Illinois is not a “trail” within the meaning of section 3-107(b) of the Act. The cases interpreting this section of the Act have made clear that a “trail” is something other than a path that runs through commercial and residential areas. See, e.g., *Brown v. Cook County Forest Preserve*,

284 Ill. App. 3d 1098, 1101 (1996) (paved path around lake in forested area is a “trail,” but a paved bicycle path that traverses developed city land is not a “trail”); *Goodwin v. Carbondale Park District*, 268 Ill. App. 3d 489, 493-94 (1994) (paved path through developed city park is not a “trail,” but an “unimproved” hiking, riding, fishing, or hunting trail that runs through undeveloped recreational areas is a “trail”). Plaintiff pleaded that the Fox River Trail where she fell is not a “trail” for purposes of the Act, because, according to plaintiff, it “runs through residential and commercial areas” and “is not a marked path through forest and is not surrounded by forest, wild grasses, or shrubs.” Although, as defendant argues on appeal, the path might indeed run through wild grasses and shrubs at some point other than where plaintiff fell, and therefore it might be considered a “trail” for purposes of the Act (see *Mull*, 337 Ill. App. 3d at 592), defendant may not obtain a dismissal by negating plaintiff’s allegations, which, as noted, must be taken as true. See *Kedzie & 103rd Currency Exchange v. Hodge*, 156 Ill. 2d 113, 115 (1993). In any event, defendant’s attempt to support its claim now by citing to its Web site is of no consequence, as, in considering whether defendant’s motion to dismiss was properly granted, we are limited to what was presented to the trial court. Further, the fact that the Great Western Trail is a “trail” for purposes of the Act does not mean that the Fox River Trail where plaintiff fell is similarly a “trail.” Accordingly, we determine that, at this point, defendant has failed to establish that it is immune from liability for plaintiff’s injuries. As a result, defendant’s motion to dismiss should not have been granted.

¶ 10 For these reasons, the judgment of the circuit court of Kane County is reversed, and this cause is remanded for further proceedings.

¶ 11 Reversed and remanded.