2013 IL App (1st) 121125-U

FIFTH DIVISION
August 23, 2013

No. 1-12-1125

SHEREE L. MEYER and KENNETH A. MEYER,	)	Appeal from the Circuit
	)	Court of Cook County
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 11 L 1573
	)	
LAIDLAW TRANSIT, INC.,	)	Honorable
	)	Eileen Mary Brewer,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 Held: Dismissal of plaintiffs' personal injury action is affirmed over plaintiffs' contention that the exclusive remedy provision in section 5(a) of the Illinois Workers' Compensation Act (820 ILCS 305/5 (West 2010)) did not bar the action.

¶ 2 Plaintiffs Sheree L. Meyer and Kenneth A. Meyer appeal from an order of the circuit court granting defendant Laidlaw Transit, Inc.'s (Laidlaw) motion to dismiss plaintiffs' personal injury and loss of consortium action pursuant to sections 2-619 and 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619, 2-615 (West 2010)).[1]

[1] There is no challenge to plaintiffs' naming of Laidlaw as the defendant. We note, however, that the documents attached to plaintiffs' response to Laidlaw's motion

The court found Sheree's personal injury claim barred pursuant to the exclusive remedy provision in section 5(a) of the Illinois Workers' Compensation Act (IWCA) (820 ILCS 305/5 (West 2010)) and that Kenneth's loss of consortium claim failed because it was derivative of Sheree's claim, for which Laidlaw had no liability. On appeal, plaintiffs contend that the court erred in granting Laidlaw's motion to dismiss because questions of fact regarding the applicability of section 5(a) of the IWCA exist which preclude dismissal of the claims. We affirm.

¶ 3 **BACKGROUND**

¶ 4 On February 14, 2011, plaintiffs filed a two-count personal injury and loss of consortium complaint against defendant. In count I, Sheree asserted that, on or about February 19, 2009, she was injured when she slipped on an unnatural accumulation of ice on property located at 1500 Wright Boulevard, Schaumburg, Illinois (the premises). She alleged Laidlaw was the record owner of the premises. Sheree asserted Laidlaw failed in its duty to exercise reasonable care towards her, a "business invitee," by negligently allowing an unnatural accumulation of ice on the pathway used by pedestrians as a means of ingress and egress from the premises, thus causing her to slip and fall on the premises and sustain serious personal injuries. Sheree sought damages in excess of $50,000. In count II, Kenneth, Sheree's husband, sought

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to dismiss show that First Student, Inc. merged into Laidlaw Transit, Inc. and the resulting entity, known initially as Laidlaw Transit, Inc., changed its name to First Student, Inc., effective January 17, 2009. Indeed, Laidlaw's motion to dismiss is based on the assertion that Laidlaw and First Student are the same entity.

damages for loss of consortium.

¶ 5 Laidlaw filed a combined section 2-619 and 2-615 motion to dismiss plaintiffs' claims. It asserted that Sheree's personal injury claims should be dismissed pursuant to section 2-619 because her claim was barred by the exclusive remedy provision provided in section 5(a) of the IWCA. Section 5(a) provides in relevant part:

> "No common law or statutory right to recover damages from the employer * * * for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." 820 ILCS 305/5(a) (West 2010).

¶ 6 Laidlaw alleged that Sheree was employed by First Student, Inc., (First Student) as a bus driver and was walking on her employer's property when the accident occurred. It alleged that Sheree had filed a workers' compensation claim against First Student for her injuries on the premises and received benefits as a result of that claim. It asserted that, on or around October 2007, First Student and Laidlaw had merged and Laidlaw and First Student are the same legal entity. Laidlaw claimed that First Student used the premises as an integral part of its operation, both First Student and Laidlaw had provided school bus transportation services and there was only one business conducted on the premises. It asserted that Sheree's employment with First Student "was the same as her employment with Laidlaw." Laidlaw argued that, pursuant to section 5(a) of the IWCA, because Sheree had collected workers compensation

benefits from First Student, her employer, her only remedy for her injuries was under the IWCA and her action against Laidlaw, now known as First Student, her employer, was barred.

¶ 7 Laidlaw also argued that Kenneth's loss of consortium claim should be dismissed pursuant to section 2-615 because it was derivative of Sheree's claim. It asserted that, as Sheree had no legal action against Laidlaw on her personal injury claim in count I, Kenneth could not recover for loss of consortium against Laidlaw in count II.

¶ 8 To its motion to dismiss, Laidlaw attached an affidavit by Patricia Furterer (Furterer), the vice president of insurance and risk management for First Group America, Inc.[2] Furterer averred that "[a]s a result of a corporate merger, in or around October 1, 2007, First Student[ ] merged into Laidlaw[ ]. Immediately thereafter, [Laidlaw's] name was changed to First Student." She further stated that Sheree "was originally hired as an employee of Laidlaw" and became a First Student employee after the merger of First Student and Laidlaw.

¶ 9 Furterer asserted that, "at the time of the occurrence alleged in the Complaint, [Sheree] was acting within the scope of her employment" and "was employed by First Student as a bus driver and was walking on her employer's property *** when the accident occurred." Furterer stated that Sheree had requested and received workers compensation benefits for her injuries. Furterer asserted that First Student used the

[2] Furterer's subsequent deposition shows that First Group, PLC, was the parent company of First Student, Inc., and First Group America, Inc.

premises for its business operations, the duties of Laidlaw and First Student "are the same," namely school bus transportation, and there was one business being conducted on the premises.

¶ 10 In November 2011, plaintiffs deposed Furterer to test her personal knowledge of the facts stated in her affidavit and asked her to produce the documents upon which she relied in support of her affidavit. They then filed a response to the motion to dismiss. Plaintiffs asserted that the section 5(a) exclusive remedy provision was not applicable because Sheree had named Laidlaw as the defendant, rather than her employer, First Student, and Laidlaw failed to prove by admissible evidence that Laidlaw was the same entity as First Student. Plaintiffs argued that Furterer's affidavit should be stricken because it failed to comply with the Illinois Supreme Court Rule 191(a) as Furterer lacked personal knowledge of the facts she was asserting and the affidavit contained legal conclusions.

¶ 11 Plaintiffs attached to their response a transcript of Furterer's deposition and copies of the following documents produced by Furterer:

(1) A copy of an executed "agreement and plan of merger," dated February 8, 2007, for the merger of Laidlaw International, Inc., First Group PLC, and Fern Acquisition Vehicle Corporation.

(2) A copy of a "State of Delaware Certificate of Merger of Foreign Corporation into Domestic Corporation," executed by both Laidlaw and First Student. The certificate states that, effective January 17, 2009, Florida corporation First

Student merged into Delaware corporation Laidlaw, Laidlaw was the surviving corporation and the “name of the Surviving Corporation shall be changed from [Laidlaw] to [First Student]."

(3) A copy of the March 4, 2009, "Illinois Workers’ Compensation Commission Application for Adjustment of Claim" filed by Sheree. In the application, Sheree identifies First Student as her employer, lists the 1500 Wright Boulevard address as First Student's address, describes the accident for which she is claiming compensation as “fall on ice at work” and lists the date of the accident as February 19, 2009.

Plaintiff also attached a copy of a real estate report of "ownership" dated September 20, 2010, showing that Laidlaw obtained title to the 1500 Wright Boulevard premises in September 1991 and recorded its title on November 19, 1991.

¶ 12 In Furterer's deposition, she stated that she obtained copies of the merger related documents from her company's general counsel and the copy of Sheree's workers compensation application from her company's workers compensation adjuster. Furterer stated that she had personal knowledge that First Group PLC, the parent company of First Group America and First Student, acquired and merged with Laidlaw International, Inc., the parent company of Laidlaw, because she sat in on the merger discussions.

¶ 13 Furterer further stated that she had personal knowledge that her company maintained an active workers compensation file on Sheree and had paid Sheree

$53,000 in benefits up to that point. She asserted that, although she had not reviewed Sheree's employment file, she knew Sheree was a First Student employee because her company had investigated the benefits claim and would not have paid the benefits unless Sheree was an employee. Furterer stated that she knew Sheree had been injured on First Student's property and had been acting in the scope of her employment when she was injured because Sheree had asserted such in the workers compensation claim that she had signed. Furterer asserted that, in her position as vice president of risk management, it was her responsibility to oversee the workers' compensation claims filed at First Student, the claims managers reported to her, she relied on the claims managers to provide her with information regarding pending claims such as Sheree's and claim documents were kept in the ordinary course of business.

¶ 14 Furterer stated that First Student owned the 1500 Wright Boulevard premises, claiming "that is our location." Asked why the title document showed that Laidlaw owned the premises, she responded "that's First Student" and "we own that, First Student does." She stated that she had personal knowledge that First Student occupied the premises on February 9, 2009, the date of the accident, because "[t]hat is our location. It's the property and business we acquired from Laidlaw, and we [First Student] are operating there." Furterer stated that "[w]e are operating a school bus business off that property that we purchased from Laidlaw" and that First Student paid the taxes and insurance for the property.

¶ 15 Furterer stated that she did not believe that Laidlaw still existed as a corporation.

She knew Laidlaw "is part of First Student" because "we [First Student] purchased Laidlaw." Furterer asserted that, when First Student purchased Laidlaw, it acquired all of Laidlaw's assets and employees and Laidlaw employees became First Student employees. She stated Sheree was originally a Laidlaw employee but became a First Student employee after the merger and was a First Student employee at the time of her injury. Laidlaw had no employees on the property because all Laidlaw employees were First Student employees. Furterer stated that, from her personal knowledge as the vice president of risk management, she knew that Laidlaw and First Student had the same tax identification number.

¶ 16 Laidlaw filed a reply in support to its motion to dismiss. It asserted that plaintiffs' response failed to refute the "uncontroverted evidence that the Illinois Workers' Compensation Act provides the exclusive remedy for plaintiffs' injuries and damages." Laidlaw also asserted that Furterer's affidavit did comply with the requirements of Illinois Supreme Court Rule 191(a), as shown by Furterer's deposition attached to plaintiffs' response, and that, "now that the deposition transcript has been attached to the response, her affidavit is superfluous."

¶ 17 On March 15, 2012, the court granted defendant's motion to dismiss and, on April 12, 2012, plaintiffs filed a timely notice of appeal.

¶ 18 **ANALYSIS**

¶ 19 On appeal, plaintiffs argue that the court erred in granting Laidlaw's combined section 2-619 and 2-615 motion to dismiss because questions of fact remained

precluding dismissal on the basis on section 5(a) of the IWCA.[3] We review motions to dismiss under either section 2-615 or 2-619 *de novo*. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 583 (2000). "A motion to dismiss based on section 2-615 admits all well-pleaded facts and attacks the legal sufficiency of the complaint; but a motion to dismiss under section 2-619 motion admits the legal sufficiency of the complaint and raises defects, defenses or other affirmative matter which appear on the face of the complaint or are established by external submissions which act to defeat the plaintiff's claim." *Neppl*, 316 Ill. App. 3d at 584, 736 N.E.2d at 1178. Therefore, we apply a separate analysis to each basis of Laidlaw's motion. *Neppl*, 316 Ill. App. 3d at 584, 736 N.E.2d at 1178.

¶ 20 1. Sheree's Personal Injury Claim

¶ 21 We first examine the court's dismissal of Sheree's personal injury claim pursuant to section 2-619 on the basis of the exclusivity provision in section 5(a) of the IWCA. Section 2-619(a)(9) permits involuntary dismissal where, as here, "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619 (West 2013)*; Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). Such an "affirmative matter" is "something in the nature of a defense which negates the cause of action completely." *Van Meter,* 207 Ill. 2d at 367. In ruling on a section 2-619(a) motion to dismiss, we must interpret all pleadings

[3] There is no record of the court's basis for granting the motion to dismiss. However, since the motion to dismiss was based solely upon Laidlaw's assertion that plaintiffs' claims were barred by section 5(a), we presume the court granted the motion on those grounds.

and supporting documents in the light most favorable to the nonmoving party. *Van Meter,* 207 Ill. 2d at 367-68.

¶ 22 "The Workers' Compensation Act is designed to provide financial protection to workers for accidental injuries arising out of and in the course of employment." *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (1990). It "imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer." *Meerbrey,* 139 Ill. 2d at 462. "[A]n employer-employee relationship is a prerequisite for an award of benefits under the Act." *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 462 (2010).

Section 5(a) provides:

> "No common law or statutory right to recover damages from the employer * * * for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." 820 ILCS 305/5(a) (West 2010).

It prohibits a common-law action by an employee against an employer and his agents where an accidental injury arises out of and in the course of employment. *Hilgart v. 210 Mittel Drive Partnership*, 2012 IL App (2d) 110943, ¶ 23.

¶ 23 Plaintiffs assert that section 5(a) does not bar Sheree's claim against Laidlaw because Furterer's affidavit, filed by Laidlaw in support of its section 2-619 motion to dismiss, neither names Laidlaw as Sheree's employer nor asserts that plaintiff was

engaged in her employment at the time of her injury. They point out that the affidavit names First Student as Sheree's employer but First Student is not the defendant in the case, Laidlaw is. Plaintiffs argue that, because the premises where Sheree fell was owned by Laidlaw and Laidlaw was not Sheree's employer, these facts raises factual issues that cannot be resolved on a section 2-619 motion to dismiss. Plaintiffs also assert that Sheree's workers compensation application raises a similar issue of fact precluding dismissal under section 2-619 because it too states that First Student, rather than Laidlaw, is Sheree's "employer."

¶ 24 Laidlaw responds that it is undisputed that "Post-Merger First Student/[Laidlaw] owned" the premises where Sheree fell"; prior to the accident, First Student had merged into [Laidlaw]"; and, at the time of the accident, Sheree was a post-merger First Student/Laidlaw employee. It asserts that it proved to the court that post-merger First Student/Laidlaw was the property owner and operating as one business entity and that plaintiffs offered nothing in response. We agree.

¶ 25 Furterer's affidavit, as buttressed by the copy of her deposition and the documents she produced which plaintiffs had attached to their response to the motion to dismiss, adequately set forth sufficient facts to prove that:

1. First Student had merged into Laidlaw in 2007 and Laidlaw immediately changed its name to First Student.

2. Sheree originally worked for Laidlaw and became a First Student employee after the merger.

3. Sheree was an employee of First Student at the time of the accident.

4. Sheree was walking on her employer's property at the time of the accident and had requested and received workers' compensation benefits for her injuries.

5. First Student used the property for its business operations, there was only one business conducted on the property, the business operations were singular in nature and the duties of Laidlaw and First Student on the property were the same, which was to provide school bus transportation to various schools.

¶ 26 Furterer's deposition and the documents attached to plaintiff's response show that Furterer's affidavit was made on her personal knowledge, presented the specific facts upon which Laidlaw's motion to dismiss was based and Furterer was competent to testify to those facts. Accordingly, her affidavit is sufficient pursuant to Illinois Supreme Court Rule 191(a) to prove that, at the time of Sheree's injuries, the premises where Sheree was injured was owned by First Student, Sheree's employer, that Laidlaw was now First Student and that Sheree's complaint naming Laidlaw as the defendant was actually directed to First Student, her employer.

¶ 27 Plaintiffs offered nothing to rebut these factual assertions. Their complaint was unverified and they offered no counteraffidavit to challenge the statements in Furterer's affidavit. In the context of a section 2-619 motion to dismiss, "[w]hen supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts stated therein are deemed admitted." *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995). Since plaintiffs did not file a counteraffidavit in response to

Furterer's affidavit, they admitted that Laidlaw and First Student merged in 2007, Laidlaw and First Student were the same entity, First Student was Sheree's employer at that time Sheree was injured and First Student owned the premises where Sheree was injured.

¶ 28 Given our finding that Laidlaw proved that Sheree was injured on property owned by her employer and that her complaint was directed to her employer, the question then becomes whether, as plaintiffs assert, Laidlaw failed to prove that Sheree suffered her injuries while engaged in her employment as required under section 5(a). Laidlaw did prove Sheree suffered her injuries while engaged in her employment.

¶ 29 First, the copy of the application for workers' compensation benefits under which Sheree received her benefits shows that Sheree received those benefits for the same injuries at issue here. It shows that Sheree identified First Student as her employer and that she claimed that she “fell on ice at work.” Her claim that she was injured "at work" is an admission that she was engaged in the line of her duty as an employee for First Student when she was injured.

¶ 30 Second, Sheree asserted in her complaint that she was injured while on the pedestrian path used as a means of ingress and egress from the premises. "[A]n employee's injuries are deemed to arise out of her employment when the employee is injured in an area on the 'usual route' to the employer's premises." *Hilgart,* 2012 IL App (2d) 110943, ¶ 23.

“ 'When * * * an injury to an employee takes place in an area that is the usual

> route to the employer's premises, and the route is attendant with a special risk or hazard, the hazard becomes part of the employment. Special hazards or risks encountered as a result of using a usual access route satisfy the 'arising out of' requirement of the Act.' " *Lawson,* 398 Ill. App. 3d at 134 (quoting *Litchfield Healthcare Center v. Industrial Comm'n*, 349 Ill .App. 3d 486, 491 (2004)).

Accordingly, because Sheree claimed she was injured "at work" and while on the pedestrian path used to access and exit from her employer's property, she was injured in the course of her employment with First Student.

¶ 31 In sum, Furterer's affidavit, Sheree's workers' compensation application, Furterer's deposition and the documents attached to plaintiff's response to the motion to dismiss show that First Student is Sheree's employer, Laidlaw and First Student are the same entity and Sheree was injured on property owned by her employer while engaged in her employment. They also show that Sheree received workers' compensation benefits for her injuries and that her personal action against Laidlaw for those same injuries is actually an action against First Student, her employer. Plaintiffs having failed to contradict the well-alleged facts in Furterer's affidavit by counteraffidavit or evidence, we must take those facts as true notwithstanding any contrary assertions in plaintiffs unverified complaint. Accordingly, plaintiffs failed to present evidence sufficient to raise questions of facts sufficient to preclude granting the section 2-619 motion to dismiss.

¶ 32 "Our supreme court has clearly ruled that an injured employee who applies for

and accepts workers' compensation benefits, whether through a settlement or an award, cannot thereafter also recover civil damages from the employer for the same injury." *Wells v. Enloe*, 282 Ill. App. 3d 586, 596 (1996) (citing *Collier*, 81 Ill. 2d at 241). Accordingly, Sheree's claim against Laidlaw is barred by section 5(a) of the IWCA. The court did not err in granting Laidlaw's motion to dismiss Sheree's claim.

¶ 33 Plaintiffs argue that Sheree's claim cannot be barred under section 5(a) of the IWCA because it falls within the dual capacity doctrine exception to the exclusive remedy provision in section 5(a). Under the dual capacity doctrine, an employer protected under section 5(a) "may become liable in tort if the employer *** operates in a second capacity that created obligations independent of those imposed upon it as an employer." *Senesac v. Employer's Vocational Resources, Inc.*, 324 Ill. App. 3d 380, 392 (2001). Plaintiffs argue that the dual capacity doctrine applies because, at the time of Sheree's injury, Laidlaw was operating as the owner of the premises, as established in the real estate property search, and First Student was operating as Sheree's employer. They assert that Laidlaw was operating as a distinct legal entity that had nothing to do with Sheree's employment with First Student.

¶ 34 In *Sharp v. Gallagher*, 95 Ill. 2d 322 (1983), our supreme court rejected the argument that the dual capacity doctrine applies merely because an employer owns the property where the plaintiff was injured under a different name. The court stated that "the mere ownership of land does not endow a person with a second legal persona" for the purposes of the dual capacity doctrine. *Sharp*, 95 Ill. 2d at 328 (quoting 2A A.

Larson, Workmen's Compensation sec. 72.82 (1982)). It reasoned that an "employer as part of his business, will almost always own or occupy premises" and, therefore, "[i]f every action and function connected with maintaining the premises could ground a tort suit, the concept of exclusiveness of remedy would be reduced to a shambles." *Sharp*, 95 Ill. 2d at 328 (quoting 2A A. Larson, Workmen's Compensation sec. 72.82 (1982)). The court emphasized that the doctrine "requires a distinct separate legal persona" and, because the facts in the case revealed only one legal entity, the application of the dual capacity doctrine was unavailable to the plaintiff. *Sharp*, 95 Ill. 2d at 328.

¶ 35 Similarly here, the facts in the case at bar reveal only one post-merger legal entity, that of First Student. The fact that the title to the premises is still held in the name of the former owner, Laidlaw, does not show, without more, that the dual capacity doctrine applies to defeat the IWCA exclusive remedy provision.

¶ 36 2. Kenneth's Loss of Consortium Claim

¶ 37 We next examine the court's dismissal of Kenneth's claim for loss of consortium pursuant to section 2-615. Viewing the complaint in the light most favorable to Kenneth, we must determine whether the complaint alleges facts sufficient to state a cause of action upon which relief may be granted (*Ziemba v. Mierzwa*, 142 Ill. 2d 42, 46-47, 566 N.E.2d 1365, 1366 (1991)) and do not consider the merits of the case (*Elson v. State Farm Fire and Casualty Co.*, 295 Ill. App. 3d 1, 5, 691 N.E.2d 807, 811 (1998)).

¶ 38 As plaintiffs admit, Kenneth's claim derives from Sheree's personal injury claim.

Monroe v. Trinity Hospital-Advocate, 345 Ill. App. 3d 896, 899 (2003). His action is "dependent upon the establishment" of Laidlaw's liability for Sheree's injuries. *Pease v. Ace Hardware Home Ctr. of Round Lake No. 252c*, 147 Ill. App. 3d 546, 555 (1986). Since Laidlaw's liability for Sheree's injuries has not been established, Kenneth's derivative claim for loss of consortium must fail. The court did not err in granting Laidlaw's motion to dismiss Kenneth's claim.

¶ 39 Conclusion

¶ 40 For the foregoing reasons, we affirm the decision of the circuit court granting Laidlaw's motion to dismiss plaintiffs' claims.

¶ 41 Affirmed.